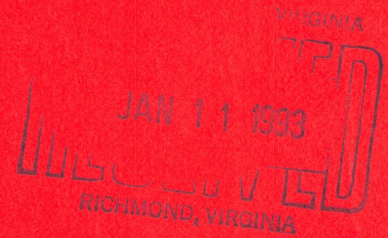


245 VA416

IN THE
SUPREME COURT OF VIRGINIA



Record No. 921005

GEORGE BETHEA, JR.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

JOINT APPENDIX

DAVID J. JOHNSON
Richmond Public Defender

JODY ANN JACOBSON
Assistant Public Defender

700 East Franklin Street-700 Centre
7th Street Tower-3rd Floor
Richmond, Virginia 23219
(804) 225-4330

MARY SUE TERRY
Attorney General

MARLA LYNN GRAFF
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624

TABLE OF CONTENTS

TRANSCRIPT OF SUPPRESSION HEARING HEARD ON 30 JANUARY 1989.....					1
	DIRECT	CROSS	REDIRECT	RECROSS	
TONY DODSON	3	11	15		
WALTER ROBINSON	18	23			
GEORGE BETHEA	25	31			
MARVIN T. PAULUS	33	35			
HARRY F. WARREN	43	46			
DUNCAN A. PENCE	59	63	91	93	
INDICTMENT FILED 9 JANUARY 1989.....					78
MOTION TO SUPPRESS FILED 20 JANUARY 1989.....					79
ORDER DENYING MOTION TO SUPPRESS FILED 30 JANUARY 1989.....					80
CONVICTION ORDER ENTERED 10 MARCH 1989.....					81
NOTICE OF APPEAL FROM CIRCUIT COURT TO COURT OF APPEALS FILED 17 MARCH 1989.....					83
COURT OF APPEALS REHEARING <i>EN BANC</i> DECISION ENTERED 26 MAY 1992.....					84
NOTICE OF APPEAL FROM COURT OF APPEALS TO THIS COURT FILED 24 JUNE 1992.....					100

I N D E X

		DIRECT	CROSS	REDIRECT	RECROSS
1					
2					
3					
4	Tony Dodson	5/96	13	17	
5	Walter Robinson	20	25		
6	George Bethea	27	33		
7	Marvin T. Paulus	35	37		
8	Harry F. Warren	45	48		
9	Duncan A. Pence	61/81	65/92	93	95

10

11

12

E X H I B I T S

13

Page

14

Commonwealth's Exhibit No. 1
Certificate of Analysis

88

15

16

Commonwealth's Exhibit No. 2
Bag containing cocaine

93

17

18

Commonwealth's No. 3
Money

94

19

20

Commonwealth's No. 4
Beeper

94

21

22

23

24

25

1

1

2

NOTE: Court is convened at 2:00

3

p.m. The Court Reporter is sworn; with the
defendant present

4

5

THE CLERK: The Commonwealth of

6

Virginia against George Bethea, Jr. Is the

7

Commonwealth prepared, Mr. Rockecharlie?

8

MR. ROCKECHARLIE: Yes, ma'am.

9

THE CLERK: Is the defendant ready,

10

Mr. McLees?

11

MR. MCLEES: Yes, we are.

12

THE CLERK: George Bethea, Jr., you

13

stand charged that, on or about August 13,

14

1988, did feloniously and unlawfully have in

15

your possession or have under your control a

16

certain drug, to-wit, cocaine, a Schedule II

17

controlled drug, with intent to distribute. Do

18

you plead guilty or not guilty?

19

DEFENDANT BETHEA: Not guilty.

20

MR. MCLEES: Excuse me, Your Honor,

21

we have a motion to suppress outstanding.

22

THE COURT: All right. We will take

23

that up.

24

MR. MCLEES: We call Tony Dodson.

25

We also move that all witnesses be removed.

TESTIMONY OF TONY DODSON

5

1 THE COURT: All right. All
2 witnesses for this case please wait in the
3 witness room.

4
5
6
7
8
9 TONY DODSON,
10 a witness called by the defendant, first being duly
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. MCLEES:

14 Q Mr. Dodson, introduce yourself to
15 the Judge, please.

16 A My name is Tony Dodson.

17 Q Do you know George Bethea, who is
18 sitting here?

19 A Yes.

20 Q Were you with him on August 13,
21 1988?

22 A Yes, sir.

23 Q Was he riding in the car that you
24 were driving?

25 A Yes, sir, right, riding in my car.

3

1 Q Did there come a time when that car
2 was stopped by Richmond Police Officers?

3 A Yes.

4 Q Would you explain what happened when
5 the officers stopped the car?

6 A We were coming from Church Hill. We
7 were coming from Church Hill where I had went over to
8 pick George up. We came across the Manchester Bridge.
9 At that time we were going between Stockton and
10 Commerce. We went pasted the stop light on Stockton
11 Street to Maury and Commerce, and at that time on the
12 right-hand lane there was two officers in a plain car,
13 and I was in on my far left side and stopped at the red
14 light. Looked over, and one of the officers had pulled
15 up a camera like he was taking pictures. At that time,
16 the light had changed, I pulled off and looked in my
17 rear view mirror. I looked inside at my front mirror,
18 and seen them come through the light, from my right and
19 all the way to my left, and at that time they pulled me
20 over. The officer got out of the car, came up and
21 asked for my drivers license. I told him I had
22 misplaced it. He called in, and he said that
23 everything was straight and told me I had to go down
24 and get a city sticker.

25 Q Now did the officer make you get out

1 of the car?

2 A Yes, he did.

3 Q When was that?

4 A After he had called in and checked
5 and told me I had to get a city sticker, and then he
6 told me to get out.

7 Q After he told you to get out of the
8 car, you did get out of car?

9 A Yes, sir.

10 Q Who else was in the car with you?

11 A George Bethea and Walter Robinson.

12 Q Where were they riding?

13 A George was on the passenger's side
14 and Walter Robinson, he was in the back on the
15 passenger's side.

16 Q Now, how many officers approached
17 your car?

18 A At the time he come through the
19 lights, there were two officers.

20 Q They were both in the same car?

21 A Yes, sir.

22 Q So two originally stopped?

23 A Yes.

24 Q Did they both approach your car at
25 this time?

1 A The one in the driver's side came
2 first to the driver's door, and then the one on the
3 passenger's side came to my passenger's side.

4 Q Did he speak to George or do you
5 know?

6 A He think he asked George to step
7 out.

8 Q When did he ask George to step out?

9 A After the first officer asked me to
10 come out, and then the other officer asked George and
11 then he asked Walter Robinson to get out.

12 Q That was after the officer told you
13 you needed a city sticker?

14 A Yes.

15 Q Now, had you threatened the
16 officers, or reached up in the seat, or reached into
17 your pocket as though reaching for a weapon or anything
18 like that?

19 A No, sir.

20 Q Was there anything that you were
21 trying to hide?

22 A No, sir.

23 Q Was George doing any of those
24 things?

25 A No, sir.

1 Q Was he trying to hide anything --

2 A No, sir.

3 Q -- or trying to give the officer a
4 bad time?

5 A No, sir.

6 Q How about Mr. Robinson in the
7 backseat?

8 A No, sir.

9 Q What happened after the officer
10 asked that all three of you step outside of the car?

11 A The one that pulled me out, he asked
12 me to stand up against the car, and told me to throw my
13 hands against the car so he could pat me down to see if
14 I had a weapon.

15 Q Did you have a weapon?

16 A No, sir.

17 Q Did he take anything from you?

18 A No.

19 Q What did they do to George?

20 A He patted him down and told him to
21 step on the curb and throw his hands against the car
22 and patted him down.

23 Q Did they take a weapon from him?

24 A No, sir.

25 Q Did he try to give him a hard time

1 or threaten them at that point?

2 A No, sir.

3 Q Did they take anything from him at
4 that point?

5 A No, sir.

6 Q Did they do the same with Mr.
7 Robinson?

8 A Yes, sir.

9 Q Did additional officers arrive, or
10 was it just the two?

11 A Other officers. There was a police
12 car pulled up, and then I guess a couple of seconds or
13 minutes some more detectives or some more officers'
14 cars pulled up.

15 Q Now how many times were you patted
16 down?

17 A I was patted twice.

18 Q By two different officers?

19 A Yes, sir.

20 Q Do you know how many times George
21 was patted down?

22 A To my knowledge, I think it was
23 three times.

24 Q By the same officer each time or
25 different officers?

1 A Different officers.

2 Q Did they say why they were patting

3 him down or what they were looking for?

4 A One of the officers said that him

5 and George had run across each other one time before.

6 Q What did that officer say?

7 MR. ROCKECHARLIE: Objection.

8 Hearsay.

9 MR. MCLEES: It is admission by a

10 party involved and it is a verbal remark made

11 in his presence.

12 Q What did that officer say?

13 A He said, he told the officer that he

14 had caught George before with some type of drugs, and

15 then that he was going to pat him down because he might

16 have something on him.

17 Q Do you remember which officer that

18 was?

19 A Not by name particularly.

20 Q What does he look like?

21 A I would say six feet, six-one kind

22 of blondish, brownish hair.

23 Q Blond-brown hair?

24 A Yes.

25 Q Is it one of the police officers

1 that just stepped out into the hall?

2 A Yes, sir.

3 Q Now did there come a time when they
4 arrested George?

5 A Yes.

6 Q Do you know what happened right
7 before they arrested him?

8 A My back was kind of toward him.
9 When he was getting shaken down, I was getting shaken
10 down. Again, all I heard was officers had told him to
11 move and he had moved and would not and another said he
12 was going to look around the car and what not and I
13 heard, I don't know exactly which officer it was, say
14 they had got something.

15 Q Did you see them find anything or
16 pick anything up?

17 A No, the only thing I seen, I turned
18 around and the officer had some, a big bag in his hands
19 with some white stuff in it.

20 Q Is that when he arrested George?

21 A Yes, sir.

22 Q How long did it take from the time
23 that the police first stopped you until the time they
24 arrested George?

25 A 20, 30, 40 minutes, something like

1 that.

2 Q Somewhere between 30 and 40 minutes?

3 A Yes, at most.

4 Q Did they arrest you for anything?

5 A No, sir.

6 Q Did they charge you with anything?

7 A No, sir.

8 Q Did they charge Mr. Robinson with
9 anything?

10 A No, sir.

11 Q They just took Mr. Berhea away?

12 A Yes.

13 MR. MCLEES: Would you answer any
14 questions Mr. Rockecharlie may have?

15

16

17

18 CROSS-EXAMINATION

19 BY MR. ROCKECHARLIE:

20 Q Mr. Dodson, you acknowledge that
21 your car did not have a city sticker on there; is that
22 correct?

23 A Yes, sir.

24 Q That is the reason that one officer
25 approached you on the diver's side; is that correct?

//

1 A Yes, he approached.

2 Q And, he asked you for your
3 operator's license, and you didn't have one; is that
4 correct?

5 A That's right.

6 Q Did he not at that time ask you to
7 step out of the car?

8 A After he called in and checked for
9 my ID.

10 Q So it's your testimony today that he
11 approached you, you did not have an operator's license,
12 and he went back to his car and he came back?

13 A He told me to sit there because he
14 was going to run it.

15 Q Then he told you after he ran it
16 through, to step out of the car when he came back?

17 A Yes, sir.

18 Q And he did not take you to the other
19 side of the car so you were away from the traffic?

20 A He told me to step forwards, step to
21 the front of the car. I was still on my left-hand side
22 of the car.

23 Q When you stepped out of the car, was
24 Mr. Bethea and the other gentlemen in the car, or had
25 they already stepped out of the car?

1 A They were still in the car.

2 Q When did they step out of the car?

3 A After the officer had told me to go
4 to the front of my car.

5 Q Then the other officer who was on
6 the passenger side asked them to step out of the car;
7 is that right?

8 A Yes.

9 Q Then at that time some other police
10 officers came, is that your testimony?

11 A Yes, sir.

12 Q While the one officer that was
13 talking to you, that's when you were talking in front
14 of the car, and where was Mr. Bethea and Mr. Robinson?
15 Were they on the curb over by the other end of the car?

16 A George Bethea was just getting out
17 of the car, and the officer asked him, Mr. Robinson, to
18 sit right there just for one minute, and I think he
19 searched George Bethea. He told Mr. Robinson to get
20 out.

21 Q So, as Mr. Bethea got out of the
22 car, the officer patted him right then, is that your
23 testimony?

24 A As he got out of the car and as he
25 closed the door a little bit.

1 Q Then Mr. Robinson got out. You were
2 talking to one officer at the front of the car, right,
3 and Mr. Bethea and Mr. Robinson were at the back of the
4 car talking to the other officer, is that correct?

5 A Side of the car.

6 Q Side of the car. That officer was
7 talking to you about the decal when all of this
8 occurred with Mr. Bethea, them finding the cocaine on
9 Mr. Bethea; is that correct?

10 A No. No, sir. When the cocaine had
11 been found then, he had, an officer had had me around
12 the side where George Bethea was. I was on one side,
13 and he was on one side.

14 Q That was after the cocaine had been
15 found?

16 A Yes, sir.

17 MR. ROCKECHARLIE: I have no further
18 questions.

19 MR. MCLEES: Redirect, Your Honor.

20 THE COURT: All right.
21
22
23
24
25

1 REDIRECT EXAMINATION

2 BY MR. MCLEES:

3 Q What happened after the coke was
4 found?

5 A After the cocaine was found?

6 Q Yes.

7 A He had turned me loose, and he said
8 Walter Robinson and I could go.

9 Q When was it that the officer told
10 you that you needed a city sticker?

11 A He had told me after he had called
12 in.

13 Q After he had called in?

14 A He had called in and another police
15 officer's car had pulled up and had asked him did they
16 say anything about the city sticker, and he said, yeah,
17 he had told me that I had needed to get a city sticker.

18 Q Were you in the car then, or out of
19 the car?

20 A I was out of the car when he had
21 came and told me.

22 Q You were out of car when they told
23 you you were in need of a city sticker?

24 A We were out.

25 Q Was George or Mr. Robinson out of

1 the car or were they in it?

2 A George Bethea was out at the time.

3 Q He was out after they told you that
4 you needed a city sticker, how long did they keep you
5 all on the side of the road before they found this
6 cocaine?

7 A We had been at the time -- George
8 had been out of the car a good while, because I was the
9 first one out. I think when the last officer's car had
10 pulled up, and he had knew George, and he had wanted to
11 search George down, and he had searched George down, I
12 would say about two, three minutes, and that's when he
13 said he had found something.

14 Q Was that after they told you about
15 the city sticker?

16 A Oh, yes, sir.

17 Q You testified before that the entire
18 incident, stop, took between 30 and 40 minutes?

19 A Yes.

20 Q How much time, would you say, had
21 passed between the stop and the time they told you you
22 needed a city sticker?

23 A I would say approximately six to
24 seven minutes.

25 Q Six to seven minutes?

1 A Yes.

2 Q So the rest of the time was devoted
3 to patting you all down?

4 A Yes.

5 Q Looking for something?

6 A Yes.

7 MR. MCLEES: Nothing further.

8 MR. ROCKECHARLIE: Nothing further.

9 THE COURT: All right. Thank you.

10

11

12

13

14

15

16

17

WITNESS STOOD ASIDE

18

19

20

21

MR. MCLEES: Call Walter Robinson.

22

23

24

25

TESTIMONY OF WALTER ROBINSON

Robinson - Direct

20

1

2

WALTER ROBINSON,

3

called as a witness for the defendant, first being duly

4

sworn, testified as follows:

5

DIRECT EXAMINATION

6

BY MR. MCLEES:

7

Q

Would you introduce yourself to His

8

Honor. Tell the Judge your name.

9

A

Walter Robinson.

10

Q

Mr. Robinson, I want you to speak

11

loudly and slowly and explain to the Judge what

12

happened on August 13. Were you riding in the car with

13

Mr. Dodson and Mr. Berthea here?

14

A

Yes, sir.

15

Q

Were you stopped by the police?

16

A

Uh huh.

17

Q

Would you explain to the Judge what

18

happened that night when the police stopped you?

19

A

We were driving, coming over

20

Manchester Bridge and we got to the light at Maury, not

21

Maury, Stockton and Decatur at the light.

22

Q

Go ahead.

23

A

So we were at the light. So the

24

police -- We pulled out when the light turned green.

25

So the police holds up the camera. George said they

1 were holding up a camera taking a picture. We kept on
2 riding. About half a block they pulled, threw the
3 lights on us, and then they stopped us. They checked
4 and told us to get out of the car. So we got out of
5 the car. Then they frisked us down, and we were
6 straight, and then some more --

7 Q Let me interrupt you. When they
8 came up to the car, how many police officers approached
9 the car?

10 A Two.

11 Q Did they tell you why they had
12 stopped you?

13 A They say it was about the city
14 sticker.

15 THE COURT: The what?

16 THE WITNESS: I mean the inspection
17 sticker. It wasn't on there. That's why they
18 pulled us over.

19 Q How long was this before they
20 ordered you to step out of the car?

21 A Well, that was right after they
22 stopped us, and told us to get out of the car.

23 Q Did they say why they wanted you to
24 get out of the car?

25 A No, they just told us to get out of

1 the car.

2 Q Did you reach under the seat or
3 reach into your pocket or anything?

4 A We didn't do none of that.

5 Q Did you threaten or give them a hard
6 time?

7 A No, we just did what they asked us
8 to do.

9 Q Okay. What happened then? What did
10 they ask you to do when you got out of the car?

11 A They asked us to get up against the
12 car.

13 Q Then what?

14 A They frisked us.

15 Q Did they find anything?

16 A They didn't find nothing, and four
17 more cars came and the officers got out, and then all
18 four stayed on George. They didn't touch us no more.
19 They only stayed on George. That was it.

20 Q How many times were you patted down
21 yourself?

22 A I was patted down twice.

23 Q By the same officers or different
24 officers?

25 A Different.

1 Q Did they find anything on you, take
2 anything from you?

3 A No.

4 Q Did they find anything on Mr.
5 Dodson?

6 A They didn't find nothing.

7 Q How many times did they pat George
8 down, that you are aware of?

9 A About five or six times.

10 Q Now the first several times they
11 patted him down, did they find anything on him?

12 A No.

13 Q Take anything from him?

14 A No.

15 Q Did he try to resist them?

16 A No.

17 Q Did he try to run away or threaten
18 them?

19 A No, sir.

20 Q Did you ever hear any conversation
21 between the officers as to why they were holding you
22 all?

23 A One of them knew him. They just
24 shook hands and that was it. They started to frisk him
25 again.

1 Q Did you hear the officer say
2 anything about him.

3 A No.

4 Q Now, did there come a time when
5 George was arrested?

6 A Uh huh.

7 Q What happened then?

8 A Then, when they arrested him, they
9 changed and acted like they wanted to beat him up and
10 all that.

11 Q Why was he arrested, do you know?

12 A My back was turned. They say, hold
13 it up. He got something off the ground, so at least
14 one of them moved, pulled me to the side and picked up
15 something off the ground, and that was it.

16 Q They arrested George.

17 A Yes.

18 Q Did they arrest you?

19 A No.

20 Q Did they arrest Mr. Dodson?

21 A No, sir.

22 Q Now, From the time the police
23 stopped the car until the time they arrested George,
24 about how much time elapsed?

25 A About 40 minutes to half an hour

1 after that.

2 MR. MCLEES: Would you answer any
3 answers Mr. Rockecharlie or the Court would
4 have.

5

6

7

8

CROSS-EXAMINATION

9

BY MR. ROCKECHARLIE:

10 Q Mr. Robinson, it's your testimony
11 that as the officer approached, you were on the
12 passenger's backseat; is that correct?

13 A Yes.

14 Q As the officer approached the
15 passenger's side, you got out of the car; is that
16 correct?

17 A Yes.

18 Q You got out of car, and he patted
19 you down; is that correct?

20 A Asked me for my ID and then frisked
21 me down.

22 Q You testified that you were patted
23 down twice. You were patted down once as you got out of
24 the car. When were you patted down, after Mr. Bethea
25 was arrested or before Mr. Bethea was arrest?

1 A That was before he was arrested.

2 Q Now you also testified that the
3 incident, the entire stop took about 40 minutes; is
4 that correct?

5 A Yes.

6 Q Is that from the time that you were
7 stopped until the time you were allowed to leave?

8 A Yeah.

9 Q How long was it from the time that
10 you were stopped to the time that Mr. Bethea, to your
11 knowledge, was arrested?

12 A Well, that was about -- Well, we had
13 been there for few hours, anyway. I don't know how
14 long really, but before, but we had been out there for
15 a few hours before all that happened.

16 MR. ROCKECHARLIE: Thank you, sir.

17 No further questions.

18 THE COURT: All right, you may step
19 down.

20

21

22

23

24

25

TESTIMONY OF GEORGE BETHEA

27

1

2

THE WITNESS STOOD ASIDE

3

4

5

6

7

8

MR. MCLEES: Call George Bethea, Your

9

Honor.

10

11

12

13

14

GEORGE BETHEA,

15

the defendant in the case at hand, called by counsel,

16

first being duly sworn, testified as follows:

17

DIRECT EXAMINATION

18

BY MR. MCLEES:

19

Q

State your full name for the record?

20

A

George Bethea, Jr.

21

Q

George, you have heard the testimony

22

of Mr. Dodson and Mr. Robinson concerning the encounter

23

with the police officer on the 13th of August? Tell

24

His Honor what you remember happened.

25

A

We came over from Church Hill and

25

1 came over the Manchester Bridge. I spotted the police
2 car coming down Decatur and Commerce Road, and I told
3 Mr. Dodson that's the police right there. They were in
4 a blue LTD, and they pulled up to the light on Maury
5 and Commerce. We pulled up beside them. I looked over
6 at the police, and when I looked over at him, he had a
7 camera in his hands taking pictures.

8 I noticed the light changed, and our
9 car pulled out. We get into the 1000 block of Commerce
10 Road. They pulled us. When they pulled us, the
11 officer that was driving the police car came around to
12 the driver's side of the car, the door, and asked Mr.
13 Dodson for his driver's license, and he told him he had
14 lost his driver's license. Then the police, he asked
15 Mr. Dodson to step out of the car, and at the same time
16 the other officer, who was on the passenger's side of
17 the police car, was on our passenger's side. The police
18 officer came to my side, and he asked for my I.D., and
19 I said I don't have an I.D. He said step out of the
20 car. He, at the same time, he had asked Mr. Robinson to
21 remain in the car. He patted me down. Then he went
22 back to the car and asked Mr. Robinson for his I.D. Mr.
23 Robinson handed it to him, and then he asked him to
24 step out of the car, and then patted him down and asked
25 him the same things he had asked me. At the same time

1 he was calling in our name, and I heard another police
2 come over the mike and ask if they needed the back up.

3 Q Let me stop you there for a minute,
4 if I may. How much time had expired from the time the
5 car stopped to the time the officer ordered you out of
6 the car?

7 A Approximately 10 minutes.

8 Q What were they doing during that
9 time?

10 A At that time, he was responding to
11 the officer that came over the mike wanting to know if
12 he wanted backup.

13 Q Were they calling in about Mr.
14 Dodson's operator's license?

15 A Yes, and that officer about back
16 up --

17 MR. ROCKECHARLIE: Objection. He has
18 no idea why they were calling in.

19 THE COURT: He was just listening to
20 them. Go ahead.

21 Q Did you hear them call in about the
22 operator's license?

23 A Yes.

24 Q During that time, before they
25 ordered you out of car, did you make any threatening

1 gestures to them or threaten to do them any harm or try
2 to get away?

3 A No, sir.

4 Q Did you reach under the seat or into
5 your pocket like you were reaching for a weapon?

6 A No, sir.

7 Q What did you do?

8 A When he came up there, I just got
9 out of the car. He came and asked me and I just
10 stepped out of the car. He opened the door and I
11 stepped out.

12 Q Ask you for what?

13 A He asked me for my I.D.

14 Q You didn't have it?

15 A No, sir.

16 Q What did he do then?

17 A He frisked me. He told me to step
18 out, put my hands on the car. He frisked me, patted me
19 down, and he just told me to remain right there.

20 Q Had you at that point given him any
21 trouble or threatened him?

22 A No, sir.

23 Q What did he do after he frisked you
24 the first time?

25 A He went back to the car and got Mr.

1 Robinson.

2 Q How many times were you frisked all
3 together?

4 A I was frisked probably three times.

5 Q You mentioned they called for a
6 backup?

7 A Yes, sir.

8 Q Did there come a time when other
9 officers arrived?

10 A Yes, sir. After he checked on the
11 decal, there came more and more police officers,
12 back-up, and I was frisked.

13 Q So this was the second time you were
14 frisked?

15 A First time, first officer. The
16 second was Officer Pence frisked me. That was after
17 the back-up that he had called for, they came up.
18 Officer Pence knows me, because he got me on another
19 drug charge. He first -- He didn't finds nothing, so I
20 remained on the side of the car.

21 Q What happened after that?

22 A After he frisked me, he frisked Mr.
23 Robinson.

24 Q And then what happened?

25 A He carried on the conversation with

1 the officer that frisked me first.

2 Q Did there come a time that you were
3 frisked the third time?

4 A There was a third time. It was an
5 officer that I don't know his name. He was one like one
6 of the four back-up officers.

7 Q They arrived after Pence did?

8 A Yes, sir.

9 Q Did he find anything?

10 A No, sir. He patted me down, but he
11 didn't find anything.

12 Q Where were you at that time?

13 A Still in the same place as when
14 Pence had frisked me.

15 Q Had you given any of them any
16 trouble or threatened them or tried to get away?

17 A No, sir.

18 Q How did it come about that they
19 arrested you?

20 A Come about because they said they
21 had seen something fall out, and there was something on
22 the ground by my foot.

23 Q And this was by your foot?

24 A Yes, sir.

25 Q They arrested you at that point

1 based on what they found on the ground?

2 A Yes, sir.

3 Q How long a period of time was it
4 between the time they first stopped you and the time
5 the officer arrested you?

6 A About 30 to 40 minutes.

7 Q Did they charge you with anything
8 else besides possession of cocaine with intent to
9 distribute?

10 A No, sir.

11 MR. MCLEES: Would you answer any
12 questions of the Court or Mr. Rockecharlie.

13

14

15

16 CROSS-EXAMINATION

17 BY MR. ROCKECHARLIE:

18 Q You testified that you know Officer
19 Pence?

20 A Yes, sir?

21 A How do you know him?

22 A Yes, sir.

23 Q How?

24 A Because he arrested me on a previous
25 drug conviction.

1 Q He patted you down on a second time;
2 is that correct?

3 A Yes.

4 Q Where were you standing?

5 A Where the first police officer
6 patted me down.

7 Q Was that the same spot the third
8 officer patted you down?

9 A Yes, sir.

10 MR. ROCKECHARLIE: That's all the
11 questions I have.

12 THE COURT: All right.

13 MR. MCLEES: That's all the evidence
14 we would have for the suppression motion.

15

16

17

18

19

20

21 WITNESS STOOD ASIDE

22

23

24

25 MR. ROCKECHARLIE: Does Your Honor

TESTIMONY OF MARVIN T. PAULUS

35

1 wish the Commonwealth to put on any evidence?

2 THE COURT: Yes.

3 MR. ROCKECHARLIE: We would call
4 Sergeant Paulus.

5

6

7

8

9

10

11 MARVIN T. PAULUS,

12 a witness called by the Commonwealth, first being duly
13 sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. ROCKECHARLIE:

16 Q Please introduce yourself to the
17 Court.

18 A Sergeant Marvin T. Paulus, Richmond
19 Bureau of Police, SNAP Division.

20 Q Were you so employed on 8-13-88?

21 A Yes, sir, I was.

22 Q Did you, on that date, have occasion
23 to observe a vehicle in which the defendant, George
24 Bethea, Jr., was a passenger in the City of Richmond?

25 A Yes, I did.

1 Q Would you relate to the Court how
2 that occurred?

3 A I was observing an '81 Oldsmobile,
4 blue in color, at Murray and Jefferson-Davis Highway,
5 was traveling towards -- on Commerce Road. He was
6 traveling towards Jefferson-Davis Highway. There was a
7 subject on the right passenger side that was waving,
8 making faces.

9 Q Would that be the defendant?

10 A Yes, it would. That drew my
11 attention to that vehicle. Upon pulling up beside the
12 vehicle, Sergeant Warren and myself noticed that there
13 was no city decal displayed on the windshield. We
14 stopped the vehicle in the one thousand block of
15 Commerce Road.

16 Q Did you, at that time, approach the
17 driver of that vehicle?

18 A Yes, I did.

19 Q What did you do upon approaching the
20 vehicle?

21 A I asked the driver if he would step
22 out. The traffic was close to where we were stopped
23 at, and I asked him to step on the sidewalk. At this
24 time I asked him for his operator's license, which he
25 did not have. I ran the check through DMV to be sure

1 that he did have a driver's license, which he did have.

2 MR. ROCKECHARLIE: No further
3 questions, Your Honor. Please answer
4 questions of counsel.

5

6

7

8

CROSS-EXAMINATION

9

BY MR. MCLEES:

10 Q Who was the person who was waving
11 and making faces?

12 A George Bethea.

13 Q Did you know him?

14 A No, I did not.

15 Q Did you have a camera?

16 A Yes, sir, I did.

17 Q You raised the camera and began
18 taking pictures of these people in the car?

19 A I took pictures, yes, sir.

20 Q Was he making faces in response to
21 your holding up the camera?

22 A No, sir. He was making faces before
23 I took the pictures.

24 Q Before you took pictures?

25 A Yes, sir.

1 Q What made you decide to take the
2 photographs?

3 A For identification purposes. We had
4 just moved into that area, and we take pictures of the
5 people for identification purposes.

6 Q Did you take pictures of everybody
7 you see?

8 A Nor everybody, but anybody that
9 draws our attention for any unusual circumstances, we
10 do take their picture.

11 Q When you stopped the car, you didn't
12 have any reason to stop the car except for the absence
13 of the city sticker?

14 A Yes, sir.

15 Q You approached the driver's side?

16 A Yes, sir.

17 Q The other officer that was with you
18 was Sergeant Martin?

19 A Sergeant Warren.

20 Q What did he do?

21 A He went to the other side.

22 Q To Mr. Bethea's side?

23 A Yes.

24 Q Why did you ask the driver to get
25 out of the car?

1 A Because I was standing in the -- on
2 the Commerce Road side of the vehicle where traffic
3 was, and I asked him to step back so I could get out of
4 the traffic.

5 Q And he did?

6 A Yes.

7 Q So he was cooperative with you?

8 A Yes.

9 Q You patted the driver down?

10 A No, sir.

11 Q You did not?

12 A Not that I recall.

13 Q Did you see anything that looked
14 like evidence of a crime in the car?

15 A I saw rice on the floor board of the
16 passenger's side, which in the past I have seen used to
17 keep moisture off of narcotics.

18 Q How long did it take you to
19 ascertain from DMV that Mr. Dodson did have a driver's
20 license?

21 A Between 8 and 10 minutes, I guess.

22 Q And, at that point you knew he
23 didn't have a city sticker?

24 THE COURT: Are we talking about a
25 city license?

1 THE WITNESS: Yes, sir. The decal
2 that you have to buy when you pay taxes.

3 Q Did you write him a ticket for that?

4 A Yes, sir, I did.

5 Q Did you tell him to get back in the
6 car and leave?

7 A Yes, sir.

8 Q You did?

9 A I told him he could go.

10 Q Did he go?

11 A Yes, sir.

12 Q At that particular time?

13 A When I told him he could go, he
14 left, yes, sir.

15 Q Was that before or after they
16 arrested Mr. Bethea?

17 A That was after.

18 Q That was after. So your testimony
19 is, Mr. Bethea was arrested before you told Mr. Dodson
20 about the city sticker?

21 A No, I told him when we stopped him
22 for the city sticker, before he was issued a citation
23 for it.

24 Q But you issued the citation at the
25 very end of this situation?

1 A I don't recall.

2 Q You don't recall?

3 A Somewhere near the end of it, but
4 I'm not sure.

5 Q Well, now after you determined --
6 How long did the entire incident take?

7 A I am not sure. I would say in the
8 neighborhood of 20 minutes.

9 Q Well, you would have in your records
10 the time when you called in that they were pulling the
11 car over, wouldn't you?

12 A I don't have any records of that,
13 no, sir.

14 Q You don't?

15 A No, sir.

16 Q What time did you write the
17 citation?

18 A Approximately 2:30. I didn't write
19 the citation. I didn't have one. Another police
20 officer brought it to the scene.

21 Q I see. Now you testified that it
22 took between 8 and 10 minutes to get the message from
23 DMV, the information that Mr. Dodson had a driver's
24 license?

25 A That is right.

1 Q And, the entire incident took in the
2 neighborhood of 20 minutes?

3 A Somewhere in the neighborhood. I
4 don't remember.

5 Q What was going on for the other 10
6 to 12 minutes?

7 A I don't understand your question.

8 Q What happened after you determined
9 Mr. Dodson did not have a driver's license to cause you
10 to detain the car for another 10 to 12 minutes?

11 A Officer Pence arrested the subject
12 in the vehicle.

13 Q When was that?

14 A Sometime during that time, the 10 or
15 12 minutes, I assume.

16 Q Did Officer Pence order both the
17 other individuals out of the car when you ordered Mr.
18 Dodson out?

19 A No sir, he did not.

20 Q He did not?

21 A Sergeant Warren asked the other two
22 passengers to get out of the car.

23 Q Sergeant Warren did that before
24 Officer Pence got there?

25 A Yes, that's correct.

1 Q Where did Sergeant Warren have the
2 two passengers?

3 A He had them in a position where he
4 could observe them.

5 Q He patted them down?

6 A I don't believe he did.

7 Q When did Officer Pence arrive?

8 A Approximately 3 minutes later, 3 to
9 5 minutes.

10 Q Why were they being detained until
11 Officer Pence arrived?

12 A They weren't being detained. They
13 just didn't have any place to go. The vehicle was
14 detained and they apparently were waiting for the
15 check.

16 Q You were still doing the check with
17 Mr. Dodson?

18 A That's correct.

19 Q What happened when Officer Pence
20 arrived?

21 A I'm not sure. I was at the front of
22 the vehicle with Mr. Dodson, and he was at the rear
23 paying attention to what he was doing. I was not
24 paying attention to what was going on at the rear.

25 MR. MCLEES: No further questions.

41

1 THE COURT: All right.

2 What time of day or night was this?

3 THE WITNESS: Approximately 2:15

4 p.m., 1415.

5 THE COURT: It was in the afternoon?

6 THE WITNESS: Yes, sir, it was.

7 THE COURT: Thank you.

8

9

10

11

12

13

14

15

WITNESS STOOD ASIDE

16

17

18

19

MR ROCKECHARLIE: Sergeant Warren.

20

21

22

23

24

25

42

TESTIMONY OF HENRY F. WARREN
Warren - Direct

45

1

2

HENRY F. WARREN,

3

a witness called by the Commonwealth, first having been
4 duly sworn, testified as follows:

5

DIRECT EXAMINATION

6

BY MR. ROCKECHARLIE:

7

Q For the record, sir, would you
8 please state your name to the Court?

9

A Sergeant Henry F. Warren.

10

Q Were you a Richmond police officer
11 on 8-13-1988?

12

A Yes, sir, I was.

13

Q Were you patrolling with Sergeant
14 Paulus in the one thousand block of Maury Street?

15

A Yes, sir.

16

Q Did you, on that day, approach a
17 vehicle in which the defendant, George Bethea, was a
18 passenger?

19

A Yes, sir, I did.

20

Q Please relate to the Court that
21 incident?

22

A Yes, sir. It was about 2:15 in the
23 afternoon. We were traveling on Commerce Road, going
24 on Commerce towards Jefferson-Davis Highway. There was
25 a car that was in the left lane, and we were in the

43

1 right lane. As we approached the car, Sergeant Paulus
2 brought to my attention to look over here, and I looked
3 to my left, and I observed Mr. Bethea, and he was
4 making faces, moving his hands and things like this
5 here, and first, it just really frightened me. I
6 didn't know what was coming off. I told Sergeant
7 Paulus to pull back behind him a little bit. As we were
8 pulling behind him, I checked his car. I wanted to see
9 if there was anything suspicious. First thing I
10 observed was the lack of a city sticker when we got
11 back in the back of his car. I told Sergeant Paulus
12 let's go ahead and pull him.

13 Q Because of his lack of a city decal;
14 is that correct?

15 A Yes, sir, that is correct.

16 Q Did there come a time when you did,
17 in fact, stop his vehicle?

18 A Yes, sir, we did.

19 Q Did you approach the car?

20 A Yes, sir, I approached the
21 passenger's side of the vehicle.

22 Q What did you do as you approached
23 the vehicle?

24 A I looked at Mr. Bethea first. I
25 glanced into the car. I had -- I didn't know at that

1 time if there was a weapon or what in the car. Couple
2 of seconds later I asked him, would you please step out
3 of the car, and at which time he stepped out of the
4 car. I took him in position right in front of his door
5 near the hood of the car. There was a passenger in the
6 rear seat of the car, and Sergeant Paulus was talking
7 to the driver. I couldn't see the passenger in the rear
8 seat, so at this time I asked the passenger in the rear
9 seat to step out of the vehicle.

10 Q At the time that he stepped out of
11 the car, did you then pat him down?

12 A No, sir, I did not.

13 Q Did there come a time when Officer
14 Pence arrived on the scene?

15 A Yes, sir, very shortly.

16 Q How long after your original stop
17 did Officer Pence arrive?

18 A Maybe a minute, two minutes at the
19 longest.

20 Q Sir, what was your purpose in asking
21 these two passengers to step out of the vehicle?

22 A When I first saw Mr. Berhea, I
23 didn't know what he was going to do. He was moving his
24 hands up and down. We had just moved into the south
25 side area into the Blackwell area. We had made some

1 traffic stops the day prior to this and found weapons
2 in the car. They were sitting on the front seat. I
3 feared that he may have some weapons. In my 22 years,
4 I have just never seen this behavior in an individual
5 before, and it startled me, and it scared me.

6 Q Officer, to the best of your
7 recollection, what was the total time that this
8 incident took place, this stop from the first you
9 stopped this car until it was released?

10 A I would estimate 15 minutes.

11
12 MR. ROCKECHARLIE: Thank you,
13 Officer. No further questions.

14

15

16

17

CROSS-EXAMINATION

18 BY MR. MCLEES:

19 Q These gestures that you saw Mr.
20 Bethea make when the car was adjacent to yours, was he
21 was making faces at you?

22 A Yes, sir, and moving his hands also.

23 Q How was he moving his hands?

24 A Toward -- in this position like
25 this, and then they went down. I could see --

1 Q He had the fingers of both hands,
2 all five fingers, were out stretched?
3 A I don't recall.
4 Q Moving them up and down?
5 A Yes.
6 Q He was making faces, you say?
7 A He was making faces.
8 Q Were they threatening you?
9 A I had never had this happen to me
10 before. Yes, I took it -- I didn't know if it was a
11 threat or not.
12 Q He didn't shake a fist at you, did
13 he?
14 A No, sir, he did not.
15 Q He didn't point a finger at you, did
16 he?
17 A No, he didn't.
18 Q He didn't make an obscene gesture at
19 you, did he?
20 A No, sir, he did not.
21 Q Who was taking the pictures?
22 A I don't recall.
23 Q You were or Sergeant Paulus?
24 A Oh, you're talking about in the car?
25 Q Yes.

1 A Sergeant Paulus picked up the camera
2 in the car.

3 Q And took a picture?

4 A I don't know if he did or whether he
5 had a camera in his hands every second.

6 Q That was before or after he was
7 making gestures?

8 A It was probably before and during.

9 Q He took the pictures before and
10 during the time Mr. Bethea was making the gestures?

11 A Mr. Bethea was making the gestures
12 before and during the picture taking, yes.

13 Q Now when you approached Mr. Bethea's
14 side of the car, what did you say to him?

15 A I asked him if he would mind
16 stepping out of the car.

17 Q What did he say, anything?

18 A He didn't say anything at all, as
19 best I recall.

20 Q Did he make any threats to you?

21 A No, he did not.

22 Q Did he try to resist you?

23 A No, he did not.

24 Q Did he reach into his pocket or
25 inside the car like he had a weapon?

48

1 A No, that was what I was watching
2 for.

3 Q Did you see any?

4 A I checked his waist band when he
5 came out of the car to make sure of that. I looked at
6 that very hard. That was one of the purposes that I
7 asked him out of the car, and no, there was no weapon.

8 THE COURT: You say, did you touch
9 him or just with your eyes?

10 THE WITNESS: Just my eyes, sir. I
11 never touched him.

12 Q And you said you got him in position
13 in front of the door where the hood was?

14 A When I closed the door, up in front
15 of the door between the front bumper and actually where
16 the door begins sort of towards the hood of the car.
17 To make it a bit better to explain, closer to the front
18 wheel.

19 Q What was the position you got him
20 in, was he standing or leaning against the car?

21 A No, he was standing. I think he
22 sort of leaped back on the car a little bit.

23 Q But you didn't have him spread eagle
24 on the car.

25 A No, sir, I did not.

1 Q You did not order Mr. Robinson out
2 of the car?

3 A No, sir, I did not.

4 Q You didn't?

5 A I asked him if he would get out of
6 the car.

7 Q And he didn't threaten you?

8 A No, sir, he didn't.

9 Q He didn't do anything threatening,
10 like pulling out a weapon?

11 A No, sir.

12 Q You didn't see any weapon on him?

13 A No, sir, I did not.

14 Q And you didn't pat either of those
15 people down?

16 A No, sir, I did not.

17 Q What did you do for a couple minutes
18 with these people before Officer Pence arrived?

19 A I had a conversation with Mr.
20 Bethea.

21 Q About what?

22 A Nothing important. It was just a
23 general conversation.

24 Q What was Sergeant Paulus doing all
25 this time?

50

1 A He was talking to the driver of the
2 vehicle.

3 Q When did Sergeant Paulus advise you
4 he was done talking to the driver?

5 A He was still talking to the driver
6 when Officer Pence pulled up.

7 Q Now Mr. Rockecharlie asked you why
8 you asked both of these individuals to get out of the
9 car? You used the term, asked.

10 A Yes.

11 Q What language did you use, do you
12 remember the exact words?

13 A Would you mind stepping out of the
14 car.

15 Q And you, of course, were in uniform?

16 A Yes, sir, I was.

17 Q And did you tell them they didn't
18 have to?

19 A No, sir, I did not.

20 Q Now you were explaining why you did
21 this, why you asked them to get out of the car and
22 mentioned because you didn't know what they were going
23 to do. You made a traffic stop, and found weapons a
24 couple of days before. That wasn't these people, was
25 it?

51

1 A No, it wasn't.

2 Q You mentioned you had never seen Mr.

3 Bethea before?

4 A No.

5 Q You have never stopped him before?

6 A I have never stopped him. I have

7 never seen him. Yes, sir.

8 Q You mentioned you were startled and

9 you were scared. That was because he had made a face

10 at you?

11 A Yes, sir.

12 Q Did you feel safer with him out of

13 the car than him in it?

14 A Yes, sir, I did.

15 Q The other man, the one on the other

16 side of you?

17 A One on what?

18 Q Mr. Bethea was toward the front of

19 the car and Mr. Robinson got out and was toward the

20 back of the car?

21 A Mr. Robinson was still in the car

22 and just probably a minute or so later, I didn't feel

23 comfortable for him being in the back of the car, and

24 I -- that's when I asked him to get out of the car, and

25 I did, I felt much more comfortable when both of them

1 were standing there.

2 Q But you never patted or searched
3 either one of them?

4 A No, I did not.

5 Q What happened after Officer Pence
6 arrived?

7 A Officer Pence arrived, there were
8 some drugs found, and it ended up that Mr. Bethea was
9 arrested.

10 Q Well, now let's break it down. When
11 Officer Pence arrived, did he pat them down right away,
12 or did he talk to you, or what did he do?

13 A I don't recall his specific actions.

14 Q Well, who patted Mr. Bethea down?

15 A I didn't pat him there.

16 Q You were there, weren't you?

17 A Yes, sir, I was.

18 Q The whole time?

19 A Yes, sir, I was.

20 Q But you don't remember who patted
21 him down?

22 A I don't remember patting him. At
23 this point there were other people there. Mr. Bethea
24 was in different places at different times. I am
25 saying that I didn't see.

1 Q So you didn't see who patted him
2 down?

3 A No, sir.

4 Q And you don't know how many times he
5 was patted down?

6 A No.

7 Q It could have been three times?

8 A I don't know.

9 Q Could it have been four? You don't
10 know?

11 A Could have been five or six, I
12 guess.

13 Q Who found the drugs, do you know
14 that?

15 A Officer Pence.

16 Q Officer Pence. How long after he
17 arrived, did he find the drugs?

18 A I don't recall what time that the
19 drugs were found.

20 Q He was there at least five minutes?

21 A Yes, he was probably there ten
22 minutes.

23 Q Was he the next officer to arrive
24 after you?

25 A Yes, sir.

54

1 Q What was going on during that ten
2 minutes?

3 A I didn't say it took him ten minutes
4 to get there. I would say he was there for about ten
5 minutes.

6 Q I understand, but after Officer
7 Pence arrived, between that time, and it was ten
8 minutes until the drugs were found, what was going on
9 during that ten minutes?

10 A I said Officer Pence was there
11 approximately ten minutes. I don't know what time
12 frame that the drugs were found. Officer Pence arrived
13 there shortly after we stopped the vehicle, and I am
14 sure that Officer Pence was there about ten minutes.

15 Q Between the time Officer Pence
16 arrived, and the time the drugs were found, what was
17 going on?

18 A Me, personally?

19 Q No, sir. What were all the other
20 officers doing, to your knowledge?

21 A I just can't speak for the other
22 officers. I can only speak for myself. I was standing
23 there with Mr. Bethea. Officer Pence arrived. My
24 attention -- I went over to Sergeant Paulus at the
25 driver's side of the car. I made sure everything was

1 okay over there. And, at one point in time, there were
2 some individuals walking, you know, on the sidewalk.
3 They stopped and started to look around and that
4 attracted my attention. I was focused on those
5 individuals that walked up the sidewalk, and at one
6 time I was at the rear of the car. I cannot say what
7 each and every officer was doing there because I was
8 seeing to my function there. I didn't see what all the
9 other officers were doing.

10 Q What you were doing once that
11 Officer Pence arrived, you didn't pay any more
12 attention to Mr. Bethea?

13 A Not a whole lot, no, sir.

14 Q So in essence, you left Mr. Bethea
15 in Officer Pence's custody?

16 A I didn't leave him in his custody.
17 Officer Pence was there.

18 Q You didn't leave him unguarded. You
19 were afraid of him?

20 A No, Officer Pence was there, and my
21 attention was drawn to other places, and I checked out
22 the whole area.

23 Q You were relying on Officer Pence to
24 take care of Mr. Bethea?

25 A Certainly.

1 Q And other officers arrived also?

2 A Yes, sir, that's correct.

3 Q Before the drugs were found?

4 A I don't know what period of time
5 the drugs were found, when the officers arrived or,
6 say, before or after.

7 Q Well how soon after Officer Pence
8 did the other officers arrive?

9 A Very shortly.

10 Q And you don't know who found the
11 drugs?

12 A I found out afterwards that Officer
13 Pence had found the drugs, but I did not see Officer
14 Pence find these drugs at this particular time that
15 they were found at the scene on Mr. Bethea. Being at
16 the scene and everything that was happening, I didn't
17 see what all had happened, I relied on other police
18 officers that told me things, or just the general
19 conversations between us.

20 Q Now you have mentioned that you did
21 not pat down Mr. Bethea?

22 A No, sir.

23 THE COURT: We have been over this.

24 Q When Officer Pence arrived, did you
25 keep an eye on Mr. Bethea, did you see him pat him

1 down?

2 A No, sir, I did not.

3 MR. MCLEES: No, further questions.

4 THE COURT: Were the passengers ever
5 in custody?

6 THE WITNESS: Not by me, no, sir.

7 THE COURT: You didn't consider them
8 in custody, you just asked them to get out?

9 THE WITNESS: Yes, sir.

10 Q In response to that, Mr. Bethea was
11 not free to leave was he?

12 A If he wanted to go, he could have
13 left.

14 Q He could have walked away, and you
15 would have let them, and you would not have stopped
16 them?

17 A No, sir.

18 MR. MCLEES: No further questions.

19 THE COURT: All right, thank you.

20 Next witness.

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

WITNESS STOOD ASIDE

MR. ROCKECHARLIE: Officer Duncan
Pence.

DUNCAN A. PENCE,
a witness called by the Commonwealth, first being duly
sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROCKECHARLIE:

Q For the record, please introduce
yourself to the Court?

A Officer Duncan A. Pence, Richmond
Bureau of Police, assigned to the SNAP division.

Q Were you so employed on August 13,
1988?

A Yes, sir, I was.

59

1 Q Did you, on this day, have occasion
2 to make a traffice stop at the one thousand block of
3 Commerce Road?

4 A Yes, sir, I did.

5 Q At that time did you observe the
6 defendant George Bethea?

7 A Yes, sir, I did.

8 Q Please relate to the Court your
9 observations?

10 A At the time that I pulled up behind
11 the 473 unit, I observed three males standing on the
12 curb beside a parked vehicle there. At that time I
13 walked up to help with anything I could. I saw that
14 there was rice in the all in the front passenger seat,
15 and in the floor board, and I just walked back and
16 stood at the rear of the car.

17 THE COURT: What is the
18 significance of rice in the front seat?

19 THE WITNESS: In my experience as a
20 police officer and from talking from other
21 officers, and from my experience as a police
22 officer, I have learned that rice is sometimes
23 used to keep heroin and cocaine dry before it
24 is distributed.

25 THE COURT: All right.

1 A At this particular time, I was
2 standing at the rear of the car, just standing by, when
3 I noticed the defendant had his right hand on his waist
4 line and appeared to be adjusting something. He then
5 grabbed his waist line and began jumping up on the rear
6 of the vehicle, still holding on to his waist and
7 appeared to be adjusting something within.

8 I started to look at him, he jumped
9 back down off the car still holding his waist line with
10 his right hand. As he jumped down off the car, I looked
11 at him even more. As he turned away from me towards
12 the car, I couldn't see his hands at that time. I
13 could see his elbows. I could see his arms moving. At
14 that time I asked him to take his hands away from his
15 waist for my own protection. I told him that I was
16 going to pat him down in the area that he kept moving
17 with his hands for my own protection to make sure he
18 didn't have a gun. He was leaning with his mid-section
19 up against the car at the time. I pulled him away from
20 the car to pat that area down, and when I did, he had
21 white short pants on, and from his left leg pants a
22 plastic bag fell to the ground. It contained rice and
23 Several packets of white powdery substance, which at
24 the time I believed to be cocaine.

25 Q So, from the time you approached the

61

1 scene, how much time elapsed when you patted him down,
2 say, from the time you arrived at the scene?

3 A I would say three or four minutes. I
4 couldn't be real sure about that.

5 Q Did you see Mr. Bethea at any time
6 when he was patted down in your presence or by your
7 person?

8 A No, sir, he was not.

9 Q Where was Officer Warren at that
10 time?

11 A I am not sure exactly. I remember
12 seeing someone at the front of the vehicle, in the
13 front of the vehicle that was stopped. I believe
14 Sergeant Warren and Sergeant Paulus were both there
15 when I was at the back of the vehicle, as I was just
16 standing by.

17 Q Is it your testimony that you
18 approached the defendant because of the way he was
19 holding his hands and moving?

20 A Yes, sir. And the motion he was
21 making on his waistline. I couldn't tell whether he,
22 he had anything there, and I had a feeling at that time
23 that I believe that he had, may have been armed, and
24 I -- then is when I patted him down, just the area that
25 he was messing with his hands.

1 Q When he jumped on to the car, did he
2 move his hands?

3 A No, he kept his right hand on his
4 waistline.

5 MR. ROCKECHARLIE: No further
6 questions.

7

8

9

10 CROSS-EXAMINATION

11 BY MR. MCLEES:

12 Q How long before you arrived at the
13 traffic stop did you get the radio call that someone
14 had stopped that car?

15 A Well, we were at Decatur and
16 Commerce Road intersection, so I imagine we were there
17 within a minute or two.

18 Q One to two minutes?

19 A Yes, sir.

20 Q What was going on as you approached?
21 You saw three males on the curb beside the vehicle.
22 What were the officers doing with the three men?

23 A As I stated earlier, there were two
24 sergeants standing at the front of the vehicle. They
25 were sort of standing mid point to the rear. The

1 defendant and the other two men were standing toward
2 the front of the mid part of the vehicle.

3 Q The defendant and the other two were
4 standing together; is that right?

5 A Yes.

6 Q The two sergeants were standing
7 towards the front of the vehicle?

8 A Yes, I believe so.

9 Q There was a group of three civilians
10 and a group of two officers some distance apart?

11 A Yes.

12 Q Did you see anyone patted down.

13 A No, sir, not while I was there
14 except for the pat down that I made.

15 Q Did the officer speak to you when
16 you arrived, I assume?

17 A I just asked them what they needed,
18 and they said they were running the information, and
19 then the occurrence took place where I observed him and
20 then took action.

21 Q The Officers said they were running
22 this information about the driver?

23 A Right.

24 Q And did they leave you with Mr.
25 Bethea?

1 A I was standing in the rear of the
2 car, just standing by looking, waiting, just watching
3 the defendant and his two friends while they did their
4 job that they were doing, and at that time that was
5 when I observed him.

6 Q You never saw any weapons in the
7 car?

8 A No, sir.

9 Q You explained something about the
10 police officers' experience that rice is sometimes used
11 in connection with narcotics?

12 A Yes, sir.

13 Q And, I presume, in your experience,
14 you have also found rice used at weddings?

15 A Yes, sir, it is.

16 THE COURT: It is also used for
17 cooking, too, but you usually don't find it in
18 the front seat of a car.

19 Q Did Mr. Bethea threaten you?

20 A No, sir, he did not.

21 Q How soon after you arrived, did this
22 difficulty he had holding his waistline did that
23 happen?

24 A It began a minute or two. It wasn't
25 very long.

1 Q But it was three to four minutes
2 before you patted him down. That was your direct
3 testimony.

4 A Yes, I had been there three or four
5 minutes.

6 Q He went on holding his waistline for
7 a minute or two, and then he started doing it and kept
8 doing it and then he jumped up on the car?

9 A Yes. I noticed similar actions in my
10 experience as a police officer, and his actions led me
11 to believe that he may have been armed because of my
12 past experience as a police officer.

13 Q But inspite of that, this fact
14 suggested to you that he might be armed, you let him
15 continue this for one to two minutes before you patted
16 him down?

17 A No, sir.

18 THE COURT: Officer Pence, did you
19 pat him down? Can you get up and show me what
20 he was doing first.

21 THE WITNESS: Yes, sir. At the time
22 that he was standing there, I was standing
23 around the car. He started doing this motion.
24 And his shirt that he had on that covered his
25 white shorts, He gets to doing this motion, and

1 jumping, and he went like this on the back of
2 the car still, and he started pulling up with
3 his hands. So at this time he started jumping
4 back down off the car. I started to watch him
5 and his clothes. At this time he jumped back,
6 and when he jumped, he still held his
7 waistline. Why you see the waistline is
8 because of the shirt he had on. He had a green
9 and whited horizontal striped shirt.

10 THE COURT: Did he have on shorts?

11 THE WITNESS: Yes, sir. He leaned
12 against the car, with his midsection against
13 the car.

14 THE COURT: Did you see his hands at
15 that time?

16 THE WITNESS: I could not see his
17 hands. All I could see were his elbows. I
18 just pulled him off the car like this. The
19 items dropped from his left pants leg.

20 THE COURT: You just pulled him off
21 the car?

22 THE WITNESS: Yes, sir.

23 THE COURT: Did the rice come out
24 first?

25 THE WITNESS: No, sir. The rice was

1 around the packets.

2 THE COURT: In other words, that
3 rice was around the packets?

4 THE WITNESS: Yes, sir.

5 THE COURT: But you did not go
6 inside his clothing or anything like that?

7 THE WITNESS: No, sir not until
8 after the arrest.

9 THE COURT: How large was the bag?

10 THE WITNESS: Pardon?

11 THE COURT: Approximately how big
12 would you say the bag was, how thick?

13 THE WITNESS: Approximately that
14 thick.

15 THE COURT: All right. Thank you.

16 MR. ROCKECHARLIE: I have no further
17 questions, Your Honor.

18 MR. MCLÆES: No questions.

19

20

21

22

23

24

25

1 WITNESS STOOD ASIDE
2
3
4

5 THE COURT: Next witness?

6 MR. ROCKECHARLIE: That would be the
7 Commonwealth's case.

8 THE COURT: All right. Closing
9 arguments?

10 MR. ROCKECHARLIE: Commonwealth
11 waives?

12 MR. MCLEES: Judge, I would say it
13 appears a violation of the Constitutional's
14 fourth amendment ordering Mr. Bethea out of
15 the car. And, as far as the way Sergeant
16 Warren characterized them as asking them to
17 step out. But, when a police car flashes his
18 lights and orders them to pull over, a
19 uniformed officer comes up and the officer's
20 words are, would you mind stepping out of the
21 car? I think a reasonable person would
22 interpret that as merely a courteous way of
23 ordering them out, not, oh gee, that the
24 defendant is free to ignore or disobey,
25 ordering them out of the car, detaining him.

69

1 There again no ordinary person would suppose
2 they are able to walk away, and especially
3 without impunity.

4 THE COURT: I don't think there was
5 a question that he wasn't under arrest or in
6 custody.

7 MR. MCLEES: But to say he was --

8 THE COURT: If he wanted to keep on
9 walking, they wouldn't have done anything to
10 him.

11 MR. MCLEES: We simply contend that
12 no reasonable person could believe that under
13 the circumstances, no reasonable civilian
14 would believe that. Under the circumstances
15 now, Officer -- Sergeant Warren testifies that
16 when he left Mr. Bethea, he was relying on
17 Officer Pence to keep an eye on him, and that
18 he had been keeping an eye on the two of them.

19 THE COURT: Keeping an eye on them
20 and having them under arrest are quite
21 different. I keep an eye on everybody in the
22 courtroom, because you can't rely e on the
23 deputies to do it all the time.

24 MR. MCLEES: But there is a
25 point of contradiction between the police

1 officers. Sergeant Warren's testimony that
2 Sergeant Paulus was talking to Mr. Dodson
3 about his operator's license, and Sergeant
4 Warren was keeping an eye on Mr. Bethea and
5 Mr. Robinson because he was scared, for no
6 reason, but that some people a couple days
7 before had guns. He didn't know anything
8 about these people.

9 THE COURT: He was more or less
10 familar with the facial expressions he had
11 made.

12 MR. MCLEES: He testified that Mr.
13 Bethea made a face at him.

14 THE COURT: And raised his hands
15 and--

16 MR. MCLEES: I contend that that is
17 not the way it was.

18 THE COURT: In this day and time I
19 think anybody that makes a face at a police
20 officer, I would watch him.

21 MR. MCLEES: Well, the testimony is
22 that in the subsequent conduct there was
23 nothing whatsoever threatening or unusual in
24 their subsequent conduct. The officers
25 contradict the other officer. Sergeant Warren

1 says that when Officer Pence arrived, Sergeant
2 Warren was watching George Bethea and Mr.
3 Robinson, and then he relied on Officer Pence.

4 Officer Pence testified that when he
5 arrived, the three gentlemen who had been
6 there were midway down the length of the car
7 and the two officers were standing toward the
8 front of the car, and then Officer Pence said
9 he watched Mr. Bethea. But, according to his
10 testimony, nobody threatened the three
11 officers. We have contradictions between the
12 officers, and we just have contradictions;
13 Number 1, the length of the detention of those
14 individuals is unrealistic. They didn't need
15 to hold them that length of time to write a
16 ticket for not having a city sticker.

17 THE COURT: Not having an operator's
18 license, they had reason to believe that he
19 might be driving on a revoked permit, and that
20 took 8 to 10 minutes.

21 MR. MCLEES: That took eight, nine to
22 ten minutes, but Sergeant Paulus said they
23 were detained another ten.

24 THE COURT: I think after the arrest
25 20 minutes in searching the vehicle. The

1 additional 10 minutes is to clear up the
2 defendant and his witnesses. It took 40
3 minutes or so, and that took 8 to 10 minutes
4 to check his operator's license. Furthermore,
5 he didn't have a summons. He had to wait for
6 an officer to bring a summons, which is not
7 unusual for a sergeant, when you don't make
8 many traffic stops.

9 MR. MCLEES: Well, Your Honor, we
10 rely on the length of time and, you know, was
11 it reasonable in ordering Mr. Bethea out of
12 the car? It was unreasonable. And the pat
13 downs, the repeated pat downs by several
14 officers, to be unreasonable.

15 THE COURT: I really don't have too
16 much problem with anything, although it does
17 present a real legal problem. The Court
18 rejects the idea that they were patted down
19 three or four times; and the Court finds the
20 fact that there are two elements. The
21 Sergeant was driving down the street, and this
22 car was on the left of them. The defendant
23 himself the was one making some faces. This
24 officer and the other Sergeant got a camera
25 and took his picture, but that was done right

1 before the other officer noticed that there
2 was no city license on the car, which gave
3 them ample reason to stop the car. No city
4 license. Once stopped, they found out then the
5 driver of the car didn't have an operator's
6 license, so the sergeant commenced to
7 investigate, which I think is the duty of any
8 enforcement officer, once he determines he
9 didn't have a driver's license. He checked 8
10 to 10 minutes, detaining them there.
11 Thereafter Officer Pence and his people
12 arrive. Prior to that, Sergeant Warren asked
13 him, said, do you mind stepping out of the
14 car? I don't really interpret that as a
15 command. It's just a nice way of asking the
16 man. He said it on the stand. He said no --
17 it might have been a different problem -- but
18 he said he asked him to step out. It was not
19 a command; it was more a request than a
20 command. But the police officer testified
21 that several days before in the area of
22 Blackwell they had found guns in the car.
23 Also he saw rice on the floor. He knew that
24 was strange. The Court learned something new;
25 especially that rice is used to keep the drugs

1 dry. My recollection is that he did testify
2 about that, and, at the in any event, it was
3 rice on the floor found when the other officer
4 comes. Officer Pence comes and he observes the
5 defendant. He saw rice on the floor, which
6 aroused his suspicion. You were right. Rice
7 is certainly used in different ways. It is
8 used on the supper table, used a lot of
9 places. It's unusual to have it on the right
10 passenger side of the car. We know that rice
11 is used to keep heroin and cocaine dry for
12 distribution. So, that aroused their
13 suspicion, which is reasonable. And, then,
14 Officer Pence started to watch him, and his
15 shirt was over his shorts and he kept holding
16 on to his waistline. The Court observed the
17 display by the officer for the record; to me,
18 I gathered it might have been somebody who
19 might have a little pain in his stomach; or it
20 might have been somebody trying to hold up his
21 shorts, and then he jumped up on the car, and
22 I gathered from that -- to explain, you don't
23 jump on both feet -- but he jumped up and sort
24 of sat on the car, and then he jumped down.
25 He was still holding it and fiddling with his

1 waistline.

2 Most everybody knows that weapons
3 are carried in the waistband, and he had on
4 shorts, so it couldn't be a leg holster, and
5 so with that he thought that he might be
6 carrying a weapon. Now he even went up and
7 told the man, I am just going to pat you down
8 for the use of weapons, for his own safety;
9 and before, the defendant was sort of up
10 against the car. He just sort of made a
11 motion, he took his hands and pulled them
12 back, and that is when the packet dropped out
13 of his pants.

14 The Court finds these as a fact,
15 jumping from the car could have jarred the
16 packet and came down, and what it probably
17 did, it got loose and he tried to reinsert it
18 in a secure position and it slipped from his
19 shorts, so it followed chronologically.

20 The Court finds for a fact that the
21 officers were reasonable in making the stop.
22 He didn't have a city decal, and the reason
23 they were checking is because he didn't have
24 an operator's license. And to cite Terry,
25 Pence, who, from his observation as a police

76

1 officer, I think we have to sort of rely on
2 the observation of a police officer. They are
3 out on the street arresting people, and they
4 don't know the occupants of the car, they have
5 fear for their own protection. Those are my
6 thoughts in the matter. If it were like
7 defendant stated, Mr. McLees, I would think
8 that your position was well taken, but the
9 Court, again finds that he was patted down
10 only once, and that was by Officer Pence. none
11 of the other officers seemed to be involved: I
12 overrule the motion to suppress. You may have
13 your objections for reasons assigned. Let the
14 record show those are the finding of facts by
15 the Court.

16 THE COURT: All right.

17 THE CLERK: George Bethea, you stand
18 charged that you, on or about August 13, 1988,
19 did feloniously and unlawfully have in your
20 possession or have under your control a
21 certain drug, to-wit, cocaine, a Schedule II
22 controlled drug, with intent to distribute.
23 How do you plead, guilty or not guilty?

24 DEFENDANT BETHEA: Not guilty.

25 THE CLERK: And on your plea of not

Virginia:

In the Circuit Court of the City of Richmond

Manchester Courthouse

January 9, 1989

The GRAND JURY charges that: on or about August 13, 1988, in the City of Richmond,

George Bethea, Jr.

did feloniously and unlawfully have in his possession or have under his control a certain drug, to-wit, cocaine, a Schedule II controlled drug, with intent to distribute.

Virginia Code Section: 18.2-248

D.A. Pence _____

Witnesses sworn and sent by
the Court to the Grand Jury to
give evidence.

A TRUE BILL.

Lisa R. Purdy Clerk

[Signature]
Foreman

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
MANCHESTER COURTHOUSE

COMMONWEALTH OF VIRGINIA,
PLAINTIFF.

V.

GEORGE BETHEA,
DEFENDANT.

RECEIVED

JAN 20 1989

CRIMINAL NO. COURT MANCHESTER
CLERK'S OFFICE

MOTION TO SUPPRESS

COMES NOW the Defendant, by and through his Undersigned Attorney and MOVES this Court for an ORDER suppressing the evidence seized in the above-styled cause. As Grounds the Defendant says:

1. Defendant was a passenger in a vehicle stopped by Sargeants Paulis and Warren of the Richmond Bureau of Police. The stop was made pursuant to observing that the vehicle had no city decal displayed on its windshield.
2. At the time of the stop, all three (3) occupants of the vehicle were ordered to step outside the vehicle. Backup units were also called and the subjects were detained for at least thirty (30) minutes. Subjects were frisked at this time for weapons.
3. During said detention, Officer Pence, one of the backup units, observed Defendant adjusting his clothing. The officer moved the Defendant from the car and the evidence was seized from the ground near the defendant after it fell.

Defendant respectfully requests that the evidence be suppressed as the detention and seizure of his person was in violation of his federal and state Constitutional rights.

Respectfully Submitted,

GEORGE BETHEA
By Counsel

John H. McLees, Jr.
Public Defender
Counsel for George Bethea
Office of the Public Defender
900 East Main Street
Richmond, Virginia 23219
(804) 225-4330

79

FILED 1/20/89
TESTE: IVA R. PURDY, Clerk

Virginia:

JUDGE WILKINSON

Snead

Nelson

In the Circuit Court of the City of Richmond, Manchester Courthouse

the 30th day of January, 19 89

Commonwealth of Virginia, plaintiff,)
against) Indictment for a
George Bethea, Jr., defendant,) Felony -
Case No. 89-30-F

George Bethea, Jr., who stands indicted for a felony, to-wit: feloniously and unlawfully have in his possession or have under his control a certain drug, to-wit, cocaine, a Schedule II controlled drug, with intent to distribute, this day was led to the bar in the custody of the Sheriff of this City, and also appeared John McLees, Jr., his Attorney at law, and John Rockecharlie, an Assistant Attorney for the Commonwealth.

Whereupon, counsel for the defendant moved the Court to suppress certain evidence seized in this case, and the Court having heard the evidence and argument of counsel, doth overrule said Motion.

Thereupon, the defendant, being arraigned, after consultation with counsel, pleaded not guilty to said charge, and with the consent of the accused, and the concurrence of the Assistant Attorney for the Commonwealth, and of the Court, trial by jury was waived, and the Court having heard the evidence on behalf of the Commonwealth, counsel for the defendant moved the Court to strike the Commonwealth's evidence as to the intent to distribute, which Motion the Court overruled.

Whereupon, the Court having fully heard the evidence and argument of counsel, doth find the defendant guilty as charged in the Indictment, but the fixing and imposition of sentence is delayed until March 10, 1989 at 9:30 a.m, pending a pre-sentence report of the Probation and Parole Officer of this District, and the defendant was ordered remanded to jail.

80

Enter this order, . . .

James M. Wilkerson

Judge

Virginia:

In the Circuit Court of the City of Richmond, Manchester Courthouse

the 10th day of March, 19 89.

Commonwealth of Virginia, plaintiff,)

against)

George Bethea, Jr.,

(D.O.B. 4/28/65)

(Date of Offense: 8/13/88)

defendant,)

Order -

Case No. 89-30-F

George Bethea, Jr., who on January 30, 1989, was found guilty of possessing cocaine, with intent to distribute, but against whom the fixing and imposition of sentence was delayed pending a pre-sentence report by the Probation and Parole Department, this day was led to the bar in the custody of the Sheriff of the City of Richmond, and also appeared John McLees, Jr., his Attorney at law, and John A. Rockecharlie, an Assistant Attorney for the Commonwealth, and Marie A. Donovan, his Probation and Parole Officer.

Whereupon, said report having been filed according to law and the defendant advised as to the contents thereof, and having waived his privilege of cross-examining the Probation Officer thereon, and arguments of counsel having been heard, after allocution of the defendant, it is the judgment of this Court that the defendant do pay and satisfy a fine in the sum of \$100.00 and be confined in the penitentiary for a period of fifteen (15) years, but for reasons appearing proper to the Court, the last seven (7) years are suspended during the defendant's good behavior, and on further condition that he abide by the rules and regulations of the Sheriff of the City of Richmond and/or the Director of the Department of Corrections while incarcerated; that he be placed on supervised probation upon his release; that he enter into and successfully complete a drug treatment program; that he waive his fourth amendment right to search and seizure and submit to any blood/urine analysis his probation officer deems appropriate to determine if he has used any illegal substances; and that he pay the fine and court costs in this proceeding.


It is further Ordered that the Commonwealth do recover of the defendant her fine and costs incident to this proceeding, and that the defendant be remanded to the custody of the Sheriff of this City to be dealt with according to law.

It is further Ordered that the \$801.00 seized at the time of the defendant's arrest and marked as Commonwealth's Exhibit 3, be forfeited to the Commonwealth, and held by the Clerk for a period of thirty days from the date of final judgment and if no appeal is noted then said money shall be applied to the defendant's fine and costs in this case and in Case No. 88-438-F.

The Court certifies that the following drugs were introduced as evidence: Commonwealth Exhibit 2, ten (10) knotted plastic bag corners containing cocaine, 1.625 grams, and a clear plastic baggie containing rice and sixteen (16) small ziplock plastic bags of cocaine, 7.521 grams.

It is further Ordered that said drugs introduced in this case be forfeited to the Commonwealth and held by the Clerk for a period of thirty days from the date of final judgment and if no appeal is noted then said evidence shall be destroyed as provided for by law.

Enter this Order,



Ernest R. Williams Judge
Enr. Law O.B. pg.

RECEIVED

MAR 17 1989

CIRCUIT COURT MANCHESTER
CLERK'S OFFICE

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

COMMONWEALTH OF VIRGINIA,
PLAINTIFF.

V.

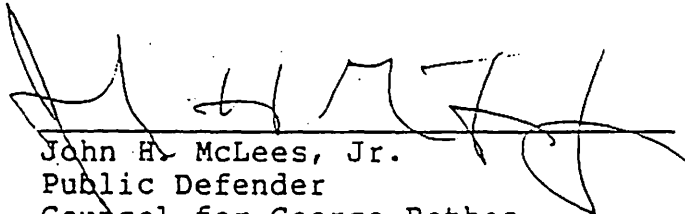
CRIMINAL NO. 89-30-F

GEORGE BETHEA,
DEFENDANT.

NOTICE OF APPEAL

George Bethea, hereby notes his appeal from the judgement of this court entered on March 10, 1989. A transcript of the trial and other incidents of the case will be filed.

GEORGE BETHEA
By Counsel


John H. McLees, Jr.
Public Defender
Counsel for George Bethea
Office of the Public Defender
900 East Main Street
Richmond, Virginia 23219
(804)225-4330

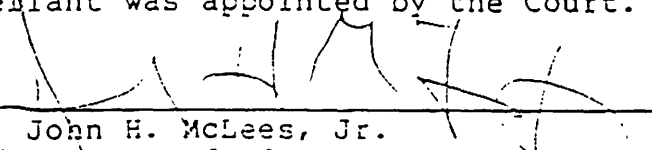
CERTIFICATE OF SERVICE

1. The Appellant is George Bethea, inmate, Richmond City Jail, 1701 Fairfield Way, Richmond, Virginia. Counsel for the Appellant is John H. McLees, Jr., Office of the Public Defender, 900 East Main Street, Suite 801, Richmond, Virginia, 23219, (804) 225-4330. Counsel for the Appellee is Aubrey M. Davis, Commonwealth's Attorney, for the City of Richmond, 800 E. Marshall Street, Richmond, Virginia 23219, (804) 780-8045.

2. On March 7, 1989, copies of the Notice were delivered to opposing counsel and to the Honorable David B. Beach, Clerk of the Supreme Court of Virginia, 100 North Ninth Street, Richmond, Virginia 23219.

3. Counsel for the Appellant was appointed by the Court.

MAR 17 1989


John H. McLees, Jr.
Public Defender

83

By Rebecca J. Jarnett D.C.

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Koontz, Judges Baker, Barrow, Benton,
Coleman, Duff, Moon, Willis, Elder and Bray
Argued at Richmond, Virginia

GEORGE BETHEA, JR.

v. Record No. 0371-89-2
COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE SAM W. COLEMAN III
MAY 26, 1992

UPON REHEARING EN BANC

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND
James B. Wilkinson, Judge

Russell C. Williams, Assistant Public Defender
(David J. Johnson, Public Defender, on brief),
for appellant.

Marla Lynn Graff, Assistant Attorney General
(Mary Sue Terry, Attorney General, on brief),
for appellee.

PUBLISHED

In this appeal, we hold that a police officer's request or directive for a passenger to step out of a lawfully detained vehicle does not constitute an unreasonable seizure in violation of the fourth amendment. A panel of the Court held that the officer illegally seized the passenger by asking or telling him to exit the car and, therefore, the evidence discovered on the passenger after he disembarked was the result of an illegal seizure. See Bethea v. Commonwealth, 12 Va. App. 303, 404 S.E.2d 65 (1991). Upon a rehearing en banc, we affirm the ruling of the trial court that refused to suppress the evidence; accordingly, we uphold Bethea's conviction for possessing cocaine with the intent to distribute in violation of Code § 18.2-248, for which he was sentenced to fifteen years imprisonment with seven years suspended.

A "seizure" for purposes of the fourth amendment occurs when the "circumstances...amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.'" "[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has seized that person."

Moss v. Commonwealth, 7 Va. App. 305, 307, 373 S.E.2d 170, 171-72 (1983) (citations omitted). The fourth amendment does not proscribe all seizures, only those that are "unreasonable."

Terry v. Ohio, 392 U.S. 1, 9 (1968). Whether a seizure is unreasonable is determined by balancing the individual's right to be free from arbitrary government intrusions against society's countervailing interest in preventing or detecting crime and in protecting its law enforcement officers. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). Employing this balancing test, the Supreme Court, in Pennsylvania v. Mimms, 434 U.S. 106 (1977), held that a police officer who ordered the driver of a lawfully detained vehicle to step out of the car acted reasonably, and thus, the seizure was permissible under the fourth amendment. The Court reasoned that the state's "legitimate and weighty" interest in the personal safety of its police officers, who otherwise could be exposed to danger from "assault" and "unobserved movements" if the driver remained in the vehicle, outweighed the "de minimis" intrusion into the driver's privacy interest in being required to step out of the vehicle. Id. at 110-11.

While Mimms involved the driver of the vehicle, the principles upon which the decision is based logically extend to

encompass a passenger in a lawfully detained vehicle. See id. at 122 (Stavens, J., dissenting) ("the court's logic necessarily encompasses the passenger"); see also Rakas v. Illinois, 439 U.S. 128, 155 n.4 (1978) (Powell, J., concurring) ("[T]his Court determined in Pennsylvania v. Mimms, that passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made") (emphasis added); Foley v. Connelie, 435 U.S. 291, 298 (1978); United States v. Taylor, 857 F.2d 210, 214 (4th Cir. 1988).

The state courts which have considered the passenger issue, since the Mimms decision, have consistently held that it is reasonable for a police officer to direct or ask a passenger to exit a vehicle during a traffic stop and is consonant with fourth amendment protections. See State v. Landry, 588 So. 2d 345, 347 (La. 1991) (overruling State v. Williams, 366 So. 2d 1369 (La. 1978)); People v. Martinez, 466 N.W.2d 380, 383-84 (Mich. Ct. App. 1991); Derricott v. State, 578 A.2d 791, 793-94 (Md. Ct. Spec. App. 1990), cert. granted, 584 A.2d 64 (Md. 1991); People v. Melgosa, 753 P.2d 221, 225-26 (Col. 1988) (en banc); State v. Reynolds, 753 S.W.2d 1, 2 (Mo. Ct. App. 1988); People v. Padilla, 183 Cal. Rptr. 97, 98 (Cal. Ct. App. 1982). See also Hatcher v. Commonwealth, ___ Va. App. ___, ___ S.E.2d ___ (1992).

Whether the actions of the officer are reasonable depends on the facts and circumstances of each case. Viewed in the light most favorable to the Commonwealth, Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975), the evidence at trial established that George Bethea, Jr., was a passenger in a

vehicle lawfully stopped by Officers Marvin Paulus and Harry Warren. Officer Paulus, who was new to the force, had a camera and had taken photographs of Bethea from the patrol car. The officers observed the occupants of the vehicle, and, in particular, Bethea, "making faces," "waving his hands," and "waving" at the officers. Because the vehicle did not display a City of Richmond decal on the windshield, the officers decided to stop the vehicle. When Paulus approached the driver, he asked him to step out of the car and asked to see his operator's license, which the driver did not have. While Paulus ran a Department of Motor Vehicles check to see if the driver was licensed, Officer Warren asked Bethea if he would "please step out of the car" because Bethea's antics just prior to the stop had scared him. Bethea exited the vehicle and Warren "took him in position right in front of his door near the hood of the car," where he remained. Officer Duncan Pence arrived on the scene shortly thereafter and observed rice on the front passenger floor of the vehicle, which he knew was used on occasion to keep cocaine or heroin dry. In the meantime, Pence saw Bethea get up on the rear of the automobile while holding the waistline of his shorts, jump off the vehicle, still holding his waistline with his right hand, and turn toward the vehicle so that Pence could not see his hands. Pence directed Bethea to take his hands away from his waist. Pence told Bethea that he was going to "pat him down in the area that he kept moving with his hands" to make sure he did not have a weapon. As Pence pulled Bethea away from the

vehicle, a plastic bag containing rice and several packets of cocaine fell from the left pant leg of Bethea's shorts.

Bethea does not contest the legality of the stop of the vehicle. Also, the Commonwealth concedes that when the police stopped the vehicle and directed Bethea to step outside, Bethea was seized for fourth amendment purposes. Consequently, the sole issue is whether Officer Warren acted unreasonably when he requested that Bethea exit the vehicle. Bethea's liberty interest in remaining free from arbitrary intermeddling by state agents must be balanced against the state's interest supporting the officer's intrusive action.

The state's interest in the personal safety of its police officers is "legitimate and weighty." Mimms, 434 U.S. at 110. By requiring a passenger to exit a vehicle, a police officer who, in a traffic stop, is involved with unknown individuals, is able to establish "a face-to-face confrontation [which] diminishes the possibility, otherwise substantial, that [the occupants of the vehicle] can make unobserved movements [which], in turn, reduces the likelihood that the officer will be the victim of an assault." Id. (footnote omitted). We acknowledge that intrusion on a passenger's personal liberty is different than the intrusion on the driver's personal liberty, which was at issue in Mimms. Because the passenger has broken no law, he or she reasonably expects the police officers to deal solely with the driver. See 2 W. LaFare, Search and Seizure § 3.2(h), at 469 (2d ed. 1987). Nevertheless, the intrusion on a passenger's personal liberty is de minimis. The intrusion involves no touching, frisking or

physical intrusion of the person; it is of short duration and the safety interest to be protected is "legitimate and weighty." To comply with the request, the passenger need only to exit the vehicle, an act that amounts to no more than a mere inconvenience. Like the driver, the passenger "is being asked to expose to view very little more of his person than is already exposed." Mimms, 434 U.S. at 111. When the state's interest in allowing police officers to take measures for their protection and safety is weighed against the de minimis intrusion on the passenger's personal liberty, the former prevails. Consequently, Officer Warren acted reasonably in requesting that Bethea exit the vehicle and, thus, did not violate his fourth amendment rights.

Accordingly, we affirm Bethea's conviction.

Affirmed.

BENTON, J., with whom Koontz, C.J., and Barrow, J., join, dissenting.

The majority's reliance on Pennsylvania v. Mimms, 434 U.S. 106 (1977) to support its contention that the fourth amendment allows a police officer to order a passenger from an automobile and detain the passenger during a routine traffic stop is misplaced. "[A]bsent some articulable suspicion vis-a-vis the passenger, the Mimms rationale does not authorize removal of the passenger from the vehicle." State v. Becker, 458 N.W.2d 604, 607 (Iowa 1990). See also Heller v. State, 576 So.2d 398 (Fla. Ct. App. 1991); State v. Schlosser, 774 P.2d 1132, 1135, n.3 (Utah 1989); Johnson v. State, 601 S.W.2d 326, 329 (Tenn. Ct. App. 1980).

The Mimms opinion "hold[s] only that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." 434 U.S. at 111 n.6 (emphasis added). Indeed, the Court noted that its decision focused on the driver rather than "occupants" in general. Id. at 110 n.5. Underlying the Court's reasoning is the premise that the driver was lawfully detained. Id. at 109. That premise is reinforced in New York v. Class, 475 U.S. 106 (1986), where the Supreme Court, citing Mimms, stated that since the officers in Mimms "had personally observed the seized individual in the commission of a traffic offense before requesting that he exit his vehicle," 475 U.S. at 117, that observation allowed the balance between governmental

interests and governmental intrusion to "tip in favor of the legality of the governmental intrusion." Id. On the other hand, a mere passenger in a vehicle stopped for a routine traffic violation is not the person who committed the traffic offense. At a minimum, the officer must have a reasonable articulable suspicion of personal danger to order the passenger out of the vehicle. See Johnson, 601 S.W.2d at 328. The police officer in this case did not articulate such a suspicion and this record contains no facts which would support such a suspicion.

The majority relies on cases that appear to comport with its determination that Mimms applies equally to drivers and passengers. However, for the most part, the passages relied on by the majority are dicta, see Foley v. Connelie, 435 U.S. 291, 298 (1978); Derricott v. Maryland, 578 A.2d 791, 793-94 (Md. App. 1990); or found in dicta in a concurring opinion, see Rakas v. Illinois, 439 U.S. 128, 155 n.4 (1978) (Powell, J., concurring); or made without analysis of the different privacy interests involved, see U.S. v. Taylor, 857 F.2d 210, 214 (4th Cir. 1988); People v. Melgosa, 753 P.2d 221 (Colo. 1988); State v. Reynolds, 753 S.W.2d 1, 2 (Mo. App. 1988). Nothing in Mimms indicates that the passenger shares with the driver the same lessened degree of privacy rights when the driver is stopped for a traffic violation.

The fact that the driver was [committing a traffic violation] authorizes the officer to stop the vehicle in which the passenger is riding. The resulting intrusion on the passenger which flows from the initial stop is an unavoidable consequence of action justifiably taken against the driver. Further intrusion on the passenger is not

justified, however, unless some articulable suspicion exists concerning a violation of law by that person, or unless further interference with the passenger is required to facilitate a lawful arrest of another person or lawful search of the vehicle.

State v. Becker, 458 N.W.2d at 607.

The record proves that the two City of Richmond police officers were sitting in an unmarked automobile taking "pictures of people for identification" when Bethea began making faces at Officer Warren, who had the camera. After Warren observed Bethea's actions, Warren then:

told Sergeant Paulus to pull back behind him a little bit. As we were pulling behind him, I checked his car. I wanted to see if there was anything suspicious. First thing I observed was the lack of a city sticker when we got back in the back of his car. I told Sergeant Paulus let's go ahead and pull him.

After the automobile stopped, Paulus walked to the driver's window and asked the driver to get out of the automobile and stand on the sidewalk. Paulus was standing in the street while talking to the driver. Paulus testified that he asked the driver to exit the automobile in order that "he could get out of traffic" while talking to the driver. When Paulus learned that the driver did not have an operator's license with him, Paulus "ran [a] check through the Department of Motor Vehicles to be sure that he did have a driver's license." The dispatcher informed Paulus that the driver had a valid operator's license.

Warren positioned himself on the automobile's passenger side. When he approached the automobile, Bethea did not say anything, make any threats, or resist. Warren described the scene:

I looked at Mr. Bethea first. I glanced into the car. I had -- I didn't know at that time if there was a weapon or what in the car. Couple of seconds later I asked him, would you please step out of the car. I took him in position right in front of his door near the hood of the car. There was a passenger in the rear seat, so at this time I asked the passenger in the rear seat to step out of the vehicle.

Warren did not frisk either passenger after they exited the automobile. As they were standing by the automobile, Officer Pence arrived at the scene. Pence testified that when he looked in the automobile, he saw rice in the front passenger seat and on the floor board. He testified "that rice is sometimes used to keep heroin and cocaine dry."

Pence noticed that Bethea was holding his waistline and appeared to be adjusting something as he jumped onto the trunk of the automobile. Pence asked Bethea to move his hands within view and pulled Bethea away from the automobile to frisk him. At that moment, a bag containing cocaine fell from Bethea's shorts. After all three of the occupants were searched, Bethea was arrested. Pence then gave the driver a citation for not having a city license affixed to the automobile and allowed the driver and other passenger to depart.

I cannot agree with the Commonwealth's contention that Warren was justified in ordering Bethea out of the automobile for the officer's protection. When Warren approached the automobile, Bethea was sitting calmly in the front seat, making no threatening statements or actions. Warren made no inquiry of Bethea regarding the face and hand gestures that he observed. Paulus observed the same conduct as Warren and testified only

that Bethea "was waving and making faces." There is no evidence of furtive gestures, belligerence, or uncooperative behavior by Bethea or the other passenger. Moreover, Warren did not testify that there was anything to indicate that Bethea may have been concealing a gun, knife, club, or other dangerous weapon. See Simmons v. Commonwealth, 217 Va. 552, 556, 231 S.E.2d 218, 220-21 (1977) (where the investigating officer had reason to believe the suspected burglar was armed and saw the suspect's jacket sagging in the front, "the officer had reasonable cause to believe that defendant might be carrying a concealed weapon and the search was warranted"). Although Warren asked Bethea and the third man to exit the automobile because he "felt more comfortable with both of them standing," he did not frisk either person.

Even though Warren testified that he was frightened by Bethea's behavior, I do not believe that this fear, without more, constitutes a sufficient basis to require Bethea to step from the car. The trial judge's observation that persons who make faces at police officers bear watching is too generalized a reason to conclude that Warren's subjective apprehension was reasonable. In Cooper v. State, 584 So. 2d 1124 (Fla. Ct. App. 1991), a Florida case with similar facts, the appellate court found the evidence did not support the officer's claim he feared for his safety. There, a passenger seated in the back seat of an automobile stopped during a routine traffic check had been "'bouncing back and forth from the front to the back.'" Id. at 1125. Although the arresting officer had no reason to think the passenger might possess a weapon, he had the passenger step out

of the vehicle. The appellate court, while noting that the officer testified he feared for his safety, reversed the passenger's conviction for possession of cocaine as a result of the traffic stop, explaining:

[I]t is incumbent upon a reviewing court to examine the facts -- aside from such statement -- in the light of a citizen's constitutional protection. We are less likely to lose such protection by cataclysm as we are by erosion in a case by case progression.

Id. at 1125-26. Clearly, the facts presented to this Court do not indicate that the officer could have reasonably feared for his safety.

The intrusion on Bethea's rights was not de minimus. The majority, without discussion, characterizes the activity as "no more than a mere inconvenience" to the passenger. But, as Justice Stevens points out in his dissent in Mimms, the millions of traffic stops occurring each year are not fungible:

Nor is it universally true that the [occupant's] interest in remaining in the car is negligible. A woman stopped at night may fear for her own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority.

Mimms at 120-21 (Stevens, J., dissenting).

Leaving to the unfettered discretion of the police officer the decision whether a passenger must exit a vehicle exposes the authority to the precise abuse anticipated by Justice Stevens in his dissent to Mimms.

Some citizens will be subjected to this minor indignity while others -- perhaps those with more expensive cars, or different bumper stickers, or different -- colored skin -- may escape it entirely.

Mimms at 122 (Stevens, J., dissenting). The majority gives only lip service to the potential for abuse of authority by qualifying its holding to provide that "[w]hether the actions of the officer are reasonable depends on the facts and circumstances of each case." It is apparent from the majority's analysis that a police officer's unsupported subjective belief that he or she may be in danger during the course of a routine traffic stop will validate an order such as that given in this case. The majority simply leaves open an empty promise that a passenger's expectation of privacy might, under some undefined set of circumstances, outweigh society's interest in the safety of its officers and the enforcement of its laws.

Finally, Warren did not act upon a reasonable suspicion that Bethea had committed, was committing, was about to commit a felony or criminally possessed a concealed weapon. He justifies his exercise of authority to order Bethea out of the vehicle on the antics that Bethea engaged in while he was trying to take Bethea's photograph during an unspecified police operations designed to photograph citizens in the neighborhood. Warren improperly elevated his intrusion upon Bethea beyond the incidental restraint imposed by the traffic stop.¹ Indeed, by

¹I do not address whether the police would be warranted in removing the passenger from the automobile if necessary to effectuate a custodial arrest of the driver or accomplish a search of the automobile incident to an arrest under New York v. Belton, 453 U.S. 454 (1980). The driver's failure to display a

permitting Warren to order the removal of a passenger for the most routine of traffic stops the majority ignores the implication of the Supreme Court's own disclaimer in Mimms that "we do not hold today that 'whenever an officer has an occasion to speak with the driver of a vehicle, [the officer] may also order the driver out of the car.'" 434 U.S. at 111 n.6. One of the most fundamental fourth amendment principles requires that, "in justifying a particular intrusion, the 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." Lansdown v. Commonwealth, 226 Va. 204, 209, 308 S.E.2d 106, 110 (1983) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1963)), cert. denied, 465 U.S. 1104 (1984). The facts do not create a reasonable suspicion that Bethea had committed, was committing, or was about to commit a felony.

In addition, "the officer's action [must be] reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20. If the officer's testimony is believed, Bethea's antics were not the justification for the police stopping the automobile. The occupants of the automobile were not suspects of any reported crime. See Harris v. Commonwealth, 9 Va. App. 355, 388 S.E.2d 280 (1990), rev'd on other grounds, 241 Va. 146, 400 S.E.2d 191

city automobile license was a violation of City of Richmond Code § 28-333 (1979). This violation can result, at most, in a \$15 fine and is not designated by ordinance to be a misdemeanor. City of Richmond Code § 28-334; see also Code § 46.2-752. Accordingly, this case does not involve a search incident to arrest based on a misdemeanor committed in an officer's presence.

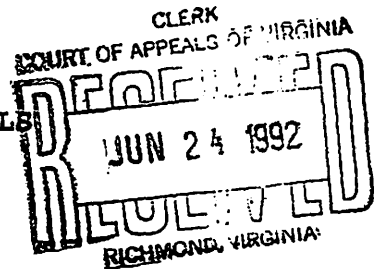
(1991). The officers stopped the automobile because it did not display in its front window a city decal. There is no suggestion that the driver was considered to be a threat to the officers' safety. Paulus testified that he asked the driver to exit the automobile and stand on the sidewalk only, in order to give Paulus protection from the traffic flow.

"In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference." Brown v. Texas, 443 U.S. 47, 52 (1979). This principle holds true for passengers in cars stopped for routine traffic infractions. Accord Becker, 458 N.W.2d at 607. Moreover, a citizen's right to privacy is not subject to intrusion whenever a police officer or a judge deems the intrusion to be "no more than a mere inconvenience." Bethea's right to personal security and privacy shielded him from the intrusion of being ordered out of the car. "[E]ach individual is 'clothed with constitutional protection against an unreasonable ... seizure,' which may not be denied by the individual's 'mere propinquity to others independently suspected of criminal activity.'" State v. Damm, 787 P.2d 1185, 1189 (Kan. 1990) (quoting Ybarra v. Illinois, 444 U.S. 85, 91 (1979)). Indeed, the officer did more than order Bethea to exit the car. The officer "took him in position" at the front of the automobile and further exacerbated the intrusion by restricting Bethea's movement to the position he was required to assume at the side of the automobile.

Obviously, the Commonwealth has a legitimate and weighty interest in the personal safety of police officers who become involved in traffic stops. This case, however, does not involve a reasonable suspicion of danger to the officer's personal safety. Rather, the majority sanctions an intrusive police practice that allows a passenger's "reasonable expectation of privacy [to be] subject to arbitrary invasion solely at the unfettered discretion of officers in the field." Brown v. Texas, 443 U.S. 47, 51 (1979). "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" Davis v. Mississippi, 394 U.S. 721, 726-27 (1969). Because Mimms allows officers to require only drivers to exit from a vehicle in a routine traffic stop and because there was an absence of reasonable suspicion of criminal activity or reasonable suspicion of personal danger to the officer justifying the order that Bethea exit the vehicle, I would reverse the conviction. The only evidence supporting the conviction was a product of the unlawful detention of Bethea and should have been suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

V I R G I N I A :

IN THE COURT OF APPEALS



GEORGE BETHEA, JR.

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

Record No. 0371-89-2

NOTICE OF APPEAL

George Bethea, Jr., by counsel, notes his appeal from the judgment of the Court of Appeals of Virginia entered herein on 26 May 1992. A transcript and other incidents of trial were filed in the Court of Appeals.

GEORGE BETHEA, JR.

By Russell C. Williams
Counsel

Russell C. Williams
Assistant Public Defender

Office of the Public Defender
700 Centre -- 700 East Franklin Street
7th Street Tower -- 3rd Floor
Richmond, Virginia 23219
(804) 225-4330

CERTIFICATE OF SERVICE

On 24 June 1992 a copy of this notice was mailed to the offices of opposing counsel.

Russell C. Williams