Appendix A

VIRGINIA: IN THE GENERAL DISTRICT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v. Docket No.: CR14-003711

Gregory Tarrel Brown,

Defendant.

**MOTION TO SUPPRESS**

Comes now the Defendant, Gregory Tarrel Brown, by counsel, and pursuant to the Fourth Amendment of the United States Constitution, Constitution of the Commonwealth of Virginia and Section 19.2-266.2 of the Code of Virginia, 1950, as amended, moves this Honorable Court to order the suppression of any and all evidence recovered from Mr. Brown. In support of his motion, Mr. Brown states as follows:

1. On 5/22/ 2014 Gregory Tarrel Brown, was detained without probable cause by Virginia Beach Police.
2. Where no probable cause existed, Mr. Brown was ultimately placed in handcuffs without justification and without his consent he was searched.
3. As a result of the unlawful search and seizure of Mr. Brown, he was ultimately arrested for possession of marijuana and possession with intent to distribute heroin.

WHEREFORE, Mr. Brown, respectfully requests that this Honorable Court grant his Motion to Suppress any and all evidence recovered.

Gregory Tarrell Brown

By:_____
Of Counsel

Herman C. Smith, III, Esquire
5900 East Virginia Beach Blvd., Suite 416
Norfolk, VA 23502
Phone: (757) 226-9414
Fax: (757) 228-5194

**CERTIFICATE**

I, Herman C. Smith, III, Esq., Counsel for the Defendant, hereby certify that a true copy of the foregoing Motion to Suppress was hand delivered to Sara R. Chandler, Esquire, Commonwealth's Attorney for the City of Virginia Beach, by mail at 2425 Nimmo Parkway, Virginia Beach, VA 23456 this ___ day of _____, 2016.

_____

Appendix B

# *VIRGINIA:*

*In the Court of Appeals of Virginia on* **Thursday** *the* **9th** *day of* **November, 2017.**

Gregory Tarrell Brown, Appellant,

against Record No. 0873-17-1
Circuit Court Nos. CR04-1908, CR09-997, CR09-1121, CR09-1143, CR14-3711 and CR14-3859

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. Appellant entered a conditional guilty plea to two counts of possession with intent to distribute a Schedule I or II controlled substance, second offense, preserving his right to appeal the trial court's denial of appellant's motion to suppress evidence.[1] He argues on appeal that the police improperly seized and searched him when they responded to a call regarding the sale of narcotics at a residence in a high crime area in Virginia Beach.

On appeal from a trial court's ruling on a motion to suppress, "the burden is upon the [defendant] to show that the ruling, when the evidence is considered most favorably to the Commonwealth, constituted reversible error." Shiflett v. Commonwealth, 47 Va. App. 141, 145, 622 S.E.2d 758, 760 (2005) (quoting McGee v. Commonwealth, 25 Va. App. 193, 197, 487 S.E.2d 259, 261 (1997) (*en banc*)). The appellate court must "give deference to the factual findings of the trial court but independently decide whether, under

[1] In the same proceeding, appellant pled guilty to possession of marijuana, second offense, and failure to provide identification to the police. The court sentenced appellant to twelve months' incarceration on each conviction and ordered that the sentences run concurrent with the sentences imposed on the drug convictions. These convictions are not part of this appeal.

the applicable law, the manner in which the challenged evidence was obtained satisfies constitutional requirements." Id. at 145-46, 622 S.E.2d at 760 (quoting Jackson v. Commonwealth, 267 Va. 666, 673, 594 S.E.2d 595, 598 (2004)).

So viewed, the record established that at about 9:30 p.m. on May 21, 2014, four Virginia Beach police officers responded to a residence in a known high crime area to investigate reported drug sales. The officers parked their police vehicles a short distance from the residence, an end-unit townhouse, and approached on foot. Appellant and another man were in the driveway in front of the townhouse. Officer Foss[2] smelled marijuana as he approached, and the smell became stronger as he came nearer appellant. Foss had been a police officer for seven years and had received training in recognizing the particular odor of marijuana. Foss had no doubt the marijuana odor was coming from appellant. Officer Snyder went to a different area of the driveway and found an individual crouching by a parked car. When the person stood up, Snyder saw a bag of marijuana hanging from the young man's waist. As Snyder placed him under arrest, Bridget Carreiro, the man's mother and appellant's girlfriend, became "very upset" and started walking toward Snyder. When the commotion involving Carreiro began, appellant started to walk away from Foss and ignored the officer's request to stop. Appellant resisted when Foss grabbed appellant's arm to detain him. Foss handcuffed appellant and placed him on the ground to maintain control over him. Foss told appellant he had smelled marijuana on him and then proceeded to search him. Foss recovered thirty-six capsules of heroin (approximately five grams), twenty-five grams of cocaine, about one gram of marijuana, $716 in cash, a cell phone, and an electronic monitoring device from appellant. Appellant refused to provide any information about himself. He was identified after he was fingerprinted at the jail.

Police obtained a search warrant for the residence and recovered additional amounts of heroin, cocaine, and marijuana, as well as items used in drug distribution. A police detective testified as an expert at the sentencing hearing that, depending on how the drugs were packaged for distribution, the value of all the

[2] At the time of the suppression hearing in May 2016, Foss was a detective on the Virginia Beach police force.

heroin recovered ranged from $8,250 to $66,000, and the value of all the cocaine ranged from $1100 to $3000.

Whether police conduct violates the Fourth Amendment hinges on whether the conduct was reasonable, as the Constitution "condemns only 'unreasonable' searches and seizures." Kyer v. Commonwealth, 45 Va. App. 473, 480, 612 S.E.2d 213, 217 (2005) (*en banc*). A police officer may detain a person to investigate possible criminal behavior where the officer has "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." Whitfield v. Commonwealth, 265 Va. 358, 361, 576 S.E.2d 463, 465 (2003) (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)). In determining whether the officer had a valid basis to detain the person, "a court must consider the totality of the circumstances." Id.

Probable cause is a flexible, common-sense standard, requiring only a probability of criminal activity. See Harmon v. Commonwealth, 15 Va. App. 440, 444, 425 S.E.2d 77, 79 (1992) ("[a]ctual proof that criminal activity *is* afoot is not necessary; the record need only show that it *may* be afoot"). Probable cause is more than "mere suspicion," but does not require that the facts be "sufficient to convict" the accused of the offense. Taylor v. Waters, 81 F.3d 429, 434 (4th Cir. 1996). Therefore, "[u]nlike a factfinder at trial, 'reasonable law officers need not resolve every doubt about a suspect's guilt before probable cause is established.'" Joyce v. Commonwealth, 56 Va. App. 646, 660, 696 S.E.2d 237, 243 (2010) (quoting Slayton v. Commonwealth, 41 Va. App. 101, 107, 582 S.E.2d 448, 451 (2003)).

Officer Foss had been dispatched to a residence in a known high crime area to investigate reported drug sales. He had received training to recognize the particular odor of marijuana, and he immediately smelled marijuana when he approached appellant in the driveway of the residence. As Foss came nearer to appellant, the officer was certain the smell was emanating from appellant rather than the man who had been standing next to appellant. "[P]robable cause may be supported by the detection of distinctive odors, as well as by sight." Bunch v. Commonwealth, 51 Va. App. 491, 496, 658 S.E.2d 724, 726 (2008) (quoting United States v. Haynie, 637 F.2d 227, 234 (4th Cir. 1980)). Appellant's continued resistance further reasonably

confirmed the officer's belief that appellant was involved in criminal activity. See Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."). Accordingly, Foss was justified in directing appellant not to walk away, grabbing appellant's arm when he ignored Foss's order, and searching appellant's person.[3] See Bunch, 51 Va. App. at 497, 658 S.E.2d at 727. We find no Fourth Amendment violation occurred when Foss seized and searched appellant.

II. Appellant also argues the trial court abused its discretion in sentencing him to serve eleven years on the convictions for the two 2014 drug offenses, in addition to thirteen years and eight months of previously suspended time on four prior convictions,[4] for a total sentence of twenty-four years and eight months. Appellant asserts the court did not give proper weight to appellant's "youth"[5] and other mitigating factors in imposing sentence on the two new convictions.

---

[3] Carreiro and her sister-in-law testified at the suppression hearing that they had been at Carreiro's residence when the police officers came and that the officers had immediately grabbed appellant, thrown him on the ground, and searched his pockets. The trial court gave little credence to their testimony, specifically finding that Officer Foss smelled marijuana on appellant when he approached and that appellant walked away after Foss told him to stay. See Parham v. Commonwealth, 64 Va. App. 560, 565, 770 S.E.2d 204, 207 (2015) (stating that fact finder "determin[es] the credibility of the witnesses and the weight afforded the[ir] testimony").

[4] Appellant was convicted of possession of a controlled substance with intent to distribute in 2005 and given a seven-year prison sentence, with six years suspended. The suspended sentence was revoked and five years re-suspended in 2009. The suspended time was revoked again in March 2014, and appellant was ordered to serve four months, leaving four years and eight months suspended. Appellant was convicted in 2009 of two charges of drug possession and sentenced to five years on each, with nine years of the total sentence suspended. Appellant also was convicted in 2009 of failing to register as a sex offender, based on an offense for which he was convicted in 2000, and sentenced to two years, to run concurrent with the two drug sentences. In March 2014, the nine-year suspended sentence was revoked and re-suspended. As part of his plea agreement on the 2014 drug offenses, appellant stipulated that he was in violation of the conditions of four previously suspended sentences. At the hearing in March 2017, appellant acknowledged he had violated his probation; the trial court revoked the suspended sentences and ordered that appellant serve all the remaining time.

[5] Appellant was thirty-four years old at the time of sentencing.

The sentence imposed by a trial court is reviewed under an abuse of discretion standard. See Scott v. Commonwealth, 58 Va. App. 35, 46, 707 S.E.2d 17, 23 (2011). "A Virginia trial court 'clearly' acts within the scope of its sentencing authority 'when it chooses a point within the permitted statutory range' at which to fix punishment." Du v. Commonwealth, 292 Va. 555, 564, 790 S.E.2d 493, 499 (2016) (quoting Alston v. Commonwealth, 274 Va. 759, 771, 652 S.E.2d 456, 463 (2007)). As long as the sentence imposed falls within the prescribed statutory range, this Court "will not interfere with the sentence." Scott, 58 Va. App. at 46, 707 S.E.2d at 23.

Appellant faced a maximum punishment of two life terms for the 2014 drug convictions. Each drug conviction required a mandatory sentence of three years. The trial court sentenced appellant to ten years each on the two drug convictions, suspending five years on one and four years on the other, leaving him eleven years to serve. The trial court did not abuse its discretion in sentencing appellant. See Du, 292 Va. at 564, 790 S.E.2d at 499.

The trial court also did not abuse its discretion in revoking appellant's suspended sentences and ordering that appellant serve the remaining time. Code § 19.2-306(A) provides that a trial court "may revoke the suspension of sentence for any cause the court deems sufficient that occurred at any time within the probation period, or within the period of suspension fixed by the court." Code § 19.2-306(C)(ii) states that if the court finds good cause to believe that the defendant has violated the terms of suspension, "the court shall revoke the suspension and the original sentence shall be in full force and effect."

Before imposing sentence, the court noted that past attempts to rehabilitate appellant by imposing suspended sentences had not been sufficient to keep appellant from using or distributing drugs and the "rational prospect" that appellant's behavior would change was "not very high," even considering the fact that appellant had recently learned he had a three-year-old child. The court stated it had "taken into account all of the argument that was made" by appellant's counsel, but was "not left with many options." The court said that while the guidelines were "very harsh," they were "appropriate." The guidelines ranged from twenty-one years and four months to thirty-five years, with a mid-point of twenty-eight years and seven months. The

total sentence the court imposed – twenty-four years and eight months – was near the low end of the guidelines. Because the court did not abuse its discretion in sentencing appellant, we will not interfere with the judgment. See Scott, 58 Va. App. at 46, 707 S.E.2d at 23; Jett v. Commonwealth, 34 Va. App. 252, 256, 540 S.E.2d 511, 513 (2001).

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

It is ordered that the Commonwealth recover of the appellant the costs in this Court, which costs shall include a fee of $400 for services rendered by the Public Defender on this appeal, in addition to counsel's necessary direct out-of-pocket expenses, and the costs in the trial court.

This Court's records reflect that the Office of the Public Defender for the City of Virginia Beach is counsel of record for appellant in this matter.

Costs due the Commonwealth by appellant in Court of Appeals of Virginia:

Public Defender $400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Marty L P. Ring

Deputy Clerk

Appendix C

VIRGINIA: IN THE COURT OF APPEALS OF VIRGINIA

Gregory Tarrell Brown,
Appellant,

v. Record No. 0873-17-1
Circuit Court Nos. CR04-1908, CR09-997, CR09-1121, CR09-1143, CR14-3711 and CR14-3895

Commonwealth of Virginia,
Appellee,

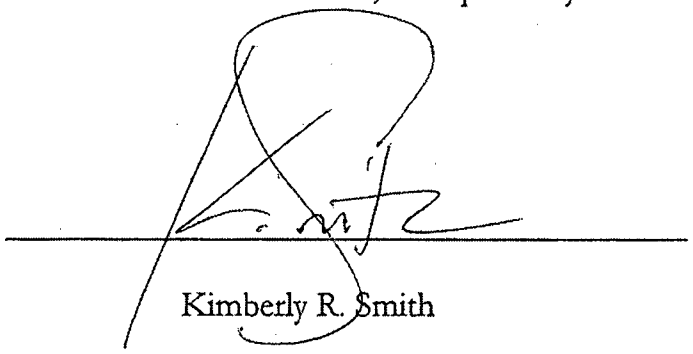
Demand for Consideration by Three Judge Panel

Subject Line: Re: Gregory Tarrell Brown v. Commonwealth of Virginia,

Record No. 0873-17-1

Pursuant to Virginia Code Section 17.1-407(D) and Rule 5A:15A(a), the appellant demands that his petition for appeal, which was denied by the Court of Appeals on November 9, 2017 be considered by a three-judge panel of the Court of Appeals. The November 9, 2017 Order erred in affirming the decision of the trial court's denial of appellant's motion to suppress because he was unlawfully seized and searched in violation of his fourth amendment rights when officer Foss pre-textually claimed he smelled marijuana and then seized and searched defendant without probable cause or suspicion. The Order further errs in holding that the trial court did not abuse its discretion in revoking the remainder of appellant's suspended sentence when it failed to

and further that the body of this demand includes 270 words, thus counsel for appellant has complied with the 350 word count limit, as required by rule 5A:15A(a).



Kimberly R. Smith

Appendix D

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 29th day of October, 2018.*

Gregory Tarrell Brown, Appellant,

against Record No. 180362
Court of Appeals No. 0873-17-1

Commonwealth of Virginia, et al., Appellees.

From the Court of Appeals of Virginia

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

And it is ordered that the Commonwealth recover of the appellant the costs in this Court and the costs in the courts below.

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Public Defender $850.00 plus costs and expenses

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: _____

Deputy Clerk

Appendix E

SUPREME COURT OF VIRGINIA
PATRICIA L. HARRINGTON, CLERK
SUPREME COURT BUILDING
100 NORTH 9TH STREET, 5TH FLOOR
RICHMOND, VIRGINIA 23219
(804) 786-2251 V / TDD
FAX: (804) 786-6249

DOUGLAS B. ROBELEN
CHIEF DEPUTY CLERK

November 28, 2018

Mr. Gregory T. Brown, No. 1041808
Powhatan Reception and Classification Center
3600 Woods Way
State Farm, VA 23160

Re: *Gregory Tarrell Brown v. Commonwealth of Virginia, et al.*
Record No. 180362

Dear Mr. Brown:

This will acknowledge receipt of your motion for an extension of time in the above case. Please mail a copy of your motion to the Virginia Beach Commonwealth's Attorney, and let me know once you have done this.

Sincerely,

Douglas B. Robelen
Chief Deputy Clerk

DBR/ep

Appendix E

# VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 21st day of December, 2018.*

Gregory Tarrell Brown, Appellant,

against Record No. 180362
Court of Appeals No. 0873-17-1

Commonwealth of Virginia, et al., Appellees.

Upon a Petition for Rehearing

On November 27, 2018 came the appellant, who is self-represented, and filed a motion for an extension of time to file a petition for rehearing in this case.

Upon consideration whereof, the Court grants the motion and the petition for rehearing is considered filed.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

Appendix G

**VIRGINIA:**

***In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 31st day of January, 2019.***

Gregory Tarrell Brown, Appellant,

against Record No. 180362
Court of Appeals No. 0873-17-1

Commonwealth of Virginia, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the appellant's "motion to rehear appeal," which is treated as a petition to set aside the judgment rendered herein on the 29th day of October, 2018 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

PETITION FOR WRIT OF CERTIORARI

Gregory Brown an inmate currently incarcerated at State Farm Enterprise Unit in State Farm, Virginia, respectfully petitions this court for a Writ of Certiorari to review the judgement of the Virginia Court of Appeals.

ZURI ELIZABETH POLK
NOTARY PUBLIC
Commonwealth of Virginia
Registration No. 7802048
My Commission Expires March 31, 2022

4/16/19

Additional material from this filing is available in the Clerk's Office.