VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 14th day of May, 2020.

Present: All the Justices

Derrick Lyndon Wooten, Appellant,

against Record No. 190805
Court of Appeals No. 1617-18-1

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no reversible error in the judgment of the Court of Appeals.

In January 2016, Detectives K.B. Nichol and Danielle Hollandsworth observed Derrick Lyndon Wooten make an illegal U-turn on Poplar Avenue in the City of Newport News. The detectives initiated a traffic stop. As they approached the vehicle, Detective Nichol saw Wooten moving his right shoulder and elbow up and down toward the center console area but could not ascertain the purpose of these motions. When Detective Nichol reached the driver's window, he saw an large, opaque, orange pill bottle in the driver's seat touching Wooten's right thigh. He saw that the bottle had no prescription label. He ascertained Wooten's identity and subsequently learned that his license was suspended or revoked.

Detective Nichol told Wooten to "really slowly, with your right hand, hand me that pill bottle." Wooten complied, telling Detective Nichol "it's not mine" before placing the bottle in the detective's hand. It contained a number of white pills marked "512." Based on this description and information from the poison control center, Detective Hollandsworth promptly identified the pills as a prescription medication containing oxycodone and acetaminophen, also known as Percocet, a Schedule II narcotic.

The detectives ordered Wooten and his passenger out of the vehicle and arrested them. While searching Wooten, Detective Nichol discovered two cellular phones, $161 in cash, two

large bags containing loose crack cocaine, one bag containing 15 individually wrapped rocks of crack cocaine, and 40 bags of heroin.

Wooten was subsequently indicted on one count each of possessing cocaine, heroin, and oxycodone with intent to distribute, in violation of Code § 18.2-248. Wooten filed a motion to suppress the evidence arguing that Detective Nichol lacked adequate suspicion to conduct a warrantless search of the bottle. At a hearing on the motion, he argued that Detective Nichol's demand for the bottle constituted a seizure, and that it was unlawful because there was no probable cause to justify it. He argued that "the ultimate question is can [Detective Nichol] say hand me over that pill bottle, in other words, do a seizure of the pill bottle and then search it . . . . [M]y [argument] is that asking [for] the pill bottle or the seizure of the pill bottle was unconstitutional, then of course, the search, that's all fruits of the poisonous tree." The circuit court denied the motion.

Following a bench trial, the court convicted Wooten of all three counts. It sentenced him to a term of twenty years' imprisonment with seventeen years and six months suspended on the cocaine charge, forty years' imprisonment with thirty-seven years and six months suspended on the heroin charge, and ten years imprisonment with all time suspended on the oxycodone charge.

Wooten appealed to the Court of Appeals, which denied his petition by unpublished, per curiam order. Wooten appeals.

Wooten asserts that the Court of Appeals erred by denying his petition for appeal because the circuit erred by denying his motion to suppress. He argues that a warrantless search is presumptively unconstitutional unless subject to an exception to the warrant requirement. He argues that the automobile exception permits a warrantless search only if an officer has probable cause to believe that the vehicle contains evidence of a crime and there are exigent circumstances. He argues that an officer may also search a vehicle incident to an occupant's arrest, but only when the suspect is within reach of the vehicle or if the officer has reason to believe that the vehicle contains evidence relevant to the offense for which the suspect was arrested.

According to Wooten, neither of these exceptions apply under the facts of this case. When Wooten was arrested, he was handcuffed and led to the back of the car, so its interior was not within his reach. Because the only offense for which Detective Nichol at that time had valid

probable cause to arrest Wooten was driving with a suspended or revoked license, the car could contain no evidence related to the offense for which he was arrested. Although the bottle was in plain view, it had no immediately apparent incriminating character establishing the probable cause required to search it. Wooten concludes that Detective Nichol therefore had neither reasonable, articulable suspicion nor probable cause to demand that Wooten give the bottle to him.

Wooten argues that this case is analogous to *Cost v. Commonwealth*, 275 Va. 246 (2008). In that case, an officer approached a passenger sitting in a vehicle and observed him reaching for his pocket. When the passenger disobeyed an instruction to stop reaching for his pocket, the officer ordered him out and patted him down. The officer felt capsules in the passenger's pocket and removed them because based on his training and experience, he said, he knew that they contained heroin—which turned out to be true. This Court subsequently reversed the ensuing conviction, however, because many lawful medications are packaged in capsule form, so the incriminating character of the capsules in Cost's pocket could not have been immediately apparent during the pat down.

Wooten argues that unlike the defendant in *Mavin v. Commonwealth*, 31 Va. App. 161 (1999), cited by the Commonwealth, he did not attempt to conceal the bottle and deny knowledge of its existence after the officer had already seen it. Although Detective Nichol described seeing furtive movements as he approached the car, he did not associate those movements with the bottle. Therefore, the movements could not contribute to establishing probable cause that it was or contained contraband.

> Appellate review of a trial court's denial of a defendant's motion to suppress is de novo when the defendant claims that the evidence sought to be suppressed was seized in violation of the Fourth Amendment. In performing this review, we consider the evidence in the light most favorable to the Commonwealth and accord [it] the benefit of all inferences fairly deducible from the evidence. The defendant bears the burden of establishing that the denial of his suppression motion was reversible error.

Glenn v. Commonwealth, 275 Va. 123, 130 (2008) (internal citations and quotation marks omitted). This includes the burden of establishing an expectation of privacy in the item searched or seized. *Delong v. Commonwealth*, 234 Va. 357, 363 (1987).

The Court concludes that Wooten failed to satisfy his burden of proving an expectation of privacy in the bottle to challenge its search or its seizure. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (footnotes omitted).

As the video of Wooten's encounter with Detective Nichol establishes, Wooten denied a possessory interest and expectation of privacy in the bottle before he surrendered it to the detective. *United States v. Clark*, 891 F.2d 501, 506 (4th Cir. 1989) (holding that "denial of ownership" of a container "precludes [a defendant] from arguing now that he had a reasonable expectation of privacy in [it] that would give rise to Fourth Amendment protection"). When a suspect denies ownership of a container, courts do not "require law enforcement officials to make arcane inquiries into the possibility that [he or she] may have had an expectation of privacy in [it]. Instead, . . . 'the agents could justifiably rely on [such] statements to think they would not violate [the suspect's] rights.'" *Id*. (quoting *United States v. Washington*, 677 F.2d 394, 396 (4th Cir. 1982)); *see also United States v. Givens*, 733 F.2d 339, 341 (4th Cir. 1984) (holding defendants have no expectation of privacy in a package addressed to a third party).

For these reasons, this Court affirms the judgment of the Court of Appeals. This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of the City of Newport News.

JUSTICE POWELL, dissenting.

Respectfully, I disagree with the majority's decision because it leaves out the important fact that Wooten was ordered by Detective Nichol to hand him the pill bottle. The sequencing of events is important. Wooten was stopped for making an illegal u-turn. While running his license and registration, Detective Nichol discovered that Wooten was driving on a suspended or revoked license. Detective Nichol returned to the driver's side of the car and said, "Mr. Wooten, really slowly with your right hand, hand me that pill bottle." Faced with a Hobson's choice between refusing to comply with an express directive by the officer or handing the pill bottle

over with the denial of ownership, Wooten complied with the demand for the pill bottle. His denial of ownership was nothing more than a desperate attempt to avoid the consequences of the illegality of the pill bottle's contents.

Under these circumstances, when faced with a direct order from a police officer, I do not believe that Wooten voluntarily abandoned the pill bottle and his expectation of privacy in the contents of that bottle. "[A]n individual who relinquishes possession of an object when ordered to do so by the police does not 'abandon [that object] and forego his expectation of privacy' in it." *Al-Karrien v. Commonwealth*, 38 Va. App. 35, 45 (2002) (quoting *State v. McBee*, 593 N.E.2d 574, 581 (Ill. App. Ct. 1992)).

I would reverse the judgment of the trial court with regard to the finding of abandonment. Because the Court of Appeals did not address the argument regarding plain view, I would remand it.

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Teste:

Clerk