No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Fred M. Carrington — PETITIONER
(Your Name)

VS.

Harold W. Clarke, Dept. of Cor — RESPONDENT(S)

PROOF OF SERVICE

I, Fred M. Carrington, do swear or declare that on this date, _____, 20__, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Lauren Catherine Campbell, Office of the Attorney General of Virginia. 202 North 9th Street Richmond, Va. 23219

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Sept. 16, 2021

Debra Hensley

DEBRA HENSLEY
NOTARY PUBLIC
REGISTRATION # 7940272
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES
JUNE 30, 2025

expires June 30, 2025

F. M. Carrington
(Signature)

VIRGINIA:

In the Court of Appeals of Virginia on **Tuesday** *the* **19th** *day of* **December, 2017.**

Fred Carrington, s/k/a
Fred Mack Carrington, Appellant,

against Record No. 0439-17-1
Circuit Court Nos. CR15001643-00 through CR15001643-02

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Norfolk

Before Judges Decker, Malveaux and Senior Judge Annunziata

For the reasons previously stated in the order entered by this Court on October 27, 2017, the petition for appeal in this case hereby is denied.

This order shall be certified to the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Kristen M. McKenzie

Deputy Clerk

Appendix E

VIRGINIA:

In the Court of Appeals of Virginia on **Friday** *the* **27th** *day of* **October, 2017.**

Fred Carrington, Sometimes Known as
Fred Mack Carrington, Appellant,

against Record No. 0439-17-1
Circuit Court Nos. CR15001643-00 through CR15001643-02

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 was convicted of distribution of a Schedule I or II controlled substance, possession of a Schedule I or II controlled substance with the intent to distribute, and conspiracy to distribute a Schedule I or II controlled substance. On appeal, he asserts that the trial court erred by denying his motion to suppress. He contends that the police seized him without reasonable, articulable suspicion he was engaged in criminal activity. He also argues that the police searched him without either probable cause to arrest or search him.

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*)). While 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[1] and . . . give due weight to inferences drawn from those facts

[1] "In Virginia, questions of fact are binding on appeal unless 'plainly wrong.'" McGee, 25 Va. App. at 198 n.1, 487 S.E.2d at 261 n.1 (citations omitted).

by resident judges and local law enforcement officers." Ornelas v. United States, 517 U.S. 690, 699 (1996) (footnote added).

So viewed, the evidence proved that on March 12, 2015, Investigator Gillespie was working undercover in a high-drug traffic area of Norfolk. As Gillespie sat in an unmarked police car, he saw appellant, appellant's co-defendant, David Platt, and a man in a wheelchair on the sidewalk. The man in the wheelchair approached Gillespie first, followed by Platt. Platt entered the passenger side of Gillespie's vehicle and asked Gillespie what he wanted. Gillespie told Platt he was "looking for dope," a street term for heroin. Gillespie stated he wanted to purchase "$20 worth." After Platt instructed Gillespie to move the car, Gillespie drove down the street and pulled over next to the curb. For safety reasons, Gillespie placed his vehicle in a position where appellant and the man in the wheelchair remained in view. Gillespie was wearing a wire so that his fellow officers could monitor his discussions and respond to his signals for assistance.

Gillespie gave Platt $20 in currency whose serial numbers had been previously recorded. When Platt left Gillespie's vehicle, Gillespie watched him approach appellant and make a hand-to-hand exchange. Gillespie could not see what the two men exchanged; however, he could see that Platt did not put his hands in his pockets after leaving Gillespie's vehicle. Immediately following the exchange, Platt walked back to Gillespie's vehicle with his right hand closed and handed Gillespie two capsules later determined to contain heroin.

Gillespie gave an "arrest signal" to officers nearby, but the officers were delayed. As a delay tactic, Gillespie asked Platt if he could purchase another $20 worth of heroin. Gillespie gave Platt another $20, as well as a $15 "runner's fee." Platt exited Gillespie's vehicle and again walked back toward appellant and the man in the wheelchair. The arrest teams arrived and arrested appellant before Platt reached appellant.

Officer Cosca of the Vice and Narcotics Division assisted with appellant's arrest. Cosca testified that, as investigators approached appellant, appellant stopped pushing the wheelchair. Instead of complying with the investigators' commands, appellant turned away from them and reached "towards his waist area." Cosca approached appellant from a different direction than the investigators. Upon seeing appellant reach for his

waistband, Cosca grabbed appellant's arms because Cosca "wasn't sure what [appellant] was doing," but was concerned appellant might be reaching for a weapon or contraband. Appellant "flexed," and Cosca "took him to the ground" and placed him in handcuffs. After appellant was handcuffed, he continued to reach for his waistband. At that point, Cosca searched appellant and found a medium sized baggie protruding from his waistband. Inside the baggie were forty-four oval-shaped clear capsules containing a "gray-beige, off-white powdery substance" later determined to be heroin.

The two capsules purchased by Gillespie were submitted for forensic analysis, as well as the forty-four capsules recovered from appellant. The two capsules were submitted in one bag, and the forty-four capsules were submitted in a separate bag. The request for analysis described the capsules in each bag as "small, clear oval-shaped capsules" filled with a "tan-colored powdery substance."

Each of the two capsules purchased by Gillespie contained heroin. Five samples of the forty-four capsules were tested, and each of the samples contained heroin. The total weight of the two capsules purchased by Gillespie was .1506 gram. The total weight of the five tested samples was .4247 gram. The weight of the remaining untested samples was 5.3947 grams.

Appellant testified at the suppression hearing that, at the time he was seized, he was wearing a long shirt that covered his waistband. He also denied supplying the heroin that Platt sold to Gillespie. While he admitted that he had heroin on him at the time he was arrested, he maintained that the heroin was for his personal use.[2] He explained his possession of Gillespie's currency by stating that Platt gave the money to the man in the wheelchair to buy beer, and the man in the wheelchair gave it to appellant to complete the purchase.

At the suppression hearing, as well as on appeal, appellant contends that the trial court erred by denying his motion to suppress because the police lacked probable cause to arrest and search him. He points

[2] Appellant's testimony at the suppression hearing was not admitted into evidence at trial.

out that Gillespie witnessed only a hand-to-hand exchange between Platt and appellant, but did not see appellant hand the two capsules of heroin to Platt.

We disagree. While we have held that "[an officer]'s observation of the exchange of an unidentified item for money may not [standing alone] . . . give[] rise to probable cause," Ross v. Commonwealth, 35 Va. App. 103, 107, 542 S.E.2d 819, 821 (2001) (citation omitted), we have also "cited with approval various cases in which such an exchange coupled with additional circumstances established probable cause to arrest," Powell v. Commonwealth, 57 Va. App. 329, 337, 701 S.E.2d 831, 834 (2010) (explaining Ross).

> Ross . . . made clear *the "fact that [the officer] did not see and could not identify the item that Ross removed from the baggie does not preclude a finding of probable cause under these circumstances."* This was true even though the officer "had no drug training and had never served on a drug task force" and had made only six drug-related arrests in his five-and-a-half-year career as a police officer.

Id. at 337, 701 S.E.2d at 834-35 (emphasis added) (quoting Ross, 35 Va. App. at 108-09, 542 S.E.2d at 821-22).

Here, the evidence available to the police at the time of appellant's seizure was not limited to Gillespie seeing unidentified items exchanged between Platt and appellant. Gillespie saw appellant with Platt and a third man in a high-drug area, and prior to the hand-to-hand exchange, Gillespie told Platt he wanted to purchase $20 worth of heroin. Immediately after Platt took the cash from Gillespie, Platt walked directly to appellant without Platt putting his hands in his pockets and made a hand-to-hand exchange. Immediately following this exchange, and without Platt placing his hands in his pockets, Platt returned to Gillespie with two capsules of heroin. When Gillespie told Platt he would like to purchase more heroin, and agreed to pay Platt a "runner's fee," Platt left Gillespie's vehicle and immediately walked in appellant's direction.

"An established exception to the warrant requirement of the Fourth Amendment exists for a search incident to a lawful arrest." King v. Commonwealth, 49 Va. App. 717, 723, 644 S.E.2d 391, 394 (2007).

> "[P]robable cause exists when the facts and circumstances within the officer's knowledge, and of which he has reasonably trustworthy information, alone are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed." "The test of constitutional validity is whether

> at the moment of arrest the arresting officer had knowledge of sufficient facts and circumstances to warrant a reasonable man in believing that an offense has been committed." To establish probable cause, the Commonwealth must show "a probability or substantial chance of criminal activity, not an actual showing of such activity."

Ford v. City of Newport News, 23 Va. App. 137, 143-44, 474 S.E.2d 848, 851 (1996) (citations omitted).

Applying the foregoing standards to the facts here, we conclude that the trial court did not err by denying the motion to suppress. While Gillespie could not identify the items that were exchanged by appellant and Platt, a "person of reasonable caution [could] believe" that appellant had supplied drugs to Platt in exchange for the cash Gillespie had given Platt. Platt and appellant were in an area known for drug transactions, Platt immediately engaged in a hand-to-hand transaction with appellant after Gillespie gave Platt $20 for heroin, Platt never reached into his own pockets after taking Gillespie's money, and Platt provided Gillespie with heroin immediately after engaging in the hand-to-hand exchange with appellant. When Gillespie asked to purchase additional heroin and gave Platt $20 and a $15 "runner's fee," Platt exited Gillespie's vehicle and walked in appellant's direction again. Finally, when Cosca approached appellant to arrest him, appellant turned away from the officers and reached toward his waistband. Such evidence, viewed as a whole, was sufficient to provide the officers with probable cause to arrest appellant for drug distribution and to search his waist for drugs incident to arrest.

II. through IV. Appellant also asserts the trial court erred by denying his motions to strike and to set aside the verdict with respect to the following charges: distribution of heroin, third offense; possession of heroin with the intent to distribute; and conspiracy. He also maintains that the trial court erred by allowing Gillespie to testify as an expert witness and to invade the province of the jury with his testimony.

A. Distribution of Heroin and Possession of Heroin With The Intent to Distribute

Appellant maintains that the evidence failed to prove that he sold the heroin to Gillespie or that he possessed the forty-four capsules with the intent to distribute. He points out that his medical records established he was addicted to heroin and that he began to exhibit withdrawal symptoms following his arrest. Appellant also notes that he had a "peach pill" in his possession at the time of his arrest that was used to treat

heroin addiction. Finally, he asserts that the quantity of heroin in his possession was consistent with personal use rather than an intent to distribute because it constituted approximately an eleven-day supply for a heroin user.

"When considering on appeal the sufficiency of the evidence presented below, we 'presume the judgment of the trial court to be correct' and reverse only if the trial court's decision is 'plainly wrong or without evidence to support it.'" Kelly v. Commonwealth, 41 Va. App. 250, 257, 584 S.E.2d 444, 447 (2003) (*en banc*) (quoting Davis v. Commonwealth, 39 Va. App. 96, 99, 570 S.E.2d 875, 876-77 (2002)). "On appeal, we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom." Wells v. Commonwealth, 65 Va. App. 722, 725, 781 S.E.2d 362, 364 (2016) (quoting Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987)).

So viewed, the evidence was sufficient for a rational fact finder to conclude that appellant sold the two capsules of heroin to Gillespie. Gillespie saw appellant standing with Platt in a high-drug area prior to Platt entering Gillespie's vehicle and negotiating Gillespie's purchase of heroin. Immediately after Gillespie told Platt he wanted to purchase heroin and gave Platt $20, Platt approached appellant and engaged in a hand-to-hand transaction. Platt returned from this exchange and turned over two heroin capsules to Gillespie. At no time after Gillespie gave Platt $20 did Platt reach into his own pockets. When the police arrested appellant, appellant had forty-four capsules of heroin in a plastic baggie concealed in his waistband. He also had $119 in increments of $20, $15, $5, and $1 bills. Twenty dollars of this currency matched the previously recorded currency Gillespie had given to Platt to purchase heroin.

Accordingly, the trial court did not err by denying appellant's motions to strike and to set aside the verdict with respect to the heroin distribution charge.

Likewise, we conclude that the trial court did not err by denying appellant's motions to strike and to set aside the possession of heroin with the intent to distribute charge. While appellant argues that the evidence failed to prove he intended to distribute the forty-four capsules of heroin found in his waistband, "[i]ntent is a question to be determined by the fact finder." Craig v. Craig, 59 Va. App. 527, 536, 721 S.E.2d

24, 28 (2012). "[A].[fact finder]'s decision on the question of intent is accorded great deference on appeal and will not be reversed unless clearly erroneous." Towler v. Commonwealth, 59 Va. App. 284, 297, 718 S.E.2d 463, 470 (2011). "Absent a direct admission by the defendant, intent to distribute must necessarily be proved by circumstantial evidence," Williams v. Commonwealth, 278 Va. 190, 194, 677 S.E.2d 280, 282 (2009), "including a person's conduct and statements," Robertson v. Commonwealth, 31 Va. App. 814, 820, 525 S.E.2d 640, 643 (2000).

Here, the direct and circumstantial evidence was sufficient for a rational fact finder to conclude that appellant possessed the heroin with the intent to distribute it. Because appellant actually sold heroin to Gillespie through Platt, the jury was presented with direct evidence of appellant's intent. Although appellant presented evidence he was a heroin addict, he had no ingestion devices[3] or "used" capsules with him at the time the heroin was recovered.

Furthermore, Gillespie, who testified as an expert witness regarding the sale, packaging, use, and distribution of narcotics in Norfolk, opined that the heroin in appellant's possession was inconsistent with personal use. Gillespie based his opinion on appellant using Platt as a "runner," the lack of ingestion devices on appellant, and the large quantity of heroin in appellant's possession. Gillespie also based his opinion on the fact that appellant was in a "high drug" area, and had over $100 in small denominations at the time of his arrest. Gillespie explained that a user typically purchased drugs with that amount of money "pretty quickly."

Thus, the evidence was competent, credible, and sufficient to prove beyond a reasonable doubt that appellant possessed the heroin with the intent to distribute it.

B. Gillespie's Testimony As An Expert Witness

Appellant asserts the trial court erred by allowing Gillespie to testify as an expert witness because Gillespie was also a "key" factual witness. Appellant likewise asserts that the trial court should have

[3] Gillespie testified that addicts typically ingested heroin by injecting it.

excluded Gillespie's testimony on the basis that his opinion testimony invaded the province of the jury on the issue of whether appellant intended to distribute the heroin.

We review the trial court's evidentiary rulings for abuse of discretion. See Thomas v. Commonwealth, 279 Va. 131, 168, 688 S.E.2d 220, 240 (2010). Appellant cites no authority, and we are aware of none, that precludes a fact witness from also testifying as an expert witness. While appellant is correct that any expert witness is prohibited from invading the province of the jury by testifying regarding the ultimate fact in issue, see Justiss v. Commonwealth, 61 Va. App. 261, 273, 734 S.E.2d 699, 705 (2012), appellant does not identify any specific testimony by Gillespie that arguably invaded the province of the jury. Furthermore, appellant did not object to Gillespie's testimony on the basis that it invaded the province of the jury. When Gillespie testified that, in his expert opinion, the amount of heroin in appellant's possession was inconsistent with personal use, appellant did not object to this testimony on the basis that it invaded the province of the jury. Instead, defense counsel suggested to Gillespie during cross-examination that Gillespie had already "made up his mind" that appellant possessed the heroin with the intent to distribute, telling Gillespie, "we really wouldn't need the jury here listening because you've made up your decision, haven't you?" Gillespie responded:

> It's not up to what my mind is made up to. I'm just here to testify in the case. It's up to the jury or the judge to make the decision. I'm not the one who makes the decision of his innocence or guilt. I display the facts of my investigation, and it's up to them to make their decision on what they believe.

"The Court of Appeals will not consider an argument on appeal which was not presented to the trial court." Ohree v. Commonwealth, 26 Va. App. 299, 308, 494 S.E.2d 484, 488 (1998); see also Rule 5A:18. "Although Rule 5A:18 contains exceptions for good cause or to meet the ends of justice, appellant does not argue these exceptions and we will not invoke them *sua sponte*." Williams v. Commonwealth, 57 Va. App. 341, 347, 702 S.E.2d 260, 263 (2010).

Accordingly, to the extent appellant maintains that Gillespie should not have been allowed to testify to the ultimate fact in issue, appellant has failed to preserve that argument for appeal. To the extent he argues

that Gillespie should not been allowed to testify as an expert witness because he was also a fact witness, we conclude that the trial court did not abuse its discretion by allowing Gillespie to testify in both capacities.

Even assuming, *arguendo*, that the trial court erred by allowing Gillespie to opine that the circumstances surrounding appellant's possession of the forty-four capsules was inconsistent with personal use, the error was harmless.

> A nonconstitutional error is harmless if "it plainly appears from the record and the evidence given at trial that the error did not affect the verdict." "An error does not affect a verdict if a reviewing court can conclude, without usurping the jury's fact finding function, that had the error not occurred, the verdict would have been the same."

Scott v. Commonwealth, 18 Va. App. 692, 695, 446 S.E.2d 619, 620 (1994) (quoting Lavinder v. Commonwealth, 12 Va. App. 1003, 1005, 407 S.E.2d 910, 911 (1991) (*en banc*)); see also Commonwealth v. White, 293 Va. 411, 423-24, 799 S.E.2d 494, 500-01 (2017) (concluding that, even if drug distribution packaging was unconstitutionally seized, the admission of such evidence was harmless because a rational fact finder would have convicted defendant of distribution based upon the large quantity of heroin and cash found on him, as well as the various denominations of cash, and the lack of ingestion paraphernalia). Here, because the evidence was sufficient to prove that appellant actually distributed some of the heroin in his possession immediately prior to his arrest, the jury had direct evidence of appellant's intent regarding the heroin capsules in his possession.

Accordingly, the trial court did not commit reversible error by admitting Gillespie's expert testimony.

C. Conspiracy

Appellant contends the trial court erred by denying his motions to strike and to set aside the verdict with regard to his conspiracy charge. He asserts the evidence failed to prove that he "prearranged" with Platt to distribute heroin to a third party, or that heroin "actually passed from [him] to Platt."

We have already concluded that the evidence was sufficient to prove that appellant participated in the distribution of heroin from Platt to Gillespie. We also conclude that the evidence was sufficient to prove beyond a reasonable doubt that appellant and Platt agreed to distribute the heroin.

To convict appellant of conspiracy to distribute heroin, the Commonwealth was required to prove there was an agreement between appellant and one or more persons "by some concerted action to commit an offense." Gray v. Commonwealth, 260 Va. 675, 680, 537 S.E.2d 862, 865 (2000). An "agreement is the essence of a conspiracy offense." Zuniga v. Commonwealth, 7 Va. App. 523, 527-28, 375 S.E.2d 381, 384 (1988). Normally, "a single buyer-seller relationship, standing alone, does not constitute a conspiracy." Id. at 528, 375 S.E.2d at 385. "If, however, the evidence demonstrates: (1) 'that the seller knows the buyer's intended illegal use,' and (2) 'that by the sale [the seller] intends to further, promote and cooperate in [the venture]', the existence of a conspiracy to distribute between a seller and a buyer, *inter se*, has been proved." Id. at 529, 375 S.E.2d at 385 (quoting Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943)) (alterations in original).

Here, at the time appellant provided the heroin capsules to Platt, the evidence was sufficient for a rational fact finder to conclude that appellant knew Platt was "buying" the heroin for the purpose of selling it to Gillespie. Because Platt made contact with Gillespie within appellant's sight, and Platt immediately returned from Gillespie's vehicle with purchase money, the jury could rationally infer that appellant sold the heroin to Platt knowing that Platt intended to sell it illegally. Cf. Feigley v. Commonwealth, 16 Va. App. 717, 723, 432 S.E.2d 520, 525 (1993) (reversing conspiracy conviction and noting that "[n]o money was exchanged between Feigley and [the middle man] until the sale to [the police officer] was complete").

While the evidence failed to prove an express agreement between appellant and Platt, a rational fact finder could conclude from the circumstantial evidence that an implied agreement to distribute the heroin existed by virtue of their conduct. Accordingly, the evidence was competent, credible, and sufficient to prove beyond a reasonable doubt that appellant was guilty of conspiracy.

V. and VI. In the fifth assignment of error, appellant contends the trial court erred by refusing to "strike the enhanced punishment from the two counts of [violating] Code § 18.2-248(C)[4]" because punishing him under that statute violated his Fourteenth Amendment due process and notice rights, his Eighth Amendment protection against cruel and unusual punishment, and his rights under both the United States and Virginia Constitution prohibiting *ex post facto* laws. Stripped down to its essence, appellant's argument is that he could not be constitutionally prosecuted, convicted, and punished for both distributing heroin and possessing heroin with the intent to distribute where both offenses were committed in a short period of time. He contends that both offenses were charged under Code § 18.2-248(C) and "cover[ed] the same situation/fluid offense."

In the sixth assignment of error, appellant argues that the trial court erred "by refusing to either dismiss one of the counts of [the Code §] 18.2-248 [violations] or force the Commonwealth to elect one of the two [charges]" because the two charges violated his constitutional double jeopardy protections and the prohibition against "multiplicity/duplicitous charging." He also makes the same argument on double jeopardy grounds, asserting that allowing both charges violated his constitutional right not to be punished twice for the same offense under both the Virginia and United States Constitution.

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[4] Code § 18.2-248(C) provides in pertinent part as follows:

> Except as provided in subsection C1, any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than 40 years and fined not more than $ 500,000. . . .
>
> When a person is convicted of a third or subsequent offense under this subsection . . . , he shall be sentenced to imprisonment for life or for a period of not less than 10 years, 10 years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence, and he shall be fined not more than $ 500,000.

A. Double Jeopardy and Multiplicity/Duplicitous Charging

We turn first to appellant's double jeopardy and multiplicity[5] arguments.

"The Double Jeopardy Clause . . . provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' U.S. Const., Amdt. 5. This protection applies both to successive punishments and to successive prosecutions for the same criminal offense." Peake v. Commonwealth, 46 Va. App. 35, 39, 614 S.E.2d 672, 674 (2005) (quoting United States v. Dixon, 509 U.S. 688, 695-96 (1993)).

> In both the multiple punishment and multiple prosecution contexts, [the United States Supreme] Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. The same-elements test, sometimes referred to as the "Blockburger" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.

Dixon, 509 U.S. at 696.

> Under Blockburger, the "applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." "The test of whether there are separate acts sustaining several offenses 'is whether the same evidence is required to sustain them.'"

Henry v. Commonwealth, 21 Va. App. 141, 146, 462 S.E.2d 578, 580-81 (1995) (footnote and citations omitted).

Here, distribution of heroin requires proof that possession of heroin with the intent to distribute does not – the actual sale of heroin. Because each charge was based upon different conduct, the trial court did not err by denying appellant's motion to dismiss on double jeopardy grounds. For similar reasons, the trial court did not err by denying appellant's motion to dismiss on the basis that the two charges were multiplicitous. Appellant committed two distinct offenses; therefore, two charges were warranted.

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[5] "Multiplicity . . . is the charging of a single offense in several counts." United States v. Stewart, 256 F.3d 231, 247 (4th Cir. 2001) (quoting United States v. Burns, 990 F.2d 1426, 1438 (4th Cir. 1993)). The danger is that a defendant may be given multiple sentences for the same offense. Burns, 990 F.2d at 1438.

B. Cruel and Unusual Punishment

Appellant asserts that the trial court erred by denying his motion to dismiss on the basis that the twenty-year mandatory sentences provided in Code § 18.2-248(C) for his two convictions for a third or subsequent offense constituted cruel and unusual punishment under the Eighth Amendment.

> The United States Supreme Court . . . has never found a non-life "sentence for a term of years within the limits authorized by statute to be, by itself, a cruel and unusual punishment" in violation of the Eighth Amendment. Hutto v. Davis, 454 U.S. 370, 372 (1982) (*per curiam*) (quoting with approval Davis v. Davis, 585 F.2d 1226, 1229 (4th Cir. 1978)).

Cole v. Commonwealth, 58 Va. App. 642, 653-54, 712 S.E.2d 759, 765 (2011). Here, appellant did not receive a life sentence and was sentenced within statutory limits. Accordingly, the trial court did not err by denying appellant's motion to dismiss on Eighth Amendment grounds.

C. *Ex Post Facto* Laws; Due Process and Notice Under the Fourteenth Amendment

Appellant asserts that the enhanced punishment provided in Code § 18.2-248(C) for a third or greater offense is unconstitutional because it violates the prohibition in the Virginia and United States Constitutions against *ex post facto* laws. Applying the same rationale, he asserts that the enhanced punishment provided in the statute violates his "due process and notice rights" under the Fourteenth Amendment.[6] Both of appellant's constitutional arguments present questions of law that this Court reviews *de novo*. Crawford v. Commonwealth, 281 Va. 84, 97, 704 S.E.2d 107, 115 (2011) (citing Shivacc v. Commonwealth, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005)).

"The United States Constitution, article 1, § 10, and the Virginia Constitution, article 1, § 9, prohibit the Commonwealth from enacting *ex post facto* laws." Kitze v. Commonwealth, 23 Va. App. 213, 216, 475 S.E.2d 830, 832 (1996) (citations omitted). An *ex post facto* law has been defined as:

> any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a

[6] Appellant does not elaborate on his "due process and notice rights" argument except to assert that, "under the facts of this case an *ex post facto* statute the way it is being used in the case at bar . . . was reversible error and violated the defendant's U.S. 14th [A]mendment due process and notice rights . . . ."

> crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed.

Collins v. Youngblood, 497 U.S. 37, 42 (1990) (citations omitted). "The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts." Dodson v. Commonwealth, 23 Va. App. 286, 294, 476 S.E.2d 512, 516 (1996) (quoting De Veau v. Braisted, 363 U.S. 144, 160 (1960)).

The United States Supreme Court has recognized four categories of *ex post facto* laws:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Stogner v. California, 539 U.S. 607, 612 (2003) (quoting Calder v. Bull, 3 U.S. 386, 390-91 (1798)) (emphasis omitted).

Here, appellant was convicted for conduct that occurred in 2015, after the enactment of the enhanced punishment provision in Code § 18.2-248(C). Therefore, no *ex post facto* violation or "due process/notice" violation exists.

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 Lenita J. Ellis, 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

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

COMMONWEALTH

V. Docket No.CR15001643-00
THRU -02

FRED MACK CARRINGTON

MOTION TO DISMISS INDICTMENT DUE TO MULTIPLICITY AND DOUBLE JEOPARDY VIOLATION

COMES NOW DEFENDANT BY COUNSEL, and pursuant to the Fourth , Fifth, Eighth, and Fourteenth Amendment of the United States Constitution, and under Article I, Section 8 of the Constitution of the Commonwealth of Virginia and Section 19.2-266.2 of the Code of Virginia, 2006, as amended, moves the Court for an order dismissing an indictment for violation of Virginia Code Section 18.2-248C. As grounds for this motion, the Defendant respectfully states as follows:

1. On the same day, Defendant was indicted for violation of Virginia Code Section 18.2-248C Sale of a Schedule I or II drug and for Possession with Intent to Distribute Schedule I or II drug(same type drug) also under Section 18.2-248C.

2. Both charges are alleged to have occurred on the same day in close proximity–police allege they saw a drug transaction occur and then immediately arrested Defendant and allege they found the drugs that are the subject of the Possession with Intent charge on him. Both indictments are charged under the same Virginia code section and cover the same offense.

3. Defendant submits this was one uninterrupted occurrence with the same facts and would be the subject of one charge under 18.2-248C ONLY, AND THAT SAID SECOND CHARGE IS DUPLICITOUS UNDER THE FACTS OF THIS CASE and is also a violation of double jeopardy..

4. Multiplicity is defined as "the charging of a single offense in several counts." United States v. Washington, 188 F3d 505 (4th Cir.1999). "When considering multiple punishments of a single transaction, the controlling factor is legislative intent." Kelsoe v. Commonwealth, 226 Va. 197, 199, 308 S.E.2d 104, (1983).

5. The Double Jeopardy clause "protects against multiple punishment for the same offense." Brown v. Ohio, 432 U.S. 161, 165 (1977).

WHEREFORE, the Defendant respectfully requests that the Court Dismiss an indictment of 18.2-248C against the Defendant as being obtained in violation of the Fifth Amendment of the United States Constitution and Article I, Section 8 Constitution of the Commonwealth of Virginia as well as being a violation of his Fourth, and Fourteenth Amendment Due Process rights. .

FRED MACK CARRINGTON
By: Lenita J. Ellis
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Appendix 7

Mr. Fred M. Carrington #1096252
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Sept 16, 2021

Clerk of Courts
Supreme Court of United States
1 First Street, N.E.
Washington, D.C. 20543

Dear Clerk

Please find enclosed a Motion for Leave to Proceed in forma Pauperis, and Petition for Writ of Certiorari that I ask you to kindly file on my behalf.

I thank you in advance for your attention to this matter.

Respectfully

F. M. Carrington #1096252

cc:
Lauren C. Campbell
Office of the Attorney General
202 North 9th Street
Richmond, Va. 23219