

App.1a

APPENDIX TABLE OF CONTENTS

Order of the Supreme Court of Virginia Denying Petition for Appeal (March 14, 2018)	1a
Memorandum Opinion by Judge Marla Graff Decker (July 18, 2017).....	2a
Order of the Circuit Court of the County of Henrico (June 1, 2016)	16a
Order of the Circuit Court of the County of Henrico (June 1, 2016)	20a
Transcript of Proceedings (May 26, 2016)	22a
Order of the Supreme Court of Virginia Denying Petition for Rehearing (May 11, 2018)	54a

App.1a

ORDER OF THE SUPREME COURT OF VIRGINIA
DENYING PETITION FOR APPEAL
(MARCH 14, 2018)

IN THE SUPREME COURT OF VIRGINIA

DMITRI I. MEDVEDEV,

Appellant,

v.

HENRICO COUNTY,

Appellee.

Record No. 171361
Court of Appeals No. 0930-16-2

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste: Patricia L. Harrington,
Clerk

By: /s/ signature not legible
Deputy Clerk

MEMORANDUM OPINION*
BY JUDGE MARLA GRAFF DECKER
(JULY 18, 2017)

COURT OF APPEALS OF VIRGINIA

DMITRI I. MEDVEDEV

v.

HENRICO COUNTY

Record No. 0930-16-2

From the Circuit Court of Henrico County
L. A. Harris, Jr., Judge

**Before: HUMPHREYS,
DECKER and O'BRIEN, Judges.**

Dmitri I. Medvedev appeals his conviction for driving under the influence with a blood alcohol concentration greater than 0.20% in violation of Henrico County Municipal Code § 22-2, which adopts and incorporates Code §§ 18.2-266 and -270 by reference. On appeal, he argues that the circuit court erred by ruling that the seizure that led to his arrest was reasonable under the Fourth Amendment of the United States Constitution. We hold that the seizure was reasonable because the evidence, viewed under the proper standard, proves that the encounter began as

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

a consensual one and that, by the time a seizure occurred, the officer had reasonable suspicion to believe that the appellant had been driving while intoxicated. Accordingly, we hold that the circuit court's denial of the motion to suppress was not error, and we affirm the appellant's conviction.

I. Background¹

On October 9, 2015, Officer Scott Phillips of the Henrico County Police received a "service call" from "dispatch." Dispatch reported that a citizen had been "following" a driver who was "operating a red Mazda SUV" that had arrived at the Jewish Community Center (JCC). The dispatcher further relayed that the driver was "all over the road" and "running off the road."² Officer Phillips responded to the call as the "backup officer." Phillips testified that based on everything the dispatcher told him, he "fe[lt] like [he] was responding to an impaired driver."

When Officer Phillips arrived at the JCC, he drove through the parking lot and toward the main entrance without activating his emergency lights. He saw a red Mazda SUV matching the description issued by dispatch parked in a public space near the building. On the opposite side of the parking lane, Officer Phillips saw a man standing at the back of a different

¹ In ruling on the propriety of a circuit court's decision on a motion to suppress, the appellate court views the evidence in the light most favorable to the party who prevailed below, in this case Henrico County. *E.g., Beasley v. Commonwealth*, 60 Va. App. 381, 385 n.1, 728 S.E.2d 499, 501 n.1 (2012).

² The record establishes that the citizen's call to the police was recorded.

car. Phillips “pulled by” and looked at the red SUV. As he “slowed,” he “looked over” at the man standing nearby. Upon “ma[king] eye contact,” the officer “sort of pointed to the SUV,” looked at the man again, and received “a positive response of a head nod.”

Officer Phillips noticed that no one was inside the SUV, but he saw a man sitting on a bench just outside one of the entrances to the JCC. Someone who appeared to be a security officer was standing next to the man. Phillips parked his police car in front of the building, about twenty-five feet away from the bench. He did not activate any of the emergency lights on his vehicle. The officer got out of his car and walked up to the man, who was the appellant.

Officer Phillips “asked” the appellant to “join” him by his police car in an effort to get the appellant “away from the front door of the school.” The appellant stood up and walked with Phillips to the officer’s car. Phillips then “asked” the appellant if he had his driver’s license with him, and the appellant handed the officer his license. At about the same time that Officer Phillips received the appellant’s license, he “detect[ed] an odor of alcoholic beverage about [the appellant’s person].” Also, the appellant exhibited what Officer Phillips described as “an off-balance posture.” Once the primary officer assigned to the call arrived, he conducted various field sobriety tests and arrested the appellant for driving under the influence of alcohol.

Prior to the appellant’s trial, he filed a motion to suppress the evidence. He contended that he was seized when Officer Phillips asked for his identification and that the officer lacked reasonable suspicion to detain him. The prosecutor responded by “conced[ing]” that the appellant was “seized” when Officer Phillips

App.5a

received the appellant's driver's license. Nevertheless, he argued that the seizure was lawful because the officer had reasonable suspicion to detain the appellant for either driving under the influence (DUI) or public intoxication.

The circuit court ruled based on the totality of the circumstances that the encounter began as a consensual one and that the officer developed reasonable, articulable suspicion to justify a brief investigative detention. The judge determined that Officer Phillips, the only witness at the suppression hearing, was "very credible." He found that the officer went to the JCC, saw a red Mazda, and received "acknowledgment" from "someone in the parking lot" that "this was the car that [the citizen had] been following." In the "same parking lot," the officer saw the appellant seated next to a security guard. The judge concluded that Officer Phillips "had the right to go up to" the appellant.

Additionally, the judge found that the officer asked the appellant, "[W]ould you mind coming with me so we can get away from this entrance," and the appellant "agreed to do that." The judge further found that "at the same time" the officer asked for the appellant's driver's license, he smelled alcohol and saw the appellant "standing in the unusual manner that he . . . described." The judge concluded that the report that the Mazda had been driven "all over the road," combined with the odor of alcohol emanating from the appellant and the way he was standing, provided the officer with reasonable, articulable suspicion to detain the appellant for further investigation.

After the circuit court denied the motion to suppress, the appellant entered a conditional guilty plea, retaining the right to appeal the denial of his

motion. The court accepted the plea, convicted the appellant, and sentenced him to six months in jail, with five-months fifteen days suspended.

II. Analysis

The appellant contends that the denial of his motion to suppress the evidence derived from the seizure of his person was error. He asserts that he was seized “the moment [the officer] took [his] license” and notes that the prosecutor agreed with this conclusion in the circuit court. He suggests that the totality of the circumstances known to the officer at the time did not provide reasonable suspicion that he had been driving while intoxicated. Additionally, the appellant notes that the court did not make any findings on the prosecutor’s alternative argument that the officer “could have been conducting an investigation into a possible drunk in public” offense.

When challenging the denial of a motion to suppress evidence, the appellant bears the burden of establishing that reversible error occurred. *Glenn v. Commonwealth*, 275 Va. 123, 130, 654 S.E.2d 910, 913 (2008). On appeal, the Court considers the evidence in the light most favorable to the party who prevailed below and affords to that party, in this case Henrico County, the benefit of all inferences fairly deducible from the evidence. *Mason v. Commonwealth*, 291 Va. 362, 367, 786 S.E.2d 148, 151 (2016). The appellate court is bound by the circuit court’s “findings of historical fact unless ‘plainly wrong’ or without evidence to support them” and “give[s] due weight to the inferences drawn from those facts by resident judges and local law enforcement officers.” *McGee v. Commonwealth*, 25 Va. App. 193, 198, 487 S.E.2d 259,

261 (1997) (*en banc*). The factual findings to which we defer include that court's assessment of the credibility of the witnesses. *McCary v. Commonwealth*, 36 Va. App. 27, 35, 548 S.E.2d 239, 243 (2001). Ultimately, however, the appellate court "review[s] *de novo* the [circuit] court's application of defined legal standards, such as whether the police had reasonable suspicion" to detain the appellant. *Bland v. Commonwealth*, 66 Va. App. 405, 412, 785 S.E.2d 798, 801 (2016). This *de novo* review "involves application of an objective rather than a subjective standard." *Id.*

The law recognizes "three distinct types of police-citizen interactions: (1) arrest[s], which must be supported by probable cause; (2) brief investigatory stops, which must be supported by reasonable articulable suspicion; and (3) brief [consensual] encounters between police and citizens." *Branham v. Commonwealth*, 283 Va. 273, 279, 720 S.E.2d 74, 77 (2012) (citations omitted) (quoting *United States v. Weaver*, 282 F.3d 302, 309 (4th Cir. 2002)). It is well established that the Fourth Amendment "does not require any level of suspicion" for a consensual encounter, which may include "non-coercive questioning by officers" and "a request for identification." *Id.*

An encounter remains consensual "[a]s long as the police do not convey, by word or deed, that compliance with their request is mandatory." *Montague v. Commonwealth*, 278 Va. 532, 538, 684 S.E.2d 583, 587 (2009). Further, the fact that "most individuals will feel obligated to respond when asked questions by a police officer" does not, standing alone, "convert a consensual encounter into a seizure." *Id.* A seizure has not occurred "unless, taking into account all the circumstances of the encounter, 'a reasonable person

would . . . believe[] that he was not free to leave" or disregard the questions. *Id.* at 539, 684 S.E.2d at 587 (alterations in original) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Factors that might suggest that a seizure has occurred include "the threatening presence of several police officers, their display of weapons, a physical touching of the person to whom the questions are directed, and the use of language [or tone of voice] indicating that compliance with the police request is required." *Id.*; see *Mendenhall*, 446 U.S. at 554.

The appellant contends that Officer Phillips seized him when the officer "received" his driver's license "and did not return it to him." He also notes in support of his argument that the prosecutor conceded in the circuit court that once the officer obtained his driver's license, he was seized for Fourth Amendment purposes. We reject this argument for two reasons.

First, although a party may concede a fact or facts, if a party offers a concession on a point of law, an appellate court may not blindly accept the concession and reverse a conviction on that basis. *See Wright v. Commonwealth*, 278 Va. 754, 760 n.3, 685 S.E.2d 655, 658 n.3 (2009); *Logan v. Commonwealth*, 47 Va. App. 168, 172, 622 S.E.2d 771, 773 (2005) (*en banc*). Instead, the reviewing court must conduct an independent legal analysis to determine whether reversal is required. *See Wright*, 278 Va. at 760 n.3, 685 S.E.2d at 658 n.3; *Logan*, 47 Va. App. at 172 n.4, 622 S.E.2d at 773 n.4. Accordingly, this Court must independently examine whether the law supports the circuit court's denial of the appellant's motion to suppress, which includes determining whether, and if so when, the appellant was seized.

Second, controlling authority establishes that Officer Phillips' request for and receipt of the appellant's driver's license was not a seizure. The Supreme Court of Virginia considered this question in *Branham v. Commonwealth*, 283 Va. 273, 720 S.E.2d 74 (2012). In that case, the police encountered the defendant in the driver's seat of a car parked near a house at which they were attempting to serve arrest warrants. *Id.* at 276-77, 720 S.E.2d at 76. One of the officers shined his spotlight on the defendant's car and asked the defendant for his driver's license. *Id.* at 277, 720 S.E.2d at 76. While awaiting the results of the license check, the same officer asked the defendant "what was going on." *Id.* The officer also asked whether the man had anything illegal and if he would "mind stepping out of the vehicle" for a weapons frisk. *Id.* After complying, the defendant consented to a search of his person. *Id.* Additionally, no evidence established that the defendant "ever asked for the return of his license." *Id.* at 278, 720 S.E.2d at 76.

Branham moved to suppress contraband found in the search of his person, contending that he was seized under the Fourth Amendment "as soon as [the officer] took his driver's license." *Id.* at 278, 720 S.E.2d at 77. The Court rejected that argument, holding that the encounter, including the license request, was wholly consensual. *Id.* at 280, 720 S.E.2d at 78. In doing so, it noted that Code § 46.2-104, which "requir[es] the owner or operator of a motor vehicle to exhibit his driver's license to an officer for identification, applies only when such a driver has received a signal to stop from a law-enforcement officer." *Id.* Because the officer had not stopped the defendant in that fashion, the Court reasoned that he "was not required by law to

surrender his driver's license for a record check." *Id.* Therefore, the Court concluded that the officer's request to see the defendant's driver's license was "no more than a request" and the defendant's "compliance was voluntary and not coerced." *Id.* The Court noted that none of the other facts converted the consensual encounter into a seizure because the "other officers did not say anything" to the defendant, there was "no display of weapons or emergency lights," the defendant's "car was not blocked," and "no threatening or coercive tone of voice was used." *Id.*

Similarly, in the instant case, the appellant was not required by law to surrender his license because when the officer requested it, the appellant was not the "operator of a motor vehicle" who had "received a signal to stop from a law-enforcement officer." *See id.* Instead, the encounter began in a consensual fashion when the lone officer simply asked the appellant, who was sitting on a bench, "[W]ould you mind coming with me so we can get away from this entrance," and the appellant "agreed" to go with him. The evidence in the record further supports the circuit court's finding that Officer Phillips' exchange with the appellant about his driver's license was similarly a request to which the appellant agreed. *See id.* Officer Phillips was the only police officer on the scene at that time, and the circuit court expressly found that his testimony was credible. The officer testified that he did not activate the lights on his police car. In addition, no evidence indicated that the officer raised his voice, touched the appellant, displayed his weapon, or indicated in any way that the appellant's compliance with his request was required. Under these facts, the request for and

receipt of the appellant's license did not convert the consensual encounter into a seizure.

As soon as Officer Phillips detected the odor of alcohol and saw that the appellant was having problems with his balance, observations that he made simultaneously with the license request, the officer had reasonable suspicion to detain the appellant. As the circuit court ruled, the officer's own observations, along with the tip from the concerned citizen, provided reasonable suspicion that the appellant had been driving under the influence of alcohol.

"In making reasonable-suspicion determinations, reviewing courts must look at the 'totality of the circumstances' . . . to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Mason*, 291 Va. at 368, 786 S.E.2d at 151 (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). "The test is not what the officer thought" but, rather, "whether the facts and circumstances apparent to him at the time of the [seizure] were such as to create in the mind of a reasonable officer in the same position a suspicion that a violation of the law [had occurred,] was occurring[,] or was about to occur." *Id.*; see *Logan v. Commonwealth*, 19 Va. App. 437, 441, 452 S.E.2d 364, 367 (1994) (*en banc*). This standard "requires far more than an officer's 'hunch' or 'gut feeling' but far less than actual proof." *Mason*, 291 Va. at 369, 786 S.E.2d at 152. Additionally, conducting this totality of the circumstances analysis requires consideration of the officer's training and experience. *Harris v. Commonwealth*, 241 Va. 146, 149, 400 S.E.2d 191, 193 (1991). However, the officer need not expressly articulate such a suspicion as long as the record contains

objective facts to support it. *Mason*, 291 Va. at 369-70, 786 S.E.2d at 152; *see Raab v. Commonwealth*, 50 Va. App. 577, 583 n.2, 652 S.E.2d 144, 148 n.2 (2007) (*en banc*).

Whether the totality of the circumstances justifies a brief investigatory detention “is dependent upon both the content of information possessed by police and its degree of reliability.” *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)). Where part of the information is provided by an informant, “[a] court must consider both ‘the veracity of the informant and the basis of his or her knowledge.’” *Reed v. Commonwealth*, 36 Va. App. 260, 267, 549 S.E.2d 616, 619 (2001) (quoting *Jefferson v. Commonwealth*, 27 Va. App. 1, 13, 497 S.E.2d 474, 480 (1998)). If the informer is “a disinterested citizen who is either a victim of or eyewitness to[] a crime, police properly may give [the informer’s report] more weight . . . than they would to information from a ‘criminal’ informer, whose motives are less likely to be pure.” *Id.* at 267-68, 549 S.E.2d at 619-20. Further, if the tipster’s identity is known or likely to be ascertainable, the information is entitled to greater weight because the tipster subjects himself to liability if the report proves false. *See Jackson v. Commonwealth*, 267 Va. 666, 679-81, 594 S.E.2d 595, 602-03 (2004). Finally, a tip indicating that it is based on firsthand information is entitled to more weight than one failing to convey the basis of the tipster’s knowledge. *Bland*, 66 Va. App. at 416, 785 S.E.2d at 803.

Here, the officer knew that his presence at the JCC had been initiated by a concerned citizen who called the police to report he had followed a red

Mazda SUV that was “all over the road” and “running off the road.” The reliability of the tip was enhanced because the call was recorded, increasing the possibility that the tipster’s voice, at the very least, could be used to identify him if the tip proved to be false.³ *See Navarette*, 134 S. Ct. at 1690.

After Officer Phillips located an SUV matching the reported description in the JCC parking lot, he saw a man he believed to be the concerned citizen standing just a few cars away. Phillips believed the man was the tipster because when the officer pointed to the SUV and looked back at the man, the man nodded his head. This evidence supports the circuit court’s finding that the citizen tipster was present at the scene when the officer arrived and that he confirmed the SUV the officer saw parked near the door was the same vehicle that the tipster had reported for its erratic driving.

Based on the information that he received from dispatch, Officer Phillips believed that he was looking for an “impaired driver.” The officer did not know with certainty that the person he saw sitting on the bench near the door—the appellant—was that driver. Nevertheless, once the officer engaged the appellant in a consensual encounter and personally observed that the appellant smelled of alcohol and was having balance problems, the officer had at least reasonable suspicion to detain the appellant briefly to investigate further.⁴ Moreover, the evidence, viewed objectively,

³ The record does not establish whether dispatch obtained the tipster’s name or other identifying information.

⁴ Officer Phillips testified that he detained the appellant for three to five minutes before the arrival of the primary officer

provided the officer with reason to believe that he could make immediate personal contact with the citizen tipster. A brief detention was permitted under these circumstances to allow the officer to confirm or dispel his suspicion that the appellant had operated the SUV and had done so while under the influence of alcohol. *Cf. id.* at 1690-91 (observing that a “reliable tip” alleging driving behavior such as “weaving all over the roadway” “generally would justify a traffic stop on suspicion of drunk driving” (quoting *People v. Wells*, 136 P.3d 810, 811 (Cal. 2006))); *Jones v. Commonwealth*, 51 Va. App. 730, 737, 660 S.E.2d 343, 346 (2008) (observing that “[t]he odor of alcohol emanating from a suspect” who an officer observed driving “provided a police officer with ‘reasonable suspicion that [he] was driving while intoxicated’” (quoting *Wallace v. Commonwealth*, 32 Va. App. 497, 505, 528 S.E.2d 739, 742 (2000))), *aff'd in part and vacated in part on other grounds*, 279 Va. 52, 688 S.E.2d 269 (2010). Contrary to the appellant’s suggestion, the fact that he was no longer driving the vehicle is of no import on the facts of this case. *See* Code § 19.2-81(D) (permitting an officer to make a warrantless arrest for misdemeanor DUI “within three hours of the alleged offense . . . whether or not the offense was committed in such officer’s presence”); *cf. Navarrette*, 134 S. Ct. at 1691-92 (observing that “allowing a

assigned to the call and that, while waiting, he did not take any additional steps to confirm or dispel the suspicion that the appellant had committed a DUI or was committing the offense of public intoxication. As the appellant confirmed at oral argument, he challenges only the constitutionality of the basis for Officer Phillips’ detention at the time he took the license, not the duration of the detention.

drunk driver a second chance for dangerous conduct could have disastrous consequences").

The record supports the conclusion that Officer Phillips had reasonable suspicion to detain the appellant in light of objective facts indicating that he may have committed a DUI.⁵

III. Conclusion

On the facts of this case, the appellant was not seized when the officer asked to see his identification and received it from him. Additionally, the officer had reasonable suspicion to support an investigative detention as soon as he smelled alcohol on the appellant and observed his balance issues. Consequently, any seizure of the appellant that occurred after the officer received his driver's license was reasonable under the Fourth Amendment, and we affirm the conviction.

Affirmed.

⁵ The Commonwealth alternatively argues that the objective facts known to the officer also provided him with reasonable suspicion to investigate whether the appellant was committing the ongoing offense of public intoxication. *See McGhee v. Commonwealth*, 280 Va. 620, 624-25, 701 S.E.2d 58, 60 (2010); *Crislip v. Commonwealth*, 37 Va. App. 66, 71-72, 554 S.E.2d 96, 98-99 (2001). In light of our ruling that the officer had reasonable suspicion to investigate the DUI offense, we do not address this argument.

**ORDER OF THE CIRCUIT COURT
OF THE COUNTY OF HENRICO
(JUNE 1, 2016)**

**IN THE CIRCUIT COURT
OF THE COUNTY OF HENRICO**

COUNTY OF HENRICO

v.

DMITRI I. MEDVEDEV

Case No. CR16-60-00M

Before: L.A. HARRIS, Jr., Judge.

On May 26, 2016, came Jeromy Lewis, the attorney for the Commonwealth, and the accused who stands charged with a misdemeanor, to-wit: driving while under the influence of alcohol and/or drugs, first offense, with blood alcohol level more than .20 (Henrico County Ordinance 22-2 incorporating Virginia Code Sections 18.2-266/18.2-270)), as charged in the warrant, appeared according to the condition of his bond, and came also Franklin D. McFadden, Jr., his attorney heretofore retained, pursuant to counsel for the Defendant's Notice and Motion to Suppress, received and filed in the Clerk's Office of this Court on February 29, 2016, and the Defendant's Motion to Strike and Motion in Limine, received and filed in the Clerk's Office of this Court on April 22, 2016.

App.17a

The Court proceeded to hear counsel for the defendant's Motions and after considering the evidence offered and the statements of counsel, said motions are hereby denied.

Whereupon, the accused was arraigned and after private consultation with and being advised by his said counsel, entered a conditional guilty plea to the warrant, which plea was tendered by the accused in person. And the Court, having made inquiry and being of the opinion that the accused fully understood the nature and effect of his plea and of the penalties that may be imposed upon his conviction, finding that the plea was voluntarily and intelligently entered, proceeded to hear and determine this case without the intervention of a jury as provided by law.

Having heard the evidence and argument of counsel, the Court finds the defendant guilty of the following offense:

- CASE NUMBER: CR16-60
- OFFENSE DESCRIPTION AND INDICATOR (F/M): driving while under the influence of alcohol and/or drugs, first offense with blood alcohol level more than .20 (M)
- OFFENSE DATE: 10/9/15
- VA SECTION CODE:22-2/18.2-266/270

And it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law and nothing being offered or alleged in delay of judgment, the Court sentences the defendant to incarceration with the Henrico County Jail for the term of six (6) months the execution of five (5) months and

fifteen (15) days of which sentence is suspended for the five (5) years, with ten (10) days being mandatory to serve and imposes a fine of \$500.00. Conditions of the suspended sentence are that the defendant keep the peace and be of good behavior. The Court further orders that the defendant's operator license is revoked for twelve (12) months, shall grant a restricted operator's license with ignition interlock if the defendant meets the requirements of the Department of Motor Vehicles and enter and complete the John Tyler Alcohol Safety Action Program. The Court further orders that the defendant pay the cost of this case in the amount of \$301.00.

By operation of law the defendant's privilege to operate a motor vehicle shall be suspended by the Department of Motor Vehicles effective thirty days from this date if the fine and costs are not paid pursuant to Virginia Code Section 46.2-395.

The Court certifies that at all times during this proceeding the defendant was present in person and his attorney was likewise present in person and capably represented the defendant.

The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to the Virginia Code Section 53.1-187.

It is ordered to allow the defendant to report to the Henrico County Jail on May 28, 2016, at 8:00 o'clock a.m., to serve his sentence of incarceration on consecutive weekends, and his bond shall continue until said time.

Shall the defendant file a Notice of Appeal the Court sets an appeal bond in the amount of \$10,000.00 cash or with surety to be posted in the Clerk's office

App.19a

on condition he wear a scram bracelet and report to the Court within five (5) days of any dispositive action from the Virginia Court Of Appeals or the Supreme Court of Virginia.

Thereupon the defendant was allowed to depart.

The copy of this order is made available to the attorney for the Commonwealth through the officer of the Court Remote Access system.

The Clerk is directed to forward an attested copy of this Order to Franklin D. McFadden, Jr., Esquire, 1010 Hull Street, Richmond, VA 23224, to the Department of Motor Vehicles, P.O. Box 27412, Richmond, VA 23261, and to John Tyler Alcohol Safety Action Program.

ENTER: 6/1/16

/s/ L.A. Harris, Jr
Judge

A Copy Teste:
Heidi S. Barshinger, Clerk
Henrico Circuit Court

/s/ Stephanie M. Ulise
Deputy Clerk

**ORDER OF THE CIRCUIT COURT OF
THE COUNTY OF HENRICO
(JUNE 1, 2016)**

**IN THE CIRCUIT COURT
OF THE COUNTY OF HENRICO**

COUNTY OF HENRICO

v.

DMITRI I. MEDVEDEV

Case No. CR16-60-00M

Before: L.A. HARRIS, Jr., Judge.

The defendant by counsel, having filed his Notice of Appeal from the judgment of this Court imposed on May 26, 2016, and entered June 1, 2016, received and filed in the Clerk's Office May 27, 2016, the Court suspends the execution of the sentence for ninety (90) days in this case to allow application for a writ of error.

The Clerk is Ordered to have the record of the trial and sentencing of May 26, 2016 transcribed.

The Court notes that there is an appeal bond set in this case.

A copy of this Order is made available to the Attorney for the Commonwealth through the Officer of the Court Remote Access system.

App.21a

The Clerk is directed to forward an attested copy of this Order to Franklin D. McFadden, Jr., Esquire, 1010 Hull Street, Richmond, VA 23224; to Department of Motor Vehicles, P.O. Box 27412, Richmond, VA 23261; to John Tyler ASAP, 4114 East Parham Road, Richmond, VA 23228; and to David B. Hargett, Esquire, 11545 Nuckols Road, Suite C, Glen Allen, VA 23059.

ENTER: 6/1/16

/s/ L.A. Harris, Jr
Judge

A Copy Teste:
Heidi S. Barshinger, Clerk
Henrico Circuit Court

/s/ Stephanie M. Ulise
Deputy Clerk

**TRANSCRIPT OF PROCEEDINGS
(MAY 26, 2016)**

**IN THE CIRCUIT COURT
FOR THE COUNTY OF HENRICO**

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

DMITRI I. MEDVEDEV,

Defendant.

Case No. CR16-60-00M

Transcript of the proceedings in the
above-styled matter, when heard on May 26, 2016

Before: The Hon. L.A. HARRIS, JR., Judge.

[May 26, 2016 Transcript, p. 4]

THE CLERK: Commonwealth of Virginia versus Dmitri
Medvedev, case number CR16-60.

THE COURT: All right, let the record show the Defendant
is present in person represented by his Counsel
Mr. McFadden. The Commonwealth is represented
by Mr. Lewis. The Defendant is charged with
operating under the influence and it's a motion
to suppress filed. Do you wish to hear the motion

to suppress during the trial or do you wish to hear it beforehand?

MR. MCFADDEN: We wish to hear it beforehand and there's also a motion in limine as well.

THE COURT: And what's that?

MR. MCFADDEN: To be filed with the Court relating to the Commonwealth failing to meet the deadline set by the Court?

THE COURT: Where in the letter?

MR. MCFADDEN: That's correct, Judge.

THE COURT: What do you want to say about that Mr. Lewis?

MR. LEWIS: Your Honor, I believe the motion that they were showing me that there was a deadline ordered by the Court for the Commonwealth to respond. The Commonwealth did not respond to that within that timeframe. And there was if anything there was an allegation that there was an ex parte communication where the get an additional deadline, I guess, preliminarily the Commonwealth's position would be that there was no order of the Court that it was a letter sent by Ms. Damon, the administrative assistant, that stated and I quote—

THE COURT: So you all ignore those?

MR. LEWIS: No, we do not ignore those, your Honor.

THE COURT: But you did then?

MR. LEWIS: Your Honor, if I could, Ms. Damon asked, requested that we file memorandum in support of our position by March 11 because this case was

set for March 15th. This case was jointly continued by Mr. McFadden and I on March 4th in order for it to be set out so it could be heard. At that point, I contacted, I guess I'm going by proffer at this point, but I contacted Ms. Damon and asked that the March 11 deadline was still the deadline as the Commonwealth could comply. She advised that as long as it was filed before the motion is heard then that would be satisfactory.

At that point, I made that contact in order for the scheduling matter. At that point, the March 11 deadline was the Friday before the March 15 trial, so what I did is then I filed the motion on the Friday before the new date was set in compliance with the same amount of time that was given.

THE COURT: You know, again, the letter is sent out hoping everybody will abide by it but it's not an order of the Court. It's just an advisory letter. So I'm going to overrule your motion on that.

MR. MCFADDEN: Understood, your Honor.

THE COURT: All right.

MR. MCFADDEN: Please note our objection.

THE COURT: All right, so you're ready to go forward on the motion to suppress?

MR. LEWIS: We are.

MR. MCFADDEN: Yes, your Honor.

THE COURT: Any motion with regard to witnesses?

MR. MCFADDEN: Motion to exclude.

THE COURT: All right, anyone who is going to testify if you would wait in the hall, please, do not discuss the matter. You will be called in when necessary.

MR. LEWIS: We'll call Officer Phillips first, your Honor.

THE COURT: Well, I'd have everybody go out there now.

MR. LEWIS: Yes, sir.

THE COURT: Any opening comments on your motion, Mr. McFadden?

MR. MCFADDEN: No, your Honor.

THE COURT: All right, anything Mr. Lewis?

MR. LEWIS: No, your Honor.

THE COURT: All right, first witness?

MR. LEWIS: Officer Phillips.

THE CLERK: Do you solemnly swear or affirm that the evidence you give now before the Court shall be the truth, the whole truth and nothing but the truth, so help you God?

WITNESS PHILLIPS: I do.

THE COURT: All right, have a seat please.

SCOTT PHILLIPS, the witness, having previously been duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q Officer, please state your name and occupation for the Court?

A Officer Scott Phillips, Henrico County Police Officer.

Q And were you employed in that capacity and displaying your badge of authority on May 1st of this year?

A I was.

Q And on that date, did you come into contact with the Defendant Mr. Medvedev?

A On May 1st?

Q Yes, sir, or excuse me, on October 9th of 2015?

A I was employed as a police officer and encountered Mr. Medvedev that day, yes.

Q Thank you. And where did that contact take place at?

A At the place of the Jewish Community Center on Monument Avenue in the county.

Q And why did you respond to that?

A In response to a service call that was issued by our dispatch, I volunteered to be the backup officer on call.

Q All right and what was it the dispatch told you that you responded to?

A Dispatch announced that there was a citizen following a suspected intoxicated driver.

Q And what did you have, and did dispatch tell you what the specific actions were that were observed by that caller?

A It was relayed that I think the wording was driver was all over the road, running off the road and operating a red Mazda SUV.

Q All right and you then responded to the JCC?

App.27a

A I did.

Q And where is the JCC located?

A The JCC is located on Monument Avenue.

Q Is that in the County of Henrico.

A In the County of Henrico.

Q And when you use the term JCC, what is that?
Is that the Jewish Community Center?

A Jewish Community Center, yes, sir.

Q All right, when you responded to the Jewish Community Center, where did you go?

A I pulled in from the Monument Avenue side and circulated around to the west end of the building and ultimately to the south side where the main entrance is.

Q All right and what did you do once you arrived there?

A As I pulled around behind the building one of the first vehicles I observed parked was a SUV, a red Mazda SUV matching the description that had come out of the radio.

Q And where did you see that car located at?

A It was, physically it was located to my right as I was driving in a primarily eastbound direction. So it was located, the building to my left, the car was to my right and one of the first parking spaces available for the public away from the building.

Q What else did you see?

App.28a

A I also saw a gentleman standing in the parking lot on the opposite side of the parking lane and about three or four vehicles up.

Q And what was he doing?

A He was just standing at the back end of the car as I pulled by, I looked at the red SUV, slowed, looked over, saw this man and we made eye contact and I sort of pointed to the SUV and looked again and I got a positive response of a head nod.

Q When you got the call from dispatch, did they say anything about where the caller was going to be?

A Not that I recall.

Q When you, after you made that, after you observed the indication from that gentleman about the red SUV, what did you do next?

A I had noticed that the car was empty. So I looked to my left towards the building and saw a man sitting on the bench just outside the door to the, into the school side of the JCC with what appeared to be a security guard standing next to him. And I then continued, drove around and then parked my car along the front curve in front of the building, about thirty feet to the east of the main door if you were to just draw a perpendicular line straight out of the door, straight to the curb and then to my car, approximately thirty feet.

Q Did you have, did you observe any other gestures or indications from the individual that was standing near that red SUV?

A No.

App.29a

Q When you parked your car, or when you pulled into the parking lot, were your lights on?

A No.

Q Were your lights on at any point?

A No.

Q When you parked your car, where did you park it at in relation to the individual that was sitting on the bench?

A As you face the building, the bench is just to the right of the door. And I was parked if you were again facing the building, I was parked further to the right from the bench, 25 feet.

Q Okay, when, what did you do once you parked there?

A Exited my car and walked up towards the two people who turned out to be a female security officer and the suspect sitting on the bench.

Q Did you speak at all with that security officer?

A I do not recall if I had, at some point I did. I don't recall if it was before, if it was at that point or later in the encounter.

Q All right, do you recall any interaction with the security guard or did you just go straight to the person at the bench?

MR. MCFADDEN: Your Honor, I'm going to object, asked and answered.

THE COURT: Well, I'm not so sure he answered.

BY MR. LEWIS:

Q Would you answer the question?

A I'm not certain.

Q Okay. When you, did you eventually speak with the guy who was sitting on the bench?

A I did.

Q All right and do you see that individual here in the courtroom?

A Yes, Mr. Medvedev.

THE COURT: The record will show he identified the Defendant.

BY MR. LEWIS:

Q And when you approached him, what did you do?

A I asked him if he would accompany me over towards my car because I wanted to get him away from the front door of the school.

Q And how did you ask that from what you can remember?

A I simply asked the question, sir, would you join me over by my car.

Q And what did he reply?

A I don't recall a verbal reply but he did stand up and walk with me. There was no argument. He stood up and walked with me over to the front of my car.

Q And once you walked over to your car, what occurred there?

A Once we were there, I recall asking him if he had his driver's license with him, which he produced. And other than that, I don't, there was no, I don't recall any other real conditional at that

App.31a

point. I was just waiting for the primary officer to arrive.

Q Did you make any physical observations about him?

A I did.

Q And what were those?

A I did. One is, I was able to detect an odor of alcoholic beverage about him. The other thing was that as we were standing there by my car he was standing in such a way that I felt was unusual. He was leaning back slightly and sliding to the right, which seemed to be sort of an off-balance posture.

Q What did you, did you make this observation before or after you had his ID in your hand?

A They are very much concurrent, so I couldn't tell you exactly what came first.

Q When you asked for his ID, did he have it on him?

A He did.

Q All right and do you remember where it was on him?

A I believe he pulled it from a billfold in his back pocket to my recollection.

Q Did you notice anything about those movements that were unusual?

A Not that I recall, no.

Q And what happened once you and him were standing there, what occurred next?

A Nothing significant, nothing memorable. I was just basically delaying until Officer Scott arrived, who was the primary officer.

Q And why was it that you were waiting for Officer Scott?

A Because if this turned into an intoxicated driver, citizen situation, it would have been Officer Scott's case to handle. It wasn't my place to intercede with questioning.

Q And approximately how long was it before Officer Scott arrived?

A Fairly short, three to five minutes is my recollection before he was there.

MR. LEWIS: Judge, that's all the questions I have. Thank you, Officer.

THE COURT: Questions, Mr. McFadden?

MR. MCFADDEN: Yes, your Honor.

CROSS EXAMINATION

BY MR. MCFADDEN:

Q Officer Phillips, you arrived at the scene based on an all car be on the lookout, correct?

A I believe it was a call for service.

Q Okay. Now when dispatch, when they make these calls, do you hear the entirety of the call from whoever the informant is or whoever is making the phone call? What portions of the—

A I'm not sure I understand.

Q What was the initial communication that you received from dispatch?

App.33a

A Initial communication is that there was a citizen following a suspected impaired driver.

Q And you're certain that the dispatcher told you that the driver was impaired?

A Impaired is not a quote, no.

Q But just for clarification, wouldn't it be more fair and accurate to say that the dispatch told you that the driver was potentially reckless?

A I can't quote the call to you, sir, so—

Q If I were to play you the dispatch recording, would that help to refresh your memory?

A Certainly.

MR. MCFADDEN: Your Honor, at this time I'd like to—

THE COURT: All right.

MR. MCFADDEN: It's going to take a moment, Judge. I'm not receiving a signal in here, Judge. I believe the Commonwealth has a copy and it's going to be clip number two. It's track number two.

NOTE: A RECORDING IS
PLAYED BEFORE THE COURT.

MR. MCFADDEN: It's track number two.

THE COURT: Well, was that the guy calling in?

MR. MCFADDEN: Yes, but based on what Officer Phillips just testified to, he didn't hear that portion of the call.

NOTE: A RECORDING IS
PLAYED BEFORE THE COURT.

MR. MCFADDEN: You can stop there.

BY MR. MCFADDEN:

Q When you heard that video, it's fair to assume that the dispatcher—

THE COURT: Well, that's not what was put out though?

MR. MCFADDEN: Well, if I may, your Honor—

THE COURT: Were you hearing what was put out?

WITNESS PHILLIPS: No, your Honor.

THE COURT: Okay.

MR. LEWIS: And that's going to be the Commonwealth's objection at this point. While we concerned with what Officer Phillips knew at the time.

THE COURT: He can testify to that, he may answer that.

MR. LEWIS: There's nothing in the recording that says as to what was actually put out.

THE COURT: Right.

BY MR. MCFADDEN:

Q So, I guess I'm just going to repeat my previous question to you. The dispatcher didn't tell you that you want to be on the lookout for an impaired driver, correct?

A Sir, I can't quote what the dispatcher said. I recall, I remember feeling like I was responding to an impaired driver call.

Q But that's just objective point of view?

THE COURT: Well, he can't remember exactly what they—

WITNESS PHILLIPS: Yes.

BY MR. MCFADDEN:

Q When you arrived, you say that Mr. Medvedev was seated on the bench, not in his vehicle, correct?

A Correct.

Q And at no point in time did you witness Mr. Medvedev driving, did you?

A That's correct.

Q And prior to taking his driver's license, you hadn't noticed anything suspicious or odd about him was your testimony a moment ago, correct?

A I had not noticed anything suspicious about him prior to his handing me his driver's license is correct.

Q Okay and after he handed you his driver's license is when you were close enough to him to have the smell of alcohol and I believe your statement was he was standing unusually, correct?

A Well, I was descriptive, yeah, leaning backwards and to the side slightly.

Q Okay and at that point, you waited three to five minutes before Officer Scott arrived and took over the investigation?

A Correct.

MR. MCFADDEN: No further questions, your Honor.

THE COURT: All right, thank you.

MR. LEWIS: Your Honor, if I could ask two questions on redirect.

THE COURT: All right.

REDIRECT EXAMINATION
BY MR. LEWIS:

Q Officer, you stated when Mr. McFadden asked you, you stated that you hadn't noticed anything unusual about him prior to him handing over his license but when I asked you on direct you said it was simultaneous, is that correct?

A Yes.

Q So, I'm going to ask you which one was it, was it simultaneous that you noticed the odor of alcohol and leaning backwards or was it after he handed you the license that you noticed those two things?

A I can't say specifically. I remember them being in the same timeframe as far as we're talking about seconds here, which came exactly when I can't say.

Q All right, okay. And one other question, Mr. McFadden asked you, you said that you felt like you were responding to an impaired driver, is that correct? Is that what you said?

A That's what I said.

Q When I asked you on direct, you said that there was something specific in terms of the driving that you knew about, which was that it was all over the road. Was that your testimony or did I hear you wrong?

A I believe that's what I said, yes.

Q And is that something that you heard from dispatch when you were responding?

A Yes, I had no knowledge of his call except what came over the radio.

Q So that the driver was quote all over the road that would have been something that you heard from dispatch?

A Yes, sir.

MR. LEWIS: Okay, those are all the questions.

THE COURT: All right, thank you Officer.

WITNESS STOOD ASIDE;

MR. LEWIS: Your Honor, I think on the basis for the motion to suppress, the basis is once the ID is handed over that he's been seized, so—

THE COURT: Is that the basis of your motion?

MR. MCFADDEN: That is correct, Judge.

MR. LEWIS: So at this point—

THE COURT: So you've heard everything that needs to be heard as far as your motion?

MR. MCFADDEN: That is correct, Judge.

THE COURT: Okay, so the Commonwealth rests as far as that's concerned?

MR. LEWIS: Yes, sir.

THE COURT: Any evidence on that?

MR. MCFADDEN: No evidence, your Honor, just argument.

THE COURT: All right, I'm listening.

MR. MCFADDEN: I'm not sure how the Court prefers. I'm used to standing.

THE COURT: Whatever is most comfortable for you.

MR. MCFADDEN: All right. First to start with the point of the Commonwealth, the starting point made the argument that this was a consensual encounter. However, the law is pretty clear and specific that once an officer asks an individual for their identification, then it no longer becomes consensual. It then becomes a seizure where the Fourth Amendment is implicated.

So once we've established a seizure then we have to turn to what specific facts that the officer had in order to justify an investigative stop. Whether or not there was a particularized suspicion of the offense. At this point, Officer Phillips testified that he subjectively believed that he was there for an intoxicated driver. What's problematic is and the reason for playing of the tape is how would information about an intoxicated driver be transferred to Officer Phillips when the dispatcher herself made no mention of an intoxicated driver. Instead what she said was a reckless driver.

THE COURT: We don't know what came out to this officer.

MR. MCFADDEN: Well, he testifies that he didn't recall.

THE COURT: I know what he said but we didn't actually hear the tape of what went out.

MR. MCFADDEN: That's correct.

THE COURT: You tell me it's not available.

MR. MCFADDEN: That's correct. It wasn't furnished to me and I believe the Commonwealth when the Commonwealth says that they don't have it to give.

THE COURT: I understand.

MR. MCFADDEN: Just the inference at this point that if the first dispatcher relaying to the second dispatcher that we have a reckless driver, it's unlikely that the second dispatcher is going to ad lib and modify the call to now we're looking for an intoxicated driver. The description fits the idea of a reckless driver. You have an individual driving all over the road. I don't think the Commonwealth at this point gets those sort of extreme inferences but even if they did, let's assume that the dispatcher relayed that this was to be on the lookout for an intoxicated driver.

One of the cases relied upon by the Commonwealth is Navarette versus California, recent Supreme Court case involving a dispatch caller. I'm sure the Court is well aware of the details but there's a few key points that I'd like to touch on. First and foremost is that the Supreme Court itself called it a close case and linked it to Alabama versus White, which has been extremely controversial and another close case. And it has certain specifics that are required.

First was the existence of an ongoing criminal offense, which traces back to Terry, the fact that criminal activity back to a particularized suspicion that criminal activity is afoot in the present tense. Sunken further, the reason why the Court decided to make what was a surprising jump in Navarette was because of the ongoing danger involved with having a drunk driver on the road. You don't want to give a drunk driver a second chance that's actively driving a car to have an

incident take place. And I'm paraphrasing the Court.

THE COURT: Yes, I see.

MR. MCFADDEN: In this situation, you have a man sitting on the bench that's not involved in driving anything. He's not engaged in an ongoing crime. If we were to say that at some point, he was driving while intoxicated, that crime is completed. And the U.S. Supreme Court made very clear and I'm going to make sure that I'm citing the Court correctly. Made very clear in Hensley, in U.S. versus Hensley that they weren't willing to make a jump in terms of reasonable suspicion of probable cause for a completed crime unless it was a felony because the government interest in those situations is dissipated. You no longer have the existing danger to the community that existed once a crime is completed with the exception of a felony, where you want to have an arrest as soon as possible to get that dangerous person off the street.

So we have that on one end where we do not have reasonable articulable suspicion that criminal activity of an ongoing crime is afoot. You have a person sitting on a bench and not engaging in any activity whatsoever. And then you turn to Virginia's interpretation of Navarette in Commonwealth versus Rosser where they again expressly raise the issue of an ongoing criminal offense, meaning requirement that the Virginia Court of Appeals 2014 case. And I'll tell the Court that it is unpublished. But the analysis is very informative in terms of how the Virginia courts are looking at Navarette and its application. Once again, they made the statement about an ongoing

criminal offense. I mean, I don't think that you really need to even get to the specifics of it being ongoing because Officer Phillips own testimony apprised the Court that he was very well in terms of reaching a reasonable articulable suspicion that Mr. Medvedev had been driving while drunk, particularly not to the level that Terry would require. All he knew was put over radio from dispatch.

You have, I think, Becker versus Commonwealth. Once again, you have a situation where dispatch received a call from an informant. This person even made a face to face contact with the officer but the officer failure to corroborate any of the details of the call, the Court eventually found that there was no reasonable articulable suspicion for the stop.

You have the same thing in Hears versus Commonwealth, which I'm pretty sure the Court is more than familiar with because it's cited quite often. And it's probably the benchmark case. You have, once again, an anonymous call and in this case the call is to be treated anonymous because the officer himself didn't have any particular information or knowledge about the caller. And there the Court required corroboration of the details of the call. You can't get corroboration of details of drunk driving if you don't have a driver, which is what Harris actually came to. Because this guy actually got in the car and drove after the call was made, the officer followed him, did not get details to actually satisfy the requirements for reasonable suspicion. There just wasn't enough there. Once he took his license, he should

have and needed to have reasonable articulable suspicion to conduct an investigative seizure on Mr. Medvedev. He failed to do so. So anything that followed from there is fruit of the poisonous tree.

THE COURT: All right.

MR. LEWIS: Yes, your Honor. The Commonwealth will concede that there was at the time that once Officer Phillips seizes the license from the Defendant at that point Mr. Medvedev is seized. But the Commonwealth's argument is, is that up and to that point, Officer Phillips had developed reasonable articulable suspicion. As your Honor knows, the reasonable articulable suspicion is just the standard to detain someone in order to obtain further information and it takes in the totality of all the circumstances. Once, the cases that have been cited throughout this are all talking about what does it take in order to get to reasonable articulable suspicion. And the Commonwealth would look at Navarette primarily along with Baldwin versus Commonwealth as well as to what develops those type of, what reasonable articulable suspicion develops into. In terms of Navarette—

THE COURT: Reasonable articulable suspicion of what?

MR. LEWIS: Of a crime occurring.

THE COURT: In this case?

MR. LEWIS: In this case, it could either be drunk in public or it could be a DUI because at the point that Officer Phillips responds, Mr. Medvedev is

clearly in public; he's out on a public sidewalk and there's also the dispatch call about the driving. So either one of those as Officer Phillips and if there is reasonable articulable suspicion looking at the entire circumstances, then this is an objective standard based on what Officer Phillips knows.

So the point that we are dealing with, Officer Phillips has gotten a call from dispatch in which he testified to that he heard that the driver in a red Mazda was being followed by the caller to the JCC. And then what we don't know specifically is what exactly he heard in terms of what the driving had been. The only thing and I think he spoke with a lot of candor that he can't remember word for word what the entire call was but he did remember that the phrase all over the road was used. So he knows that there is a red Mazda being driven to the JCC, the caller is behind it and it's been all over the road. When he gets to the JCC, he sees someone pointing at a red Mazda. He also sees Mr. Medvedev seating on a bench next to a security guard. When he gets there, he then approaches Mr. Medvedev, asks him to come on up to his car and then as he says that he can't, again spoken with a lot of candor, since this is going back to October, doesn't remember whether he observed the odor of alcohol or the leaning back and strange standing position directly before, directly after or simultaneous. I believe what he finally clarified was it was within the same timeframe.

And the Commonwealth would submit that until he actually has a license in his hand, Mr. Medvedev

has not been seized. What the Commonwealth will point to is at that point, with all of that totality of circumstances, Officer Phillips has reasonable articulable suspicion of drunk in public, if not DUI. And the Commonwealth would assume that he had both.

What Mr. McFadden has relied on in his interpretation of Navarette, the Commonwealth would submit is not entirely correct. When Navarette as your Honor is well aware of, when Navarette is talking about when it talks about the ongoing crime is the reliability of the tip from the informant, how reliable is it. And they say it's an ongoing crime, just like the hearsay exception with excited utterances, when someone calls in talking about hey, this is happening contemporaneously, we give that more reliability. There's not the requirement that the crime of driving under the influence actually has to be occurring because in Navarette, the officer pulls the car over without observing any driving that would show to be impaired. They were behind the car a couple minutes, don't see anything but go ahead and pull it over based on what the tip was and the Supreme Court said that that was fine because the caller has reliability because he used the 9-1-1 system, which can be traced back to and because they have stated a specific action of driving and didn't just say it was a drunk driver or a reckless driver. And in that case, they said, the Navarette caller said something about how they'd been run off the road.

Here we don't have Officer Phillips knowing anyone had been run off the road but we do have

him knowing that the person has been all over the road. And Navarette actually cites that those types of statements that officers know correspond with impaired driving is sufficient to find a reasonable articulable suspicion.

THE COURT: All right. I think the argument is well made on both sides. But I think you've got to look at the totality of the circumstances based on the evidence that I have here. And the evidence is you have a concerned citizen calling in. The concerned citizen, just from the evidence that I have here, pursuant to what the officer says and that was relayed to him on the radio was this concerned citizen was following this red Mazda SUV, that the Mazda was all over the road, obviously enough of a concern for him to call the police. He also relayed that this red Mazda that's been described by the citizen is at the Jewish Community Center.

The police officer goes to the Jewish Community Center and he sees this red Mazda SUV. He goes to the, or goes by and either points at it or looks at it and someone in the parking lot gives him the acknowledgment of a yes, he certainly could conclude that this was the car that he's been following. In that same parking lot, he sees an individual that turned out to be the Defendant, seated next to a security guard. So, I think at that point he certainly had the right to go up to that person.

And when he approaches that person who, again, ended up being the Defendant, he says would you mind coming with me so we can get away from this entrance. And it's no question at that point that

the Defendant agreed to do that. So as he's getting the Defendant over to a point away from the entrance and he said that basically simultaneously. And I think the officer is very credible. He doesn't say what he doesn't know and what have you. He says simultaneously at the same time he's asking for the operator's license, he smells the odor of alcohol, he sees the Defendant standing in the unusual matter that he has described.

So I think when you put together that you got the red Mazda SUV there that has been described as being all over the road, that the smell on the Defendant of alcohol at the same time, he observed the way he's standing; I think he has a reasonable articulable suspicion to continue with this investigation. So based upon that, I'm going to overrule your motion to suppress, although it's argued very well.

MR. MCFADDEN: Thank you, your Honor. Note our objection.

THE COURT: I certainly note your objection, yes. All right, do you want to arraign the Defendant?

THE CLERK: In case number CR15-60, Dmitri I. Medvedev, you are charged that on or about October 9th, 2015 in the County of Henrico and within the jurisdiction of this Court, you did drive or operate a motor vehicle while having a blood alcohol concentration of 0.08% or more by weight by volume or 0.08 grams or more per 210 liters of breath or while under the influence of alcohol or while under the influence of a narcotic, drug or other self-administered intoxicant or drug or any combination of drugs to a degree which impaired

your ability to drive or operate a motor vehicle safely, or while under the combined influence of alcohol and a drug or drugs to a degree which impaired your ability to drive or operate a motor vehicle safely. Your blood alcohol level was more than 0.20. Do you plead guilty or not guilty?

MR. MCFADDEN: It's going to be a conditional guilty plea, your Honor.

THE COURT: Is the Commonwealth willing to accept that?

MR. LEWIS: What's the, I'm not sure what the conditions—

THE COURT: Conditional plea is that he can still pursue his—

MR. MCFADDEN: Right to appeal, that's correct.

THE COURT:—right to appeal on the motion to suppress.

MR. LEWIS: Yes, your Honor, if that's the case then yes.

THE CLERK: You make this plea after speaking with your attorney?

THE COURT: Have you talked to your lawyer about it?

DEFENDANT MEDVEDEV: Yes.

THE COURT: All right. You can have a seat. The record will show that the Defendant has entered a conditional guilty plea while maintaining his right to pursue any appellate rights on the motion to suppress. All right, do you want to pick up from there and summarize for me Mr. Lewis?

MR. LEWIS: Yes, your Honor.

THE COURT: Are you agreeable with that Mr. McFadden?

MR. MCFADDEN: I am perfectly fine with it, your Honor.

MR. LEWIS: Your Honor, at that point Officer Scott arrived. He—

THE COURT: You have no objection, I know you object to the motion to suppress, but there's no objection to me considering the evidence up to this point?

MR. MCFADDEN: Oh, absolutely not, your Honor.

THE COURT: Okay, I got you.

MR. MCFADDEN: I think that's well within—

THE COURT: I got you. All right, go ahead.

MR. LEWIS: Your Honor, at that point Officer Scott with Henrico County Police arrived and conducted a DUI investigation. During that investigation, he did the field sobriety tests. Those field sobriety tests resulted in Mr. Medvedev being arrested for DUI due to his poor performance on those. He was speaking with Mr. Medvedev about the amount that he had to drink. Mr. Medvedev stated that he had had five or six shots earlier that day. He had thought that it would have worn off by then but it had not.

Your Honor, the ABCs were done, the walk and turn was done, one legged stand was done. During this time, Mr. Medvedev was unsteady on his feet; according to Officer Scott almost fell over during the walk and turn section of it. He was arrested, taken down, given a field sobriety test. The

Commonwealth would submit the certificate of blood analysis done pursuant to that and it came back as .26.

MR. MCFADDEN: No objection, your Honor.

MR. LEWIS: The Commonwealth, the only other evidence that the Commonwealth would put forward in terms of the plea is that Mr. Medvedev was there at the JCC in order to pick up his child who was there in their school or daycare program. He was not allowed to do so by the JCC security guards who ended up intervening in that and that's why he was sitting outside on the bench.

THE COURT: Anything you want to add to that summary, Mr. McFadden?

MR. MCFADDEN: No, your Honor, it's a fair and accurate representation of what the Commonwealth's evidence would have been.

THE COURT: All right, I find him guilty of the charge. Does he have a prior record?

MR. LEWIS: No, your Honor, no prior record.

THE COURT: No prior traffic record?

MR. LEWIS: No, your Honor.

THE COURT: Okay, is there anything you want to, any evidence on disposition Mr. McFadden?

MR. MCFADDEN: Just proffer, your Honor.

THE COURT: Okay, comments?

MR. LEWIS: waive and reserve, your Honor.

MR. MCFADDEN: Your Honor, at this point in time, I'm going to ask that the Court sentence Mr.

Medvedev to the mandatory minimum, which is ten days under the statute. Mr. Medvedev has no criminal or traffic history to speak of that would indicate that he has any sort of problem obeying the law in his own fashion.

THE COURT: What happened on this particular day?
That's a lot of alcohol.

MR. MCFADDEN: He thought that he had slept it off, Judge. And like a lot of people who are still intoxicated believed that they're fine. He wasn't. I mean, it was a clear lapse in judgment. But I will add that his wife was also on her way to the JCC and initially the JCC called her to come there. She was already on her way.

THE COURT: Does your client work?

MR. MCFADDEN: He does, your Honor. He works for the Department of Treasury as an auditor, has been an auditor for ten years, worked his way hard to get his U.S. citizenship and has been up until this point a great citizen and shown great respect for the law.

THE COURT: All right, Mr. Lewis?

MR. LEWIS: Your Honor, the Commonwealth would submit that the mandatory minimum would not be appropriate in this case and that Mr. Medvedev should be sentenced to more active incarceration than the mandatory minimum of ten days. The mandatory minimum is for .20 and over. At this point, we're not close to .20, we're at a .26. We're also not in a situation like a lot of mandatory minimum cases where we're just pulled over for

speeding, ends up the person is impaired as a result of a DUI investigation.

We actually have a concerned citizen who is so concerned about the driving that he sees going on that he actually follows Mr. Medvedev all the way to the JCC and then once there Mr. Medvedev's intent is to pick up his child and presumably then drive home with that child in that condition. The Commonwealth would submit that under those circumstances, the mandatory minimum is not appropriate; more incarceration is due.

THE COURT: All right, I'm going to fine him \$500 in costs and sentence to serve six months in jail. I'll suspend five months and fifteen days of that for a period of five years, ten days of that being the mandatory minimum. The privilege to operate a motor vehicle is revoked for twelve months.

MR. MCFADDEN: Your Honor, we'd also like to request that Mr. Medvedev be allowed to serve his time on weekends. As already stated, he has a full time job with the Treasury Department that we'd like for him to be able to get back and forth to, which would also require a restricted license as well, your Honor. And both of those require Court's approval.

THE COURT: I will order also he must begin ASAP, I'll give a restricted license so that he can drive back and forth to work and back and forth to ASAP program. He has to have an ignition interlock on the vehicle. He can serve his jail sentence beginning this Saturday at eight a.m. and each weekend thereafter until his sentence is complete.

MR. MCFADDEN: Thank you, your Honor.

THE COURT: You need to have a seat in the courtroom and the Sheriff will get with you. We'll get some information from you and then before you leave today, you need to make sure and see the alternative sentencing people at the jail so they can be ready for you coming in this weekend to serve your sentence. All right?

MR. MCFADDEN: Thank you, your Honor.

MR. LEWIS: Thank you, your Honor.

MR. MCFADDEN: Your Honor, there's also, he just raised a really good point. There's also the issue of any appeal bond if he chooses to appeal, will the Court allow him to remain on bond?

THE COURT: Well, I will set a bond if he appeals.

MR. MCFADDEN: Can we have the bond set at exactly what he's currently out on bond for?

THE COURT: What is he out on?

MR. LEWIS: I don't have that information.

MR. MCFADDEN: I actually think he, I had to represent him downstairs. I believe it's a PR bond. It's a \$3,000 secured bond, unsecured sorry.

THE COURT: Well.

MR. MCFADDEN: And the reason being, I mean this is a close case. So I'm going to counsel him a little more.

THE COURT: I'm not going to just, if he's, I will set an appeal bond of \$10,000 with surety one condition of the bond is he has to wear the SCRAM bracelet.

MR. MCFADDEN: All right.

THE COURT: And obviously, if he doesn't appeal, we don't have to worry about it. If he does appeal, then that's what the bond is.

MR. MCFADDEN: Thank you, your Honor.

THE COURT: All right.

MR. LEWIS: Thank you, your Honor.

PROCEEDINGS CONCLUDED

**ORDER OF THE SUPREME COURT OF VIRGINIA
DENYING PETITION FOR REHEARING
(MAY 11, 2018)**

IN THE SUPREME COURT OF VIRGINIA

DMITRI I. MEDVEDEV,

Appellant,

v.

HENRICO COUNTY,

Appellee.

Record No. 171361
Court of Appeals No. 0930-16-2

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 14th day of March, 2018 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste: Patricia L. Harrington,
Clerk

By: /s/ signature not legible
Deputy Clerk