COURT OF APPEALS OF VIRGINIA

Record No. 2130-25-2

ANTONIO SMITH, SOMETIMES KNOWN AS
ANTONIO DARRELL SMITH
v.
COMMONWEALTH OF VIRGINIA

Present: Judges Beales, Frucci and Senior Judge Clements

Opinion Issued October 20, 2026*

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

(Leonard McCall, on brief), for appellant.

(Jay Jones, Attorney General; Shelly R. James, Senior Assistant Attorney General, on brief), for appellee.

MEMORANDUM OPINION
PER CURIAM

Based on a conditional guilty plea, Antonio Darrell Smith was convicted of two felony counts of possession of a controlled substance with intent to distribute in violation of Code § 18.2-248 and a misdemeanor count of driving on a suspended license in violation of Code § 46.2-301.[1] On appeal, Smith challenges the circuit court's denial of his motion to suppress the

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

[1] The circuit court sentenced Smith to 12 months of incarceration, with 12 months suspended, on the driving on a suspended license conviction. While the summary on the sentencing order correctly reflects that he was sentenced to 12 months of incarceration, with 12 months suspended, another portion of the order reflects a sentence of 12 years of incarceration, with 12 years suspended. Therefore, we remand to the circuit court to correct the clerical error. *See* Code § 8.01-428(B); *Bagley v. Commonwealth*, 73 Va. App. 1, 30 n.10 (2021).

evidence found at the time of his arrest. For the following reasons, we affirm the circuit court's judgment.[2]

BACKGROUND[3]

On May 22, 2023, police officers observed a hand-to-hand controlled substance transaction between Smith and another individual. The officers stopped the other individual, who had controlled substances in his possession, and then identified Smith as the person from whom he had just purchased the substances. The officers then stopped Smith, placed him under arrest, and handcuffed him.

Special Agent Branham of the Virginia State Police proceeded to search Smith. While patting him down, Special Agent Branham heard a crinkle of plastic "consistent with . . . drug packaging" and felt a "rocklike substance and powder" about four inches below and to the left side of Smith's crotch. Special Agent Branham suspected that the item was narcotics and that Smith was hiding it in his underwear.

Special Agent Branham took Smith to a more discreet area of the parking lot to continue the search. The agent reached up Smith's pant leg to get a better feel of the bag and to understand where it was on Smith's body. Special Agent Branham again felt the bag and the drugs; he did not touch or feel Smith's genitals. He discovered that Smith was wearing two pairs of underwear, an outer boxer short and an inner, tighter black short. The inner black short held

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[2] Having examined the briefs and record in this case, the panel unanimously agrees that oral argument is unnecessary because "the appeal is wholly without merit." Code § 17.1-403(ii)(a); Rule 5A:27(a).

[3] On appeal from the denial of a motion to suppress evidence, we recite and "review[] the evidence in the light most favorable to the Commonwealth, as the prevailing party below." *Bagley v. Commonwealth*, 73 Va. App. 1, 8 n.1 (2021). Doing so requires us to "discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom." *Commonwealth v. Cady*, 300 Va. 325, 329 (2021) (quoting *Commonwealth v. Perkins*, 295 Va. 323, 324 (2018)).

the bag against Smith's body, preventing Special Agent Branham from getting it by reaching up Smith's pants. Special Agent Branham then retrieved the bag from the top of Smith's pants.

Special Agent Branham undid Smith's belt so that he could access the area in which he felt the bag. He then reached into Smith's underwear and pulled out the bag. He did not see Smith's groin or feel anything other than the bag. Special Agent Branham explained that he decided to conduct a search at the time of the arrest, rather than wait to search Smith after he had been transported to jail, because he was concerned the bag contained fentanyl powder which could be released and, moreover, if the search were postponed, the narcotics could be lost.

During the hearing on his motion to suppress, Smith acknowledged that the officers had probable cause to arrest him. But he argued that the manner of the search violated his Fourth Amendment rights. The circuit court denied the motion to suppress, finding that, although Smith's pants were taken down, his underwear was not and none of his skin was exposed. Smith then entered conditional guilty pleas to the two felonies of possession with intent to distribute charges and pleaded guilty to the driving on a suspended license misdemeanor. Smith appeals, challenging the two felony possession with the intent to distribute convictions.

ANALYSIS

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)). "It is the appellant's burden to show that when viewing the evidence in such a manner, the trial court committed reversible error." *Id.*; *see Whitfield v. Commonwealth*, 265 Va. 358, 361 (2003) (explaining that, although the Commonwealth has the burden of proving the legitimacy of a warrantless search and seizure in the circuit court, on appeal the defendant must show that the circuit court's denial of his suppression motion constituted reversible error).

"We review de novo the trial court's application of the law to the particular facts of the case." *Bazemore v. Commonwealth*, 82 Va. App. 478, 490 (2024) (quoting *Branham v. Commonwealth*, 283 Va. 273, 279 (2012)). "When considering whether to affirm the denial of a pretrial suppression motion, an appellate court reviews not only the evidence presented at the pretrial hearing but also the evidence later presented at trial." *Id.* at 491 (quoting *Commonwealth v. White*, 293 Va. 411, 414 (2017)). An appellate court is "bound by the trial court's findings of historical fact unless 'plainly wrong' or without evidence to support them and we give due weight to the inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* at 490-91 (quoting *McGee v. Commonwealth*, 25 Va. App. 193, 198 (1997) (en banc)).

The Fourth Amendment to the Constitution of the United States provides, as pertinent here, that "[t]he right of the people to be secure in their persons, . . . and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. In the event of a Fourth Amendment violation, the resulting evidence may be subject to the exclusionary rule, which "prohibits the introduction of evidence, tangible or testimonial, acquired during an unlawful search." *Carlson v. Commonwealth*, 69 Va. App. 749, 758 (2019).

"Both the literal text of the Fourth Amendment and its historical context establish that the 'ultimate touchstone of the Fourth Amendment is "reasonableness."'" *Commonwealth v. Hubbard*, 304 Va. 400, 411 (2025) (quoting *Riley v. California*, 573 U.S. 373, 381 (2014)). Subject to a few specifically established exceptions, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." *Commonwealth v. Gilmore*, 27 Va. App. 320, 327 (1998) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). But one of these established exceptions to the Fourth

Amendment's warrant requirement is for a "search incident to a lawful arrest." *Id.* (quoting *United States v. Robinson*, 414 U.S. 218, 224, 226 (1973)).

In *Hubbard*, the Supreme Court of Virginia reviewed a search conducted by officers who had probable cause to arrest a suspect. Suspicious that the suspect was hiding narcotics under his clothes, the officer unbuttoned the suspect's shorts and stuck his hand between the shorts and the suspect's underwear. *Hubbard*, 304 Va. at 407. The Supreme Court of Virginia held that this search, incident to a lawful arrest, was reasonable given that the suspect's naked body was never exposed to the public and given the officer's concern about the potential loss of evidence if a search were postponed until after the suspect was transported to jail. *Id.* at 415.

Similarly, here, Special Agent Branham had probable cause for the arrest, never exposed Smith's skin to the public, never touched Smith's genitals, and, like the officer in *Hubbard*, was concerned that evidence would be lost if the search was postponed until Smith was in jail.[4] As a result, the circuit court correctly held that *Hubbard* applies and denied Smith's motion to suppress.

On appeal, Smith contends that this decision was erroneous because the circuit court "misapplied *Hubbard.*" It is difficult to address this argument because Smith never meaningfully develops it or highlights any material differences between *Hubbard* and this case.[5] To the extent that Smith contends that *Gilmore*, rather than *Hubbard*, controls the result in this case, this argument fails because *Gilmore* is readily distinguishable. Unlike in *Gilmore*, here, the

[4] Although Smith suggests in his opening brief that Special Agent Branham may have lacked probable cause, at the suppression hearing, Smith expressly conceded that probable cause was not at issue. As a result, we need not consider this question.

[5] To be clear, "it is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her . . . ." *Coward v. Wellmont Health Sys.*, 295 Va. 351, 367 (2018) (quoting *Bartley v. Commonwealth*, 67 Va. App. 740, 746 (2017)); *see also Cappe v. Commonwealth*, 304 Va. 86, 90 (2025) ("Ours is an adversarial system of justice, in which courts rely on advocates to marshal arguments for their clients.").

defendant was not naked and the officer did not put his hand in any of Smith's body cavities. *See* 27 Va. App. at 325; *see also McCloud v. Commonwealth*, 35 Va. App. 276, 283 (2001) (discussing *Gilmore* and distinguishing it from a search in which a suspect's clothing was not removed and his genital area was not exposed).[6] For these reasons, the circuit court correctly concluded that the present case is distinguishable from *Gilmore*.

Alternatively, to the extent that Smith contends that the circuit court's factual findings are incorrect (and it is far from clear that he is making this argument), such an argument fails because this Court is bound by a circuit court's "findings of historical fact unless 'plainly wrong' or without evidence to support them . . . ." *Bazemore*, 82 Va. App. at 491 (quoting *McGee*, 25 Va. App. at 198). Because Smith never contends that any of the circuit court's factual findings are plainly wrong or without evidence to support them, any potential challenge to them is easily disposed of.

CONCLUSION

Accordingly, we affirm the circuit court's judgment and remand to the circuit court to correct the clerical error in the sentencing order.

Affirmed and remanded.

[6] In *Gilmore*, the defendant was ordered to remove all of her clothing and, when nothing was found by visually examining her naked body, the deputy stuck her hand inside the defendant's vagina and retrieved the money that had been exchanged for narcotics. 27 Va. App. at 325. This Court held that, under these circumstances, the deputy's warrantless search was unreasonable and, thus, in violation of the Fourth Amendment. *Id.* at 334 (affirming the circuit court's decision to grant the motion to suppress).