Appendix A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 20th day of June, 2019.

John Anthony Arnold, Appellant,

against Record No. 181381
Court of Appeals No. 1410-17-1

Commonwealth of Virginia, Appellee.

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.

The Circuit Court of the City of Norfolk shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

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

Attorney's fee $850.00 plus costs and expenses

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:

Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on **Wednesday** *the* **20th** *day of* **June, 2018.**

John Anthony Arnold, Appellant,

against Record No. 1410-17-1
Circuit Court Nos. CR16002271-00 and CR16002271-02

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Norfolk

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 contends that the trial court erred by denying his motion to suppress and finding that there was "enough probable cause" for appellant's warrantless arrest.

"On review of the denial of a motion to suppress, we view the evidence in the light most favorable to the Commonwealth." Adams v. Commonwealth, 48 Va. App. 737, 741, 635 S.E.2d 20, 21 (2006). "[W]hen a defendant challenges the denial of a motion to suppress, he has the burden to show that the trial court's ruling constituted reversible error." Id. at 745, 635 S.E.2d at 24. "Although we are bound to review *de novo* the ultimate questions of reasonable suspicion and probable cause, we 'review findings of historical fact only for clear error and . . . give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.'" Desposito v. Commonwealth, 60 Va. App. 252, 256, 726 S.E.2d 354, 356 (2012) (quoting Ornelas v. United States, 517 U.S. 690, 699 (1996)).

Appellant entered conditional guilty pleas to the charges of possession of a controlled substance with intent to distribute, second offense, and possession of a firearm while committing possession of a controlled substance, reserving his right to appeal any constitutional issues.

On April 28, 2016, Investigator Mondie used a confidential informant, CI-1, to participate in a controlled drug purchase from an individual, who was later designated as a confidential informant, CI-2. At the time of the sale, CI-2 did not have the quantity of drugs that CI-1 requested, and CI-2 needed to retrieve the rest of the drugs that he had agreed to sell. CI-2 left the scene in a vehicle, and Mondie and Investigator Ruiz followed him, eventually initiating a traffic stop of his vehicle. After seeing CI-2 throw a bag of cocaine to the ground, the investigators arrested CI-2, who was in the same neighborhood where the investigators later arrested appellant.

After his arrest, CI-2 offered to give the investigators information concerning his drug supplier. CI-2 stated that his drug supplier's name was John, but CI-2 did not know John's last name. CI-2 described John as an African-American man "in his late 30's, approximately five-ten; [with] a larger stocky build, although not heavy-set . . . ." John also "walked with a limp." CI-2 provided John's phone number, and Mondie determined that the phone number belonged to appellant. Mondie printed a photograph of appellant, and CI-2 identified appellant as his drug supplier. CI-2 told Mondie that he had made several drug purchases from appellant and that appellant would either deliver the drugs to the residence of CI-2, or CI-2 would pick-up the drugs at appellant's apartment. CI-2 also told Mondie that there was "probably a couple of ounces of cocaine inside" appellant's apartment, but CI-2 did not know the exact quantity.

CI-2 told Mondie that appellant lived in the upstairs apartment of the building located on the corner of Partridge Street and Philpotts Road in Norfolk. Mondie showed CI-2 a photograph of the apartment building located on that corner, and CI-2 positively identified the building as appellant's residence. CI-2 told Mondie that appellant lived in the upstairs apartment on the left side of the building, and appellant drove a dark-colored, four-door sedan that CI-2 believed belonged to appellant's girlfriend. CI-2 also told Mondie that appellant lived with his girlfriend, Brandi, an African-American woman.

Mondie conducted surveillance on appellant's apartment building, and he saw a man fitting appellant's description exit the building and enter a dark-colored sedan. Mondie determined that the sedan

was registered to Brandi Perry. Mondie showed CI-2 a photograph of Perry, and CI-2 identified Perry as appellant's girlfriend.

Mondie asked CI-2 if he would be willing to place an order to purchase cocaine from appellant, and CI-2 agreed to do so. Mondie testified that CI-2 probably thought that he was helping himself when he agreed to participate in a controlled buy. While CI-2 and Mondie were in a surveillance vehicle, within sight of appellant's apartment building, CI-2 called appellant, and Mondie listened to the phone call via speakerphone. Mondie testified that CI-2 called the telephone number that Mondie had used to identify appellant. CI-2 requested one hundred dollars' worth of powder cocaine and one hundred dollars' worth of crack cocaine. CI-2 told appellant that he would be home in fifteen to twenty minutes, and appellant agreed to deliver the drugs to the residence of CI-2.

Mondie waited outside of appellant's apartment building until he saw appellant exit the building. Mondie testified that, as soon as appellant exited "the common doorway" of the building, and CI-2 identified appellant as his drug supplier, Mondie advised the team to arrest appellant. Mondie stated that appellant was walking toward "the vehicle" at the time of the arrest. Mondie also observed appellant walk with a limp, and Perry was with appellant.

Mondie returned to the police station with CI-2, and Ruiz called Mondie, informing him that appellant possessed cocaine at the time of his arrest. Later, it was determined that appellant possessed a total of 2.7 grams of cocaine, worth about $245. Mondie prepared an affidavit for a search warrant, which he read into the record. Mondie testified that, at the time of appellant's arrest, appellant did not possess any smoking devices or straws that would be indicative of the nasal ingestion of cocaine. Mondie stated that Apartment D was on the second floor and on the left side of appellant's apartment building.

Appellant argues that the trial court erred in finding that there was probable cause to arrest appellant because the arrest was based on the unreliable statements of CI-2, made at the time that CI-2 was under arrest for selling narcotics, without corroborating evidence.

Probable cause for a warrantless arrest "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." Buhrman v. Commonwealth, 275 Va. 501, 505, 659 S.E.2d 325, 327 (2008) (quoting Taylor v. Commonwealth, 222 Va. 816, 820, 284 S.E.2d 833, 836 (1981)). Probable cause does not "deal with hard certainties, but with probabilities." Slayton v. Commonwealth, 41 Va. App. 101, 106, 582 S.E.2d 448, 450 (2003) (quoting Texas v. Brown, 460 U.S. 730, 742 (1983) (plurality)).

Police officers may make arrests based upon information from informants as long as they reasonably believe that the informant has provided accurate information. McGuire v. Commonwealth, 31 Va. App. 584, 594-95, 525 S.E.2d 43, 48 (2000). In evaluating whether a confidential informant has provided the police with sufficient information to give probable cause for an arrest, we especially consider two factors: "(1) the veracity or reliability of the informant and (2) the informant's basis of knowledge." Byrd v. Commonwealth, 50 Va. App. 542, 551, 651 S.E.2d 414, 419 (2007). These factors do not constitute separate and necessary parts of a probable cause determination, but rather fit into the general totality of the circumstances analysis. Boyd v. Commonwealth, 12 Va. App. 179, 187, 402 S.E.2d 914, 919 (1991). When the information from the informant is combined with the observations of the police, probable cause arises. Id. at 742, 675 S.E.2d at 211.

Here, Mondie possessed probable cause to arrest appellant when appellant exited the apartment building after agreeing to deliver cocaine to CI-2 at the residence of CI-2 in fifteen to twenty minutes. CI-2 had told Mondie that he had previously purchased drugs from appellant on several occasions. CI-2 provided a partial name, a phone number, a detailed physical description of appellant, the name of the appellant's girlfriend, the description of the car he had seen appellant drive, and the location of appellant's apartment where CI-2 had actually purchased drugs from appellant. CI-2 identified appellant from a photograph obtained by Mondie when Mondie associated appellant with the telephone number CI-2 provided. As the trial court found, CI-2, who was under arrest at the time he provided the information about his drug supplier,

was "highly reliable" and "highly motivated" to be truthful with the investigators, knowing that providing false information to law enforcement would not be helpful to his situation.

Furthermore, Mondie corroborated many of the facts that CI-2 provided about appellant. Mondie conducted surveillance on appellant's apartment building, and he saw a man fitting appellant's description exit the building and enter a dark-colored sedan, which Mondie determined was registered to Perry. CI-2 identified Perry as appellant's girlfriend from a photograph that Mondie showed him.

Moreover, Mondie had personal knowledge that appellant had agreed to deliver cocaine to the residence of CI-2 on the date of appellant's arrest. While Mondie and CI-2 were in a surveillance vehicle within sight of appellant's apartment building, CI-2 called appellant, at the phone number that he had previously provided to Mondie, and Mondie listened to the conversation via speakerphone. CI-2 asked appellant to sell him one hundred dollars' worth of powder cocaine and one hundred dollars' worth of crack cocaine. CI-2 and appellant agreed that appellant would deliver the cocaine to CI-2's residence, and CI-2 said that he would be at his residence in fifteen to twenty minutes. After the phone conversation, appellant exited the "common doorway" of the building, and he walked toward "the vehicle." CI-2 identified appellant as his drug supplier, and the police arrested appellant. In addition, Mondie observed appellant walk with a limp, and Perry was with appellant when he exited the building.

"Whether [a warrantless] arrest is constitutionally valid depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it . . . ." McGuire, 31 Va. App. at 592, 525 S.E.2d at 47 (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)). "Therefore, in determining whether an officer had sufficient probable cause to make an arrest, courts should focus upon 'what the totality of the circumstances meant to police officers trained in analyzing the observed conduct for purposes of crime control.'" Buhrman, 275 Va. at 505, 659 S.E.2d at 327 (quoting Hollis v. Commonwealth, 216 Va. 874, 877, 223 S.E.2d 887, 889 (1976)). A reasonable belief that a crime has been or is being committed provides probable cause. See id.

Given the circumstances of CI-2's identification of appellant as a cocaine distributor, CI-2's telephone call to the number associated with appellant, which Mondie heard, wherein CI-2 arranged for appellant to

deliver cocaine to CI-2 in fifteen to twenty minutes, and appellant's exit from his apartment building after the arrangement for the cocaine sale had been made, the evidence clearly provided probable cause that appellant possessed and intended to distribute cocaine at the time he exited his apartment building. See Robinson v. Commonwealth, 53 Va. App. 732, 742, 675 S.E.2d 206, 211 (2009); McGuire, 31 Va. App. at 595-96, 525 S.E.2d at 49. Accordingly, the trial court did not err in denying appellant's motion to suppress the evidence.

Appellant also argues that, if his arrest fails for lack of probable cause, then the probable cause for the search warrant fails as well. Because we find that there was probable cause for appellant's warrantless arrest, we do not address this argument.

II. Appellant argues that the trial court erred in denying his motion to suppress by finding that there were exigent circumstances to enter the apartment and perform a protective sweep.

After officers arrested appellant, Mondie left the scene, and Ruiz later called Mondie to inform him that officers had found cocaine on appellant's person. Mondie testified that, after he learned that the officers had found cocaine on appellant's person, he made a determination to seek a search warrant for appellant's apartment. Mondie agreed that it is fairly common for evidence to be destroyed once the police presence is known. In addition, CI-2 had told Mondie that there were probably "a couple of ounces of cocaine" inside appellant's apartment, but CI-2 did not know the exact quantity of cocaine inside the apartment.

Mondie did not see inside appellant's apartment before he obtained the search warrant. He only knew that Ruiz had entered the apartment before Mondie obtained the search warrant. Appellant's counsel asked Mondie, "Is it fair to say that you based your search warrant off the arrest portion?" Mondie responded, "That is correct." Mondie did not attempt to get a search warrant for the apartment before appellant's arrest. Appellant's counsel asked Mondie, "Did you base your search warrant on any known item inside . . . the house; seeing that your search warrant states packaging materials and scales?" Mondie replied, "No."

Prior to returning to appellant's apartment building, Mondie advised the officers at the scene that he had obtained a search warrant. Mondie then delivered the search warrant to the officers, but he did not participate in the search. Mondie did not know if any evidence was collected before he arrived at the

apartment. The time period between the surveillance of appellant to the time that Mondie obtained the search warrant was less than one hour. Mondie stated that law enforcement had no reason to enter appellant's apartment until they recovered cocaine from appellant's person and, at that time, he decided to seek a search warrant for appellant's apartment.

Ruiz testified that, after appellant was detained, Ruiz obtained the keys to appellant's apartment from Perry, Perry indicated which apartment she and appellant lived in, and Ruiz conducted a sweep of the apartment "for bodies, [and] for people." Ruiz did not ask Perry if he could enter the apartment after he got the key from her. Ruiz stated that a few other officers entered the apartment with him "just to conduct a sweep of the house for people, [and] make sure there was nobody else in the house." Ruiz testified that, during the sweep, the officers were inside of the apartment for about "a minute," and they did not search any drawers, cabinets, or "anything of that nature." The officers did not locate anyone inside the apartment, and, after the completion of the protective sweep, one detective was posted at the door of appellant's apartment, while the other officers went downstairs. Ruiz did not know of any officer searching appellant's apartment prior to Ruiz talking with Mondie. Ruiz was aware that many of the drugs recovered were located in plain view in the kitchen of the apartment. Ruiz was not aware of any weapons "anywhere visually on the scene." Ruiz stated that he went back into the apartment after Mondie told him by telephone that the search warrant had been issued. Ruiz believed that it took less than one hour for the search warrant to arrive at the scene.

"[T]he doctrine of judicial restraint dictates that we decide cases 'on the best and narrowest grounds available.'" Commonwealth v. White, 293 Va. 411, 419, 799 S.E.2d 494, 498 (2017) (quoting Commonwealth v. Swann, 290 Va. 194, 196, 776 S.E.2d 265, 267 (2015)).

Here, "regardless of whether the protective sweep was justified, the underlying affidavit supporting the search warrant did not contain any information that was obtained during the protective sweep, and thus the warrant could not have been tainted by any illegally-gained information." Brown v. Commonwealth, 68 Va. App. 58, 68, 802 S.E.2d 197, 202 (2017). The affidavit contained only information from Mondie's surveillance of the apartment, and from the circumstances surrounding appellant's arrest when the cocaine

was discovered on appellant's person. Mondie specifically testified that the affidavit was not based on any known item inside of the apartment. The affidavit stated that, on April 28, 2016, appellant was taken into custody at 6500 Partridge Street, and he was charged with possession with intent to distribute cocaine. The affidavit further provided that appellant was seen leaving the common doorway of 6500 Partridge Street with Perry, and he possessed cocaine and a key to Apartment D at 6500 Partridge Street. Perry told the police that she was the leaseholder of the apartment, and appellant resided there with her. The affidavit stated that, based on Mondie's knowledge and experience, the quantity of cocaine that appellant possessed was not indicative of personal use. The affidavit also stated that Mondie expected to find packaging materials in appellant's apartment.

Further, the evidence did not indicate that Mondie communicated with anyone who conducted the protective sweep between the time that the sweep was conducted and the time that Mondie obtained the search warrant. See id. at 69, 802 S.E.2d at 202. The record does not show that evidence was found or seized during the protective sweep, only that no people were found and that the officers exited the apartment after the one-minute sweep was complete. Ruiz testified that, at the time of the protective sweep, the officers only wanted to make sure that no people were inside of the apartment. Ruiz also stated that the officers were inside of appellant's apartment for about "a minute," and they did not search drawers or cabinets or "anything of that nature." The trial court found that, during the protective sweep, the officers "didn't search, they didn't seize, they didn't take anything into evidence, and nothing that they saw was included into the search warrant affidavit. They simply limited their entry to that one minute to be sure that nobody was inside and in a position to destroy any evidence." Therefore, the protective sweep did not taint the issuance of the search warrant, and the trial court did not err in denying the motion to suppress.

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.

The trial court shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

This Court's records reflect that Patricia A. Hardt, Esquire, is counsel of record for appellant in this matter.

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

Attorney's fee $400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Marty K P. Ring

Deputy Clerk