COURT OF APPEALS OF VIRGINIA

Record No. 0830-25-2

JAVONTE HOLMES, S/K/A JAVONTE TORIANO HOLMES
v.
COMMONWEALTH OF VIRGINIA

Present: Judges Malveaux, Friedman and Bernhard

Argued at Richmond, Virginia

Opinion Issued September 22, 2026*

FROM THE CIRCUIT COURT OF THE CITY OF PETERSBURG
Dennis M. Martin, Sr., Judge

Samantha Offutt Thames, Senior Appellate Attorney (Virginia Indigent Defense Commission, on briefs), for appellant.

Liam A. Curry, Assistant Attorney General (Jason S. Miyares,[1] Attorney General, on brief), for appellee.

MEMORANDUM OPINION BY
JUDGE FRANK K. FRIEDMAN

Javonte Holmes was indicted for possession of cocaine, possession of a firearm while in possession of cocaine, and possession of a firearm by a convicted violent felon. Holmes filed a pre-trial motion to suppress the evidence found in a car in which he was a passenger. The trial court denied the motion to suppress and later convicted Holmes of all three offenses. It sentenced Holmes to 20 years' incarceration with 13 years suspended.

On appeal, Holmes argues that the trial court erred in denying his motion to suppress. Because the record supports the trial court's judgment, we affirm.

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

[1] Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

BACKGROUND[2]

On December 1, 2023, Petersburg Police Detective Sergeant Sherman Holland was observing a hotel parking lot "[d]ue to narcotic complaints and narcotics arrests" at the hotel. Police "were assigned to that location for . . . narcotics arrests, weapons violations, trespassing, prostitution, [and] several other criminal activities." In the last three months of 2023, the same police unit had made "more than 10" arrests for narcotics and firearms offenses. The hotel property was "posted for no trespass," and the police had permission from the hotel management "to find out if people were visiting or residents."

At around 9:00 p.m., Detective Holland saw a sedan pull into the hotel parking lot. During the "20 to 25 minutes" that the sedan was parked, "[t]here was no movement. No one approached the vehicle, no one exited the vehicle." At 9:30 p.m., Detective Holland walked over to the sedan. He was wearing plain clothes but displaying his badge of authority and a placard that said "police" and "crime suppression unit."

As Detective Holland approached, he saw Holmes in the front passenger seat; the only other occupant was the driver. According to Detective Holland, Holmes "sat up" and "started messing around . . . in the floor board, in his lap area," and "[t]oward the right of him, towards the door." Detective Holland was concerned that he might be reaching for a firearm.

Detective Holland told both occupants "to place their hands where [he] could see them." Holmes began to put his hands on the dashboard, but before doing so, he lowered his left hand toward the floorboard and dropped something. He then placed both hands on the dashboard.

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[2] "In reviewing the denial of a motion to suppress, we 'consider the facts in the light most favorable to the Commonwealth, the prevailing party at trial.'" *Aponte v. Commonwealth*, 68 Va. App. 146, 156 (2017) (quoting *Hairston v. Commonwealth*, 67 Va. App. 552, 560 (2017)). Additionally, where, as here, the record contains video evidence, we review such evidence "not to determine what we think happened, but for the limited purpose of determining whether any rational factfinder could have viewed it as the trial court did." *Meade v. Commonwealth*, 74 Va. App. 796, 806 (2022).

Throughout the encounter, Holmes repeatedly removed his hands from the dashboard. Detective Holland said that Holmes was "making a lot of movements." He would place his hands on the dashboard "for a moment and then he would, again . . . start moving them."

Detective Holland asked the driver to get out of the sedan and checked the driver for weapons. He then released the driver to another police officer who had arrived and he walked to the passenger side of the sedan. Detective Holland had a "quick conversation" with Holmes, telling him "that honesty was . . . everything." Holmes was still "moving around" at first but then gave Detective Holland "a look" and admitted that "he was sitting on a firearm." Detective Holland ordered Holmes out of the sedan and detained him.

Police found a pistol on the passenger seat, where Holmes had been seated. Holmes told Detective Holland that he had "a little bit of coke on him," and police recovered a powder wrapped in a piece of paper on the passenger-side floorboard of the sedan, "right where" Holmes' feet had been.

Holmes was indicted on April 18, 2024, on one count of possession of a firearm by a convicted violent felon, one count of possession of cocaine, and one count of possession of a firearm while in possession of cocaine.

Holmes filed a pre-trial motion to suppress, arguing that he was seized based only on his "presence in a high-crime area" and that he and the driver had apparently given Detective Holland "'weird' looks" when they drove by him. At the suppression hearing, Holmes argued that he and the driver were "seized" for Fourth Amendment purposes when he "initially" complied "with the order to put their hands on the dash." And he contended that at that point, Detective Holland lacked "reasonable, articulable suspicion to believe the men were involved in criminal activity." Concluding that "the initial seizure [was] . . . unconstitutional," Holmes asserted that "anything stemming from that . . . would be fruit of the poisonous tree."

The Commonwealth disagreed with Holmes' identification of the moment of seizure. The Commonwealth's attorney first insisted that the police had observed suspicious movement and highlighted a portion of the video recording which she argued showed that Holmes "reached toward the floor board area, then placed his hands in his lap area . . . immediately upon them making visual contact with the officer." She also drew a distinction between Holmes and the driver, noting that while "the driver, upon being asked to show his hands, immediately place[d] his hands in view of the officer," Holmes "delayed in doing so. And at that point, the officer has at least an articulable suspicion that criminal activity is afoot." The Commonwealth asserted that "at no time" did Holmes keep "his hands entirely where the officer ha[d] instructed him to do so. He continue[d] to move his hands about the vehicle." The Commonwealth submitted that "no seizure occurred because the defendant never submitted to the officer's authority."

The trial court denied the motion to suppress. It first held that Holmes lacked standing to challenge the search of the car because he was merely a passenger and had no possessory interest in the car. The court also found that the gun was "not on the person of the defendant" and not in any container that Holmes claimed belonged to him.

The court then held that even if Holmes had standing, it would still deny the motion to suppress.[3] The court found that Holmes and the driver were "sitting in a parking lot for no reason at all, at night in a high drug area." It found that the officers had "the authority to go and to investigate whether these people [were] rightfully" on the hotel property. The court also

[3] In denying Holmes' motion to suppress, the trial court made clear that it had considered Detective Holland's body camera footage and relied on it for some of its factual determinations supporting reasonable suspicion. For instance, the court described how Detective Holland "articulated on the video that [the two men in the car] were looking weird toward him." Additionally, Detective Holland testified that when he first approached the car, he "asked [the men] to place their hands where [he] could see them." But, consistent with the body camera footage, the trial court found that he actually did not say anything at first and instead pointed and made a gesture with his hands, instructing the men to place their hands on the dashboard.

found that although Holmes and the driver "[i]nitially" complied with Detective Holland's direction, the detective had to repeat his direction "throughout the entire time there." It held that the detective's observations, including his observations of Holmes' behavior while "he's asking them to comply," provided reasonable suspicion "to believe that a crime [wa]s afoot."

Holmes was tried without a jury. The trial court "incorporated" the testimony from the suppression hearing and admitted the firearm found in the car and the powder found packaged on the floorboard. It also admitted two certificates of analysis, showing that the firearm was in working order and that the powder was cocaine. And it admitted a certified copy of Holmes' prior conviction for statutory burglary, a "violent felony" under Code §§ 18.2-308.2 and 17.1-805(C). Holmes moved to strike the charges, arguing only that the physical evidence was inadmissible because it was "taken in violation of his Fourth Amendment rights." The trial court convicted Holmes of all three offenses. It sentenced Holmes to 20 years' incarceration with 13 years suspended. Holmes timely appealed.

ANALYSIS

Holmes brings two assignments of error on appeal. First, he argues that the trial court erred in holding that he lacks standing under the Fourth Amendment. Second, he contends that the trial court also erred by denying his motion to suppress on the merits.

"'On appeal of the denial of a motion to suppress, [this Court] view[s] the evidence in the light most favorable to the Commonwealth,' as the prevailing party below." *Pick v. Commonwealth*, 72 Va. App. 651, 661 (2021) (alterations in original) (quoting *McCracken v. Commonwealth*, 39 Va. App. 254, 258 (2002) (en banc)). "We give deference to the trial court's factual findings and review *de novo* the application of law to those facts." *Ray v. Commonwealth*, 74 Va. App. 291, 302 (2022). It is Holmes' "burden to show that the denial of his motion to suppress was reversible error." *Id.*

I. Holmes Was Not Seized Until He Complied with Detective Holland's Instructions

"If a police officer has reasonable, articulable suspicion that a person is engaging in, or is about to engage in, criminal activity, he may detain the person to conduct a brief investigation without violating the Fourth Amendment's protection against unreasonable searches and seizures." *Atkins v. Commonwealth*, 57 Va. App. 2, 19 (2010). "An officer questioning a citizen exceeds the scope of his authority and effects a seizure only when, 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Barkley v. Commonwealth*, 39 Va. App. 682, 692 (2003) (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). Crucially, though, "[a] person is not seized according to the Fourth Amendment until he submits to a police officer's show of authority." *Hill v. Commonwealth*, 68 Va. App. 610, 617 (2018). On appeal, "this Court must consider what appellant 'actually did in response to the police officer's show of authority' and when appellant actually *submitted* to [the officer]'s show of authority in order to determine when appellant was seized for Fourth Amendment purposes." *Beasley v. Commonwealth*, 60 Va. App. 381, 392 (2012) (quoting *Woodson v. Commonwealth*, 245 Va. 401, 405 (1993)).

In determining when an appellant has submitted to an officer's show of authority, we consider the appellant's refusal to comply with the officer's instructions. For example, in *Jones v. Commonwealth*, 52 Va. App. 548 (2008), police officers saw Jones sitting alone in a car parked in the parking lot of a hotel known for drug transactions. *Id.* at 552. "During a fifteen-minute period of observation, Jones did not leave the vehicle and no one approached it." *Id.* Officers walked over to the car to investigate. *Id.* at 553. After the officers told Jones to put his hands on the steering wheel, Jones initially complied but then started reaching towards the floorboard, and the officer repeated the instruction. *Id.* When Jones reached for the floorboard a third time, another officer saw a "large bowie knife," "right behind the passenger seat" and "right

next to [Jones]," where he could easily reach it. *Id.* at 553-54 (alteration in original). He warned the first officer that there was "a knife right there" and that he should "get [Jones] out of the car." *Id.* at 554. We held that despite his initial, momentary compliance, Jones' subsequent refusals to comply meant that he did not submit to the officer's authority, so he was not seized until he got out of the car. *Id.* at 557. And we concluded that, at the time of the seizure, police "had a reasonable articulable suspicion that Jones possessed a concealed weapon and that a reasonable suspicion of that offense *ipso facto* rendered him potentially armed and dangerous." *Id.* at 560-61 (footnote omitted).

Similarly, in *Beasley*, police were observing a hotel parking lot "known for narcotics transactions and gun crimes" and "marked with no trespassing signs." 60 Va. App. at 395-96. Shortly before 3:30 a.m., they saw a person matching Beasley's description walk around the parking lot and then enter the passenger side of a minivan. *Id.* at 396. As they approached, police saw both Beasley and the driver make furtive movements. *Id.* at 396-97. As in *Jones*, the officer told Beasley "to keep his hands where they could be seen." *Id.* at 394. After a "very brief, initial moment of compliance," Beasley "continued moving his right hand in a furtive manner." *Id.* We held that Beasley "was not seized for Fourth Amendment purposes" while he continued moving his hand because "[u]p to that point, appellant had not yet actually submitted" to the officer's show of authority. *Id.* "Appellant only *actually submitted* to [the officer]'s show of authority when *appellant* stopped moving his hands furtively following the [officer]'s third instruction to keep his hands on his lap where they could be seen." *Id.* By that point, the combined circumstances gave police "a reasonable, articulable suspicion that appellant was involved in potential criminal activity, such as a drug transaction, the possession of a concealed weapon, or both." *Id.* at 398.

Here, Holmes fluctuated between submitting and refusing to submit to Detective Holland's show of authority. After he first instructed Holmes to place his hands on the dashboard, Detective Holland had to order him to *keep* his hands there multiple times. The trial court found that Holmes and the driver "[i]nitially" complied, but that "throughout the entire time there, [Detective Holland] keeps telling them [to] stop moving." Although the body camera footage does not clearly depict Holmes reaching toward the floorboard or the door as Detective Holland described, it certainly confirms that he removed his hands from the dashboard several times. And in any case, we must defer to the trial court's factual findings based on video evidence.[4] *See Meade v. Commonwealth*, 74 Va. App. 796, 806 (2022).

> Such deference stems not from the trial court being in a superior position to view the video evidence but from the difference in our respective roles. As factfinder, a trial court views video and other evidence to determine what it believes happened; we, on appellate review, view video evidence not to determine what we think happened, but for the limited purpose of determining whether any rational factfinder could have viewed it as the trial court did.

Id. Here—even if we may view the video differently than the trial court—we acknowledge that a rational factfinder could conclude, based on the video evidence (and Detective Holland's testimony), that Holmes refused to follow Detective Holland's instructions throughout much of the encounter. Accordingly, like the defendant in *Beasley*, Holmes was not seized until the last time he complied with the officer's instructions, right before he admitted to having a firearm. *See Beasley*, 60 Va. App. at 394.

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[4] The dissent argues that the trial court "declined to decide" what the recording depicts, so "there is no interpretation of the evidence to which this Court can defer." *Infra* at 15. The record contradicts that assertion. As noted above, *supra* at 4 n.3, the trial court viewed and openly relied upon Detective Holland's body camera footage in denying Holmes' motion to suppress. Further, a trial court's read of the record evidence merits deference even in the absence of written or oral factual findings. When a trial court makes no specific finding on an issue, we presume that it "resolved all factual ambiguities or inconsistencies in the evidence in favor of the prevailing party and gave that party the benefit of all reasonably debatable inferences from the evidence." *Hill v. Commonwealth*, 297 Va. 804, 808 (2019).

Our dissenting colleague disagrees and concludes that Holmes submitted the first time he complied with Detective Holland's request. The dissent's attempt to distinguish this case from *Beasley* and *Jones* falls short, however. It emphasizes that those cases turned on "refusal," stating that "[n]either case holds that a citizen who obeys every time he is told has failed to submit because he had to be told more than once." *Infra* at 20. But that summary conveniently overlooks *why* Holmes "had to be told more than once." The reason? He refused to follow Detective Holland's instructions to keep his hands on the dashboard. In order to conclude otherwise—to imagine that Detective Holland gave multiple instructions for no discernible reason—we would have to join the dissent in viewing the evidence in the light most favorable to Holmes. Our standard of review prescribes just the opposite. *See Aponte v. Commonwealth*, 68 Va. App. 146, 156 (2017).

In essence, the dissent claims that Holmes did not withdraw his initial submission by moving his hands because he returned his hands to the dashboard without incident each time he was told to do so. There is scant (if any) case law supporting that proposition—indeed, it is directly contrary to *Beasley*. Under *Beasley*, a defendant who moves his hands despite an officer's orders not to do so submits to the officer's authority (and is thus seized) only when he stops moving his hands. *Beasley*, 60 Va. App. at 394.

Having determined that Holmes was not seized until the last time he complied with the officer's instructions, the only remaining question is whether the police had reasonable suspicion at that moment.

II. The Police Had Reasonable Suspicion When Holmes Was Seized

A warrantless, investigative seizure is reasonable only if "the officer has reasonable, articulable suspicion that criminal activity may be afoot." *McCain v. Commonwealth*, 275 Va. 546, 552 (2008). A "police officer must be able to point to specific and articulable facts which,

taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). "Although a mere hunch does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." *Mitchell v. Commonwealth*, 73 Va. App. 234, 246-47 (2021) (quoting *Bland v. Commonwealth*, 66 Va. App. 405, 413 (2016)).

When reviewing whether police had reasonable suspicion to initiate a brief, investigative stop, we "must view the totality of the circumstances and view those facts objectively through the eyes of a reasonable police officer with the knowledge, training, and experience of the investigating officer." *Murphy v. Commonwealth*, 9 Va. App. 139, 144 (1989). "[W]e eschew any 'divide-and-conquer analysis' that ignores the 'totality of the circumstances.'" *Shifflett v. Commonwealth*, 58 Va. App. 732, 740 (2011) (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)); *see also Raab v. Commonwealth*, 50 Va. App. 577, 581 (2007) (en banc) (noting that even a series of seemingly innocent events can collectively rise to the level of reasonable suspicion).

Here, by the time Holmes was seized, police could point to the following facts: (1) it was nighttime; (2) Holmes and the driver were in a "high drug area"; (3) there was no movement in their car for 20-25 minutes; (4) Holmes was "looking weird toward" Detective Holland; (5) the hotel had "no trespass" signs; (6) Holmes dropped something from his left hand onto the floorboard before initially placing his hands on the dashboard[5]; and (7) Holmes removed his hands from the dashboard multiple times throughout the encounter.

[5] The dissent chides us for recognizing this fact at all because it does not appear in the trial court's ruling. *Infra* at 15-16. But Holmes concedes in his opening brief that, in the video evidence, "[h]e can be seen to have a palm-sized white object in his left hand, which he drops to his lap before he immediately replaces his hands on the dashboard." This is a straightforward concession of fact, supported by the evidence in the record. Contrary to the dissent's view, *infra*

To be sure, many of these factors—when viewed in isolation—are hardly sufficient to furnish reasonable suspicion. After all, while "[t]he character of the location and the time at which a person is observed" may be relevant, "they do not supply a particularized and objective basis for suspecting criminal activity on the part of the particular person stopped." *McCain*, 275 Va. at 552. And Detective Holland had no evidence, nor is there any in the record, suggesting that the two men were, in fact, trespassing; for all he knew, they were staying at the hotel. *See Ewell v. Commonwealth*, 254 Va. 214, 217 (1997) (holding that mere presence in a parking lot posted with "no trespass" signs does not provide reasonable suspicion). *But see Navarette v. California*, 572 U.S. 393, 403 (2014) (holding that "reasonable suspicion 'need not rule out the possibility of innocent conduct'" (quoting *Arvizu*, 534 U.S. at 277)).

Even so, we must view these facts (1) in the aggregate; and (2) "through the eyes of a reasonable police officer with the knowledge, training, and experience of the investigating officer." *Murphy*, 9 Va. App. at 144; *see Navarette*, 572 U.S. at 402 ("Reasonable suspicion depends on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996))).

Here, like in *Beasley*, the "accumulating factors, in their totality, provided a reasonable, articulable suspicion that criminal activity was afoot involving appellant." *Beasley*, 60 Va. App. at 397. After observing no movement for 20-25 minutes, Detective Holland approached the car at nighttime, in the same parking lot where his unit had made "more than 10" arrests for narcotics and firearms offenses in the preceding 3 months. After shining his flashlight into the car, he saw Holmes make several suspicious movements. Holmes dropped something from his

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at 16, such concessions routinely carry the kind of weight we place on this one. *See, e.g.*, *Logan v. Commonwealth*, 47 Va. App. 168, 170 (2005) (en banc) (relying on a factual concession that the Commonwealth made for the first time on appeal).

left hand and repeatedly removed his hands from the dashboard. Detective Holland testified that these movements concerned him because, based on his experience and training, he thought Holmes might be reaching for a weapon. *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) ("[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."). Taken together, these circumstances, though perhaps seemingly innocent, "rise to the level of reasonable suspicion."[6] *McCain*, 275 Va. at 555; *see Beasley*, 60 Va. App. at 396-97 (finding reasonable suspicion based on the late hour, high-crime area, and the defendant's several furtive gestures in the car).

Because the police had reasonable suspicion when they seized Holmes, they did not violate his Fourth Amendment rights, and the trial court properly denied his motion to suppress.[7]

CONCLUSION

For these reasons, we affirm the trial court's judgment.

Affirmed.

[6] The dissent states that "[a]dding unremarkable innocent circumstances to one another does not yield an incriminating one . . . ." *Infra* at 23. It is difficult to square that statement with the case the dissent cites later in the very same sentence—*Terry v. Ohio*. After all, the U.S. Supreme Court there described how the defendants undertook "a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation." *Terry*, 392 U.S. at 22; *see also United States v. Sokolow*, 490 U.S. 1, 9 (1989) (holding that all of the relevant factors were "quite consistent with innocent travel" but that "taken together they amount to reasonable suspicion"); *Hill*, 68 Va. App. at 619 ("A 'series of acts,' which appear innocent when viewed on an individual basis, may 'collectively . . . [be] suspicious enough that a reasonable officer [will] ha[ve] grounds to stop [a defendant] for purposes of investigating the situation further.'" (alterations in original) (quoting *Raab*, 50 Va. App. at 581)).

[7] Because we conclude that Holmes' Fourth Amendment rights were not violated, we need not address whether he had standing. *See Commonwealth v. Swann*, 290 Va. 194, 196 (2015) (per curiam) (explaining that we must decide cases on the "best and narrowest grounds available" (quoting *McGhee v. Commonwealth*, 280 Va. 620, 626 n.4 (2010))).

Bernhard, J., dissenting.

Javonte Holmes did what he was told, each time he was told. The Commonwealth's own witness said so under oath. Asked on cross-examination whether "[e]very time that you requested them to return their hands to the dash, they complied," Detective Sergeant Sherman Holland answered, "Yeah, they did." Asked whether Holmes kept his hands on the dashboard through the time he spent with the driver, Holland answered, "Most -- most of the time." The majority holds that a man who behaved that way was not seized at all until roughly six minutes later, when he admitted he was sitting on a firearm.

That holding sweeps far wider than this case warrants. If obedience is not submission, then nothing in those six minutes was a seizure, and nothing in them required any justification whatever—not the flashlight, not the commands, not the questions, not Holmes kept in the car with his hands on the dashboard while the officer took the driver out, patted him down, and came around to the passenger side. On that view the Fourth Amendment does not engage until the citizen gives the officer something to find. And the suspicion the majority holds sufficient is drawn in substantial part from that same unexamined interval: the seventh circumstance in its own inventory is that Holmes "removed his hands from the dashboard multiple times throughout the encounter." Compliance thus becomes the source of the suspicion said to justify the seizure, and a citizen who has given the police no cause for anything beyond a consensual encounter is left without means to make his detention into one the Constitution notices.

I would hold that Holmes was seized when he first put his hands on the dashboard as ordered, that Holland lacked reasonable, articulable suspicion at that moment, and that the motion to suppress should have been granted. I would reverse and remand. Because the majority holds otherwise, I respectfully dissent.

ANALYSIS

I. The trial court made no finding about what the recording depicts.

The majority rests its account of the encounter on *Meade v. Commonwealth*, 74 Va. App. 796, 806 (2022), and concludes that "we must defer to the trial court's factual findings based on video evidence." The qualifier is the majority's own, and it is the difficulty. Deference to findings based on video evidence presupposes a factfinder who watched the recording and drew a conclusion from it. The trial court declined to do either, and said so.

When the Commonwealth pressed the court to find that the recording showed Holmes's hands leaving the dashboard, the court answered: "I don't even think the Court has . . . to find all the facts that the Commonwealth is asking it to find." It continued: "[T]here's no test for the officer -- for the Court to sit and look at the officer's credibility to see whether what the officer said is actually shown in the video. There's no requirement to a -- for a trial court to do that." And it went further still:

> quite frankly, this video is not even in a position to clearly show what the officer saw on the scene. . . . The Court can't hear or find what the -- what the officer is saying he's seeing. From the nervousness of these two individuals and their actions, the Court can't see that on the video. Because the video doesn't demonstrate that. And the Court doesn't even have to find that.

Nor does the written order supply what the bench ruling withheld. It recites only that "[t]he Court for the reasons stated on the record DENIES the defendant's Motions to Suppress." The oral ruling is therefore the whole of the trial court's findings.

That is not a factfinder's reading of a recording. It is a considered refusal to read it. *Meade* instructs that "[s]uch deference stems not from the trial court being in a superior position to view the video evidence" but from "the difference in our respective roles" and that the factfinder "views video and other evidence to determine what it believes happened." *Meade*, 74 Va. App. at 806. Where the factfinder has announced that the recording does not show what the

officer described, and that it need not decide the question, there is no interpretation of the evidence to which this Court can defer. *Meade* supplies a rule for reviewing a finding. It does not convert an abstention into one. The majority answers that a trial court's reading of the evidence merits deference even without express findings because a court that makes no specific finding is presumed to have resolved ambiguities in favor of the prevailing party. See *Hill v. Commonwealth*, 297 Va. 804, 808 (2019). That presumption fills silence. It does not convert a disclaimer into a finding. The trial court did not omit to mention the recording; it said the recording "doesn't demonstrate" what the officer described and that it "doesn't even have to find that." To presume that a court found what it said it could not see, and expressly declined to decide, is not deference to a factfinder but substitution for one. Nor does the trial court's limited use of the recording help. It drew two things from the video. The first was Holland's own narration—that he "articulated on the video that they were looking weird toward him." What an officer says on a recording is not what the recording shows. The second was the finding that Holland "doesn't say anything" at first and "actually points." A command delivered by a pointed finger, before any question was asked, is the show of authority described below.

The difficulty compounds. Having said that it must defer, the majority proceeds to make findings of its own. It finds that, before placing his hands on the dashboard, Holmes "lowered his left hand toward the floorboard and dropped something," citing not the recording but the appellant's opening brief. It finds that "Detective Holland had to order him to *keep* his hands there multiple times." Neither finding appears in the trial court's ruling. The trial court found no dropped object, and it made no finding about how often the command was repeated. The first of the two then reappears as the sixth item in the majority's reasonable-suspicion inventory, where

it does real work.[8] An appellate court cannot at once decline to examine a recording because the factfinder's reading of it controls, and examine the recording itself to supply facts the factfinder never found. Whatever *Meade* permits, it does not permit that.

The Commonwealth does not defend the dropped object as a finding the trial court made. Its brief acknowledges that "the trial court record does not contain any direct testimony, findings of fact or argument on this point," and rests the point instead on a concession drawn from the appellant's brief. A circumstance that enters a case for the first time by appellate concession is not a finding of the trial court, and it cannot carry the weight the majority puts on it. Two further difficulties attend it. The first is that Holland never described it. He testified that Holmes "sat up, kind of made a movement as he was sit[t]ing up," and "started messing around in his -- in the floor board, in his lap area"—movement, not an object. He never said he saw anything in Holmes's hand, and he never said anything was dropped. Reasonable suspicion is measured by the facts "available to the officer at the moment of the seizure." *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). The inquiry is objective, but it is objective about what the officer perceived; a circumstance no officer observed is not among the facts available to him, and it cannot be viewed "through the eyes of a reasonable police officer with the knowledge, training, and experience of the investigating officer." *Murphy v. Commonwealth*, 9 Va. App. 139, 144 (1989). The second difficulty is that the concession the majority invokes does not say what the majority says it says. The opening brief places the object in Holmes's hand after he had already complied: "The officer then specifically points to the passenger, and yells 'hands on the dash.'

[8] The majority acknowledges as much, observing that "the body camera footage does not clearly depict Holmes reaching toward the floorboard or the door as Detective Holland described." It adds that the footage "certainly confirms that he removed his hands from the dashboard several times" and that "in any case, we must defer to the trial court's factual findings based on video evidence." The findings based on video evidence are the findings the trial court declined to make.

The passenger *immediately complies*. He can be seen to have a palm-sized white object in his left hand, which he drops to his lap before he immediately *replaces* his hands on the dashboard." (Emphases added). The Commonwealth reads the recording the same way:

> *Holmes initially complied with this request by raising both hands into view and placing them on the dashboard as instructed*. From the video, it appears that Holmes's right hand was open and flat upon the dashboard and that his left hand was closed in a fist around a white object."

(Emphasis added). On both parties' accounts the object fell after the first compliance and into Holmes's lap—not before the first compliance and toward the floorboard where the cocaine was later found. A circumstance that postdates the seizure cannot help to justify it.

II. The first command was a show of authority.

A seizure has two elements, and the majority contests only one of them. There is no seizure without submission; neither is there a seizure without a show of authority to submit to. Where the submission takes the form of passive acquiescence rather than a response to unambiguous restraint, whether the officer's conduct amounted to a show of authority is answered by asking whether, in view of all the circumstances surrounding the incident, "a reasonable person would have believed that he was not free to leave." *Barkley v. Commonwealth*, 39 Va. App. 682, 692 (2003) (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)); *see Brendlin v. California*, 551 U.S. 249, 254-55 (2007). The trial court described what happened here as "a consensual encounter with both of these gentlemen." Whether an encounter is consensual is a conclusion of law, and it is owed no deference.

It was not a request. Holland came on foot at night, in plain clothes but wearing his badge and a placard reading "police" and "crime suppression unit." He pointed his flashlight through the windshield onto two seated men. And before he asked them anything—before he inquired whether they were guests of the motel, which was the errand he said brought him—he

ordered them to put their hands on the dashboard. He agreed on cross-examination that this was "[t]he first thing you said to them." The trial court found that he made the command by pointing. That is the paradigm circumstance the Supreme Court has identified as marking a seizure: "the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Bolden v. Commonwealth*, 263 Va. 465, 471 (2002) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Nothing in "hands on the dash," repeated, and then aimed at one occupant with a pointed finger, invites a negotiated answer.

This Court has said as much about a flashlight, and *Beasley v. Commonwealth*, 60 Va. App. 381 (2012), confirms it on the record this case makes. *Beasley* considered and distinguished *Moss v. Commonwealth*, 7 Va. App. 305, 307-08 (1988), where this Court held that "[t]he blinding and stunning effect of the flashlight in the hands of a uniformed officer who is asking questions amounts to a 'show of official authority' such that a reasonable person would conclude he was not free to leave." *Beasley* found *Moss* inapposite because "the record here does not indicate how bright the 'right side alley light' of the patrol car was or indicate what its effect (if any) on the occupants of the minivan was." *Beasley*, 60 Va. App. at 391. Here the record does indicate it. Holland agreed that he shined his flashlight "through the front windshield" and that "both parties reacted to the . . . light in their face at that time": "Yes. They both reacted, yes." The showing *Beasley* found wanting is present here, and it points toward *Moss*. The Commonwealth resists that reading, arguing that Holland first put his light on the driver-side headlight and did not turn it toward Holmes until after his first movement. But Holland was asked the question directly and answered it, and the Commonwealth is bound by the testimony of its own witness.

A man seated in a parked car at night, held in a flashlight beam and told by a police officer to put his hands where the officer can see them, does not suppose that he is free to open

the door and walk away. The command Holmes obeyed was a show of authority. What remains is when he submitted to it.

III. On the trial court's own findings, Holmes submitted when he first complied.

Reversal does not require this Court to hold the trial court plainly wrong about anything. Its historical findings can stand exactly as made: that Holmes and the driver "[i]nitially" complied and that "throughout the entire time there, [Holland] keeps telling them stop moving." Whether conduct so found amounted to a refusal to submit is a question of law, which we review de novo. *See McGee v. Commonwealth*, 25 Va. App. 193, 197 (1997) (en banc).

A show of authority effects no seizure without actual submission. *Cochran v. Commonwealth*, 258 Va. 604, 608 (1999) (the *Mendenhall* test "is not applicable until the person submits to the officer's show of authority"); *Woodson v. Commonwealth*, 245 Va. 401, 405 (1993). What counts as submission depends on what the person was doing when the show of authority came. A man in flight is not seized until he is overtaken; "one sitting in a chair may submit to authority by not getting up to run away." *Brendlin*, 551 U.S. at 262. A seated passenger who is told to put his hands on the dashboard submits by putting them there. That is what the trial court found Holmes did, and what Holland conceded he did every time he was asked. The Supreme Court framed the same inquiry the same way this Term, asking "whether the facts available to Officer Vanterpool—before he ordered R. W. to put his hands up—warranted the stop," the District of Columbia having conceded that the officer "seized R. W. when he first asked R. W. to put his hands up." *District of Columbia v. R.W.*, 608 U.S. 22, 25 & n.* (2026) (per curiam). A command to show one's hands, obeyed, is a seizure of the man who obeys it.

The majority reasons instead from the number of times Holland spoke. But the frequency of an officer's commands measures the officer's caution, not the citizen's obedience. An officer

may repeat an instruction because he is alone in a parking lot at night, because he cannot see well, or because he wishes to keep the conversation going; none of that shows that the man he addressed refused him. Worse, a rule that measures submission by the officer's persistence lets the officer choose when the Fourth Amendment attaches: so long as he keeps speaking, the encounter stays consensual, and the time he spends observing costs him nothing. Submission is measured by what the person "actually did in response to the police officer's show of authority." *Beasley*, 60 Va. App. at 392 (quoting *Woodson*, 245 Va. at 405). What Holmes actually did was comply. The majority charges that this reading views the evidence in the light most favorable to Holmes. It does not. I take the trial court's findings exactly as made and Holland's testimony as given—including the answers he gave on cross-examination. Viewing the evidence in the light most favorable to the Commonwealth does not license disregarding the Commonwealth's own witness. And the rule governs the inferences drawn from the facts, not the legal question whether the facts found amount to submission, which we decide de novo. *McGee*, 25 Va. App. at 197.

IV. Beasley and Jones turned on refusal, not repetition.

The two decisions on which the majority relies say as much in terms. In *Jones v. Commonwealth*, 52 Va. App. 548 (2008), this Court explained that "on three occasions, Jones *refused* to comply with that command and reached for the floorboard. Thus, he did *not* submit to [the officer's] assertion of authority." *Id.* at 557 (first emphasis added). In *Beasley*, the appellant "felt free to ignore Sergeant Tennis's instructions and continued moving his right hand in a furtive manner," and submitted only when he "stopped moving his hands furtively" and, in the sergeant's words, "didn't move his hands anymore." *Beasley*, 60 Va. App. at 394. Refusal is the operative fact in each. Neither case holds that a citizen who obeys every time he is told has failed to submit because he had to be told more than once.

Nor is the conduct comparable. Beasley reached beneath his shirt; reached toward the side of his seat and toward the back of the minivan; moved his right hand toward the right hand of the passenger seated behind him, who was reaching toward him in turn; and rested a hand outside an open window. *Id.* at 387-88. Ordered out for a pat down, he would not spread his feet, held his hands tense against being interlocked, and refused to lift his foot off the bag of heroin and cocaine beneath it, so that the sergeant had to force the foot aside. *Id.* at 388. Jones reached for the floorboard three times after being told to keep his hands on the steering wheel, and a second officer saw a large bowie knife within his reach. *Jones*, 52 Va. App. at 553-54.

Set against that, this record shows movement without refusal. Holland testified that Holmes was "making a lot of movements" and would put his hands on the dashboard "for a moment and then he would, again . . . start moving them." The majority reads that testimony to establish refusal. It does not. Asked directly on cross-examination whether "[e]very time that you requested them to return their hands to the dash, they complied," Holland answered, "Yeah, they did." Both answers are in the same transcript, and only the first appears in the majority's account. A man who moves and then returns his hands when told has not refused; he has complied again. Nothing in this record places Holmes's hands anywhere a weapon could have been hidden or found. The majority's account concedes as much. It says he "fluctuated between submitting and refusing." A man who fluctuates between submitting and refusing has submitted at the moments he submitted. The first of those moments was the first command, and the Fourth Amendment attached then. What a person does afterward may bear on what the officer may lawfully do next; it does not travel backward and unmake a seizure already accomplished.

V. The circumstances known at first compliance did not amount to reasonable suspicion.

Parts II and III fix the seizure at Holmes's first compliance. The question is what Holland knew at that moment. On the trial court's own inventory: it was night; the lot belonged

to a motel where Holland's unit had made "more than 10" narcotics and firearms arrests over roughly three months; the sedan had sat 20 to 25 minutes with no one entering it, leaving it, or approaching it; the occupants had given Holland a look he found odd; and the property was posted against trespassing, with the manager's request that police check whether people in the lot were guests.

Location and hour cannot carry that weight. "A person's Fourth Amendment rights are not lessened simply because he or she happens to live or travel in a 'high crime' area." *McCain v. Commonwealth*, 275 Va. 546, 553 (2008). It was 9:30 in the evening—not a remarkable hour to be sitting in a car—in a motel lot with other cars parked in it and, as Holland agreed, "fairly well illuminated in front of the . . . building."

Ewell v. Commonwealth, 254 Va. 214 (1997), is close to on all fours, and it rejected suspicion built on more. There an officer observed an unfamiliar automobile and its driver in an apartment complex parking lot at about 12:30 a.m., in an area suspected of high narcotics trafficking, and the automobile left the lot when the marked police vehicle arrived. The Supreme Court held that the officer lacked reasonable suspicion "that Ewell may have been engaged in trespassing or any other criminal activity," because "nothing about Ewell's conduct was suspicious" and "Ewell acted as any other person might have acted under similar circumstances." *Id.* at 217. Holmes's car did not leave, and Holland had asked no one anything about who belonged on the property. If the facts in *Ewell* were not enough, these are not.

The trespass rationale fails for the further reason that Holland never pursued it. An officer's subjective belief that a person may be a trespasser will not "warrant a non-consensual investigatory detention." *Harris v. Commonwealth*, 262 Va. 407, 416 (2001). Holland testified that management had given permission "not to arrest, but to find out if people were visiting or residents." He asked nothing of that kind. He ordered hands onto the dashboard.

The odd look adds little. Lawful conduct that an officer finds unusual does not supply "a particularized and objective basis for suspecting criminal activity on the part of the particular person stopped." *McCain*, 275 Va. at 552. Holland never explained what about the look was suspicious, and the trial court's finding attributes it to both men rather than to Holmes.

Stillness is the remaining fact, and it proves too much. Holland watched the car for 20 to 25 minutes and, by his own testimony, saw "no movement" in it at all. A car in which nothing happens is not for that reason a suspicious car. Whatever inference the stillness will bear, it is not particular to Holmes.

I do not evaluate these circumstances in isolation. Taken together, they establish that two men sat in a parked car at night outside a motel where the police had made arrests, on property posted against trespassing, and looked at an approaching stranger in a way he did not like. Aggregation is not transformation. Adding unremarkable innocent circumstances to one another does not yield an incriminating one, and the sum here amounts to only what *Terry* forbids: a hunch. *See Terry,* 392 U.S. at 21-22, 27. The majority replies that *Terry* itself allows innocent acts to combine. So it does—but *Terry* requires acts to combine. There the officers watched two men pace an identical route and stare into the same store window "roughly 24 times," conferring after each pass and joined once by a third man. *Id.* at 23. Holland watched a car in which, by his own testimony, there was "no movement" at all for 20 to 25 minutes. Stillness is the absence of acts. A series of nothing does not become something by being added together.

VI. Holmes had standing to challenge his seizure and the remedy is remand.

The two procedural bars the Commonwealth advances do not prevent relief to Holmes. The first, under Rule 5A:18, is aimed at a single characterization—that Holmes did not argue below that this was a traffic stop. Because I would not decide whether the encounter was a traffic stop, the objection is beside the point. What Holmes did argue below he argued plainly:

his written motion asserted that Holland "immediately told both occupants to put their hands on the dash," that "[t]hey both complied," and that he "was seized when he submitted to the officer's show of authority"; and the trial court restated that argument back to counsel before ruling, confirming that the contention was that the men were seized when ordered to place their hands on the dash and that "they comply." The second objection—that Holmes assigned no error to the standing holding and so waived the suppression issue entirely—is answered by the first assignment of error, which assigns error to the denial of the motion "for a lack of standing."

The trial court's alternative holding on standing answers a question Holmes did not ask. *Rakas v. Illinois*, 439 U.S. 128 (1978), and *Atkins v. Commonwealth*, 57 Va. App. 2 (2010), govern a passenger's ability to contest the search of a car in which he claims no interest, and on that question the trial court was right. *See Rakas*, 439 U.S. at 148; *Atkins*, 57 Va. App. at 14. But Holmes's first assignment of error challenges the seizure of his own person, and no property interest is needed for that. *Mitchell v. Commonwealth*, 73 Va. App. 234, 246 (2021). I would sustain the first assignment of error to that extent and no further, and I would not decide whether this encounter is properly called a traffic stop. The answer does not bear on a person's standing to contest his own detention.

The trial court also grounded the standing ruling in part on the driver's consent to search, reasoning that removing Holmes from the car would have revealed the pistol in any event. The chronology will not bear it. Holland testified that after Holmes admitted to the firearm, "I had him exit the vehicle. I detained him," and that only afterward, when a second sergeant arrived, "[t]he . . . driver gave us permission to search the vehicle." Consent obtained after the challenged seizure cannot supply a justification for it.

I would not, however, reverse and dismiss. Not every Fourth Amendment violation requires that the evidence be suppressed. *Baskerville v. Commonwealth*, 76 Va. App. 673, 689

(2023).[9] The Commonwealth has not argued attenuation or independent source in those terms, and this Court should not resolve unbriefed doctrines in the first instance. I would reverse the convictions and remand, expressly without prejudice to the Commonwealth's opportunity to litigate those questions on remand.[10]

CONCLUSION

Detective Holland was doing difficult work in a place that had given him real reason for concern, and nothing here should be read to suggest otherwise. But the Fourth Amendment does not measure a seizure by the officer's diligence. It asks what he knew when he took hold of another man's liberty. When Holland told two men to put their hands on the dashboard and they did as they were told, what he knew was that they had sat still in a parked car for 20 minutes outside a motel with a bad reputation, and had looked at him in a way he did not like. That was innocent lawful conduct and therefore not enough to seize the men. Holmes did what he was told, and on the Court's reasoning that is precisely why he loses. A rule that marks the moment of seizure by the citizen's resistance, and withholds the Fourth Amendment's protection from the

[9] The exclusionary rule admits of three exceptions. Attenuation permits admission where the connection between the unconstitutional police conduct and the evidence obtained is remote or has been interrupted by some intervening circumstance, so that the evidence is purged of the taint of the initial illegality; the independent source doctrine permits admission of evidence discovered by means wholly independent of the violation. *Baskerville*, 76 Va. App. at 691-94. Inevitable discovery, an off-shoot of the independent source doctrine, permits admission of evidence that "ultimately or inevitably would have been discovered by lawful means." *Commonwealth v. Jones*, 267 Va. 532, 536 (2004) (quoting *Nix v. Williams*, 467 U.S. 431, 444 (1984)); *see Wilkins v. Commonwealth*, 37 Va. App. 465, 475 (2002). It is the narrowest of the three in application: it "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment," *Nix*, 467 U.S. at 444 n.5, and the burden of establishing it rests with the Commonwealth. I express no view on how any of the three bears on this record.

[10] Holmes also assigns error to the denial of his renewed motion, made at the close of the evidence. That motion rested on the same Fourth Amendment ground as the motion to suppress, and the trial court disposed of it on the strength of its earlier ruling. It is therefore controlled by the holding above and by the remand that would follow from it, and requires no separate analysis.

man who complies, has the matter backwards. I thus respectfully dissent and would reverse the circuit court and remand for further proceedings consistent with this dissenting opinion.