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2021 - 2022 VIRGINIA LAW ENFORCEMENT APPELLATE UPDATE

MASTER LIST

Cases from the Courts of Appeals
Summary of Cases by Topic
June 2021 – May 2022
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CRIMINAL PROCEDURE

Bail

Virginia Court of Appeals
Published

Keene v. Commonwealth: April 19, 2022

Tazewell: Defendant appeals the denial of Bond.

Facts: The defendant was charged with abduction of his estranged wife, but the trial court released him on bond and imposed a protective order. The defendant had no prior criminal history and had been employed. The defendant then entered the victim's residence while on bond and threatened to kill her, later admitting to a friend that he had planned to kill the victim. The trial court initially held the defendant without bond, but then released the defendant again on a medical furlough. However, the defendant again violated bond and the trial court finally revoked the defendant's bond.

The defendant requested bond again, but this time, the trial court denied the defendant bond.

Held: Affirmed. While the Court acknowledged that the presumption against bond was abrogated in the new statute, the Court repeated that, for the trial court to deny bond it only needed to find "probable cause" that the defendant's liberty would pose a danger to himself or others; it was not required to make a determination based on proof beyond a reasonable doubt or even a preponderance of the evidence under § 19.2-120(A).

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0843213.pdf

Palmer v. Commonwealth: February 8, 2022

Gloucester: Defendant appeals the denial of pre-trial bail.

Facts: The defendant requested bail pending trial on charges of trespassing and felony drug possession, but the circuit court denied his request. In October, the Court of Appeals awarded the defendant an appeal from the circuit court's judgment. In November, the defendant waived indictment and pleaded guilty to both charges. In December, the circuit court convicted the defendant of the charges and continued the matter for sentencing.

Held: Appeal dismissed. In a *per curiam* opinion, the Court held that oral argument was unnecessary because "the appeal is wholly without merit." The Court pointed out that the United States Supreme Court held in *Murphy v. Hunt* that a criminal defendant's request for pre-trial bail becomes moot when he is convicted of the charges because even a favorable decision would not entitle him to bail. In this case, the Court found that the defendant's request for pre-trial bail became moot when the circuit court convicted him of the charged offenses because, even if the Court agreed with him on appeal, the Court could not afford him any relief from the challenged order.

Judge Raphael wrote separately because he did not believe that *Murphy* alone explained why this appeal was moot. He noted that release pending trial has been treated very differently throughout history compared to release after conviction. He pointed out that, in 1785, the Virginia General Assembly provided that "[no] person shall be bailed after conviction of a felony." More than a century later, the United States Supreme Court held in *McKane v. Durston* that there is no federal constitutional right to release pending appeal from a state criminal conviction. However, it was not until 1916 that the General Assembly first enabled defendants after conviction to seek bail pending appeal.

Judge Raphael looked at the current provision governing release after conviction, § 19.2-319. He cautioned that, unlike an appeal under § 19.2-124 seeking pretrial release—which is necessarily mooted after trial and conviction—a post-conviction appeal seeking release under § 19.2-319 is not mooted unless the conviction and sentence are affirmed on appeal. However, in this case, because the defendant's appeal only sought pretrial release, Judge Raphael agreed that the defendant's conviction required that this appeal be dismissed as moot.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0977211.pdf

Commonwealth v. Davis: November 22, 2021

Richmond: The Commonwealth appeals the granting of bond for a Presumption Offense.

Facts: The defendant, who has a previous conviction for a violent felony, possessed a firearm. The defendant is a documented street gang member whose previous conviction was for malicious wounding and brandishing a firearm after he shot a young man in the back five times, resulting in serious, significant, and life-threatening injuries. After his release from his sentence on that offense, he ran from the police, and appeared to discard a firearm. Later that same day, the defendant posted a video on social media showing himself with a handgun on his bed, and a caption that read, 'You-all will never catch me with s&%t.'" Subsequently, the defendant posted numerous images on social media of himself with firearms, some with extended magazines, and offering firearms for sale. In this case, police arrested him after finding a concealed handgun on his person.

The defendant's case began at preliminary hearing in October 2019 but has been continued repeatedly at the defendant's request. In April 2021, the defendant sought bond. Although the trial court initially did not agree to grant a bond, after learning that the defendant had been incarcerated for

twenty months, the trial court immediately stated that it would grant the defendant "a bond with strict conditions," finding that he already had been incarcerated for "a long time."

Held: Reversed. The Court held that the circuit court erred both in failing to articulate the reasons for its ruling and in failing to state whether the presumption against bail has been rebutted. Because the record did not establish that the trial court weighed all the § 19.2-120(E) factors, and because the court gave improper weight to the length of pre-trial incarceration, the Court reversed its order granting the defendant pre-trial bail.

The Court noted that, in this case, § 18.2-308.2, "which relates to a firearm and provides for a mandatory minimum sentence," prescribes a presumption against bond. The Court then pointed out that, under § 19.2-120(E), the length of the defendant's pre-trial incarceration, protracted due to his own motions, is not relevant to whether he will appear for trial or whether "[h]is liberty will constitute an unreasonable danger to himself or the public." Thus, the Court concluded that the passage of time awaiting trial was an improper factor to which the circuit court gave significant weight in determining whether to grant the defendant's motion for bail.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0368212.pdf

Virginia Court of Appeals
Unpublished

Wiggins v. Commonwealth: May 31, 2022

Norfolk: Defendant appeals the denial of post-trial bail after his convictions for Aggravated Child Sexual Battery.

Facts: The defendant repeatedly sexually assaulted a child between the age of 7 to 9 years old. The trial court convicted the defendant of three counts of aggravated sexual battery of a victim under the age of thirteen, in violation of § 18.2-67.3. The trial court sentenced the defendant to fifteen years of incarceration with six years suspended, for a total active sentence of nine years.

At sentencing, the trial court found that the defendant lived just minutes down the road from the child's residence with her father. The psychosexual evaluation report established that the defendant had an average chance of repeating the sexually violent crime of which he was convicted and that he met the criteria for a pedophilia diagnosis.

Following sentencing, the defendant requested that the trial court release him on post-conviction bail pending appeal, but the trial court denied his motion.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in denying bail on the grounds that the defendant's liberty would constitute an unreasonable danger to the public,

The Court noted that it has held that § 19.2-319 requires the trial court judge to consider questions essential to all bail decisions, which are whether the defendant will appear at such other time and place as may be directed and whether the defendant's liberty will constitute an unreasonable danger to himself and the public. The Court also noted that "post-conviction bail is generally less liberally accorded than in the pretrial stage."

The Court examined § 19.2-319, the statute governing post-conviction bail, but did not address whether the defendant's offense carried a presumption against bail under that statute.

Tags: Bail – Post-Trial

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0300211.pdf

Billingsley v. Commonwealth: March 22, 2022

Fauquier: Defendant appeals the denial of bond for Robbery, Armed Burglary, and related charges.

Facts: The defendant, a 17-year-old, sought bail after roughly a year of pre-trial detention on charges of on three counts of armed robbery, armed burglary with intent to commit robbery, conspiracy to commit robbery, and use of a firearm. The robbery is on video, and the defendant posted the video on social media afterwards, along with another video of him shooting out the window. He called the video "ducking from the Marshalls." At the preliminary hearing, a co-defendant became uncooperative and the J/Dr Court did not find probable cause. The Commonwealth obtained a direct indictment thereafter.

The defendant, who is a member of a violent criminal street gang, also has pending charges in Prince William County for possession of a firearm by a juvenile, brandishing a firearm, possession of marijuana, carrying a concealed weapon, animal abuse, and reckless handling of a firearm, regarding an incident where the defendant had brandished a firearm at police officers. The defendant also has pending charges for violation of a court order, felony unauthorized use, and grand larceny in Prince William County, and pending charges in Fairfax County for possession of a firearm while in possession of a Schedule I or II controlled substance and distribution of a Schedule I or II controlled substance, as well as possibly another brandishing charge.

The trial court denied the defendant's motion for bond.

Held: Affirmed. The Court reviewed the factors under § 19.2-120(B) and agreed that there was probable cause to believe that the defendant's liberty would constitute an unreasonable danger to the public. While there was no evidence proffered regarding the underlying circumstances of the charged offenses, the Court noted that the defendant was charged with multiple felonies that were violent in nature—three counts of armed robbery, armed burglary with intent to commit robbery, conspiracy to commit robbery, and use of a firearm in the commission of a felony. The Court also pointed out that the

trial court was also required to consider whether a firearm was alleged to have been used in the commission of the offense, per § 19.2-120(B)(ii).

Judge Chaney dissented, complaining that the trial court did not consider all the factors under § 19.2-120(B) on the record.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0857214.pdf

Commonwealth v. Watson: June 8, 2021

Fairfax: The Commonwealth appeals the granting of bail in a Robbery case.

Facts: In March 2019, the Commonwealth indicted the defendant for a November 2014 robbery and use of a firearm in the commission of that robbery. The defendant moved for bail in October 2020. At that time, the defendant had been convicted of robbery in 1995 and of felony fleeing in 2013, was on probation in the District of Columbia for unlawful possession of a firearm in 2017, and had already been denied bail in March 2020. The defendant proffered his aunt's out-of-state address in Washington, D.C., as the place he would reside while released on bail. The trial court expressed the concern for continuances necessitated by the Commonwealth's election to use Cybergenetics as a witness and granted the defendant bail.

Held: Reversed. The Court first pointed out that the defendant's robbery charge is defined as an act of violence in § 19.2-297.1 and carries a presumption against bail. The Court found that, despite the significant evidence favoring the denial of bail, the lack of evidence favoring release on bail, and the presumption itself, the trial court did not articulate factual findings in support of its conclusion that the defendant had borne his burden of persuasion that he was neither a flight risk nor a danger to the public and should be released on bail.

The Court complained that the trial court stated no factual findings concerning the factors the court was required to consider—the nature and circumstances of the armed robbery, the danger the defendant posed to the community, and his likelihood of flight. The Court pointed out that the defendant failed to tell the court the quality of his relationship with his aunt, what commitment the aunt was providing to house him, or what community ties he had in the Commonwealth or in Washington.

The Court also found that the trial court's concern for continuances necessitated by the Commonwealth's election to use Cybergenetics as a witness was an improper factor to consider in determining if the presumption had been rebutted. The Court wrote: "A delay in trial simply has no bearing on a defendant's danger to the community or flight risk."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1284204.pdf

Competency

Virginia Court of Appeals
Published

Clark v. Commonwealth: November 22, 2021

Chesapeake: Defendant appeals his convictions for Possession with Intent and related Firearm charges on Failure to Order a Competency Evaluation.

Facts: The defendant, a convicted felon, possessed a controlled substance with intent to distribute, along with a firearm. Prior to trial, defense counsel moved for a competency evaluation. At the hearing, defense counsel represented her experiences with the defendant as his counsel and her personal knowledge about his condition. She pointed to the letters and described the defendant's paranoia and schizophrenia diagnoses to corroborate her concern that the defendant's mental health problems were affecting his case. She proffered that the defendant was currently receiving Seroquel, a medication used to treat certain mental illnesses, at the jail. Counsel represented that the defendant was "having trouble differentiating between fantasy and reality" and she could not "get him to stay in reality long enough to help [her] or to understand what [was] going on."

In response, the Commonwealth played jail calls where the defendant's girlfriend told him he was likely to spend only a year in psychiatric treatment rather than prison due to his mental health history. Specifically, she said, "you don't have to play crazy because you're already on paper for that." The trial court repeatedly asked defense counsel to present evidence of the defendant's inability to understand the proceedings or assist counsel, dismissing counsel's representations as "conclusions" or "opinion." The trial court denied the motion.

Held: Reversed. The Court held that the trial court abused its discretion because it explicitly failed to consider counsel's representations, a relevant factor that should have been given significant weight. By dismissing defense counsel's representations, the Court found that the trial court contravened § 19.2-169.1(A), which specifically references counsel's representations as a basis for probable cause. The Court repeated that case law states that a trial court should strongly consider counsel's representations, and a court abuses its discretion when it fails to consider a relevant factor with significant weight.

The Court cautioned that past or present mental illness alone does not necessarily provide probable cause. Instead, mental incompetence requires that a defendant's bizarre behavior or mental illness interfere with his present capacity to participate in and understand proceedings at the time of trial.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0017211.pdf

Conflict of Interest

Brown v. Commonwealth: May 10, 2022

Charles City: Defendant appeals his conviction for Abduction on Refusal to Disqualify a Prosecutor and sufficiency of the evidence.

Facts: The defendant, angry that a county employee had just driven onto his property, found her vehicle nearby and blocked it from pulling away by trapping her with his own car. He angrily confronted her and demanded "I'm not going to move the car. You're going to stay here and you're going to tell me what you're doing here." The victim tried to contact the police, but because they were in an isolated, rural area, she could not get a cellphone signal.

Meanwhile, however, the defendant also called the police, asked them to come to the scene to resolve the issue, and told the 911 dispatcher that he "got [the victim] blocked in." During this break, the victim was able to drive through a drainage ditch and escape.

Prior to trial, the defendant moved to disqualify the entire Commonwealth's Attorney's Office from prosecuting the case, alleging a financial conflict of interest between the victim and that office. In his motion, the defendant cited the fact that the County Administrator's office—where the victim worked—created the budget for the Commonwealth's Attorney's office. The Commonwealth's Attorney represented that even though the County Administrator's office prepared the budget for his office, it was the County Board of Supervisors who approved the budget, not the County Administrator's office. The victim also testified that even though she worked in the County Administrator's office, she had no hand in creating or working with the budget for the Commonwealth's Attorney's Office. The trial court denied the motion.

At trial, the defendant argued that he lawfully detained the victim, because she was a government agent who intruded onto his private property and searched for violations without a warrant in violation of § 19.2-59.

Held: Affirmed. The Court noted that by his own language and actions, the trial court could conclude the defendant intended to restrict the victim's freedom of movement. The Court also noted that it was not relevant that the victim was able to escape quickly, as the abduction statute does not contain a temporal requirement, which means a victim can be detained under the statute even if only for the briefest of moments.

In a footnote, the Court acknowledged that it has never decided whether a victim's fear of harm should be viewed through a subjective lens, a purely objective one, or some mix of the two. Because that issue was not relevant in this case, the Court wrote: "this Court leaves definitive resolution of the objective vs. subjective issue for another day."

The Court also rejected the defendant's reliance on §19.2-59, explaining that this statute merely creates a civil cause of action against a government agent who searches a person, place, or thing without a proper search warrant. "§19.2-59 does not permit the aggrieved party to detain the violating

official. Nor would it make sense for it to do so, given that a violation of it constitutes a "malfeasance in office," not a crime that would subject the violator to arrest."

Lastly, the Court agreed that the defendant did not establish a financial relationship between the prosecutor and the victim, nor did he explain how the outcome of his trial would affect some financial interest the prosecutor held.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0598212.pdf

Continuances

Virginia Court of Appeals
Published

Bailey v. Commonwealth: June 15, 2021
73 Va. App. 250, 858 S.E.2d 423 (2021)
Chesterfield: Defendant appeals his conviction for Assault and Battery on Denial of a Continuance

Facts: The defendant repeatedly punched the victim inside an apartment. The defendant appealed his District Court conviction to the Circuit Court after representing himself in the lower court. The Circuit Court gave the defendant four months to prepare for trial, retain an attorney, and secure the attendance of any desired witnesses. The notice of appeal that the defendant signed specifically instructed him that he "MUST be present and ready for trial" on the trial date.

The defendant never communicated with the clerk and waited until days before trial to secure counsel. The defendant appeared at trial, where his attorney made an oral motion on the morning of trial for a continuance to secure two necessary witnesses for trial. The defendant's attorney proffered that he had never spoken to the two witnesses. Neither the defendant nor his counsel made any effort to secure the attendance of the supposedly needed witnesses. The proffer of the witness' testimony was that, at some unspecified time on the day in question, the two potential witnesses saw the defendant leave the apartment before the victim did.

The trial court denied the continuance and convicted the defendant.

Held: Affirmed. The Court noted that the record failed to demonstrate the prejudice necessary to establish reversible error. Accepting counsel's proffer of his understanding of what the two witnesses was accurate, the Court pointed out that the proffer did not negate the Commonwealth's evidence. The Court noted that there was no representation that the witnesses were present at the time of the incident or that either observed the interactions between the defendant and the victim in the apartment. Moreover, counsel did not proffer that either witness would or could testify that the defendant did not assault the victim.

Given that the proffer did not negate the Commonwealth's evidence, the Court found that the defendant could establish that he was prejudiced by the denial of a continuance to allow him to obtain the proffered testimony.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0182202.pdf

Virginia Court of Appeals
Unpublished

Gaye v. Commonwealth: November 3, 2021

Arlington: Defendant appeals his conviction for Distribution of Cocaine on Denial of a Continuance and his Trial in Absentia

Facts: The defendant distributed cocaine in 1996. He absconded from his preliminary hearing. Five years later, after his re-arrest and re-release on bond, the defendant was set for trial in 2001. In the "Appearance at Trial" form he executed in 2001, the defendant expressly acknowledged that if he "fail[ed] to appear on the date set for trial, I may be tried in my absence and may be indicted for the felony offense of Failure to Appear which carries a sentence of up to five years in the penitentiary."

However, the day before trial, the defendant requested a continuance. He claimed that he was going to retain a new lawyer from California, that he needed additional time to collect documents to support his alibi defense, and that he had not received in discovery all the materials he was due. The trial court denied the defendant's request for a continuance. The next day, the defendant failed to appear at trial. The defendant left a message for his attorney stating that he had "kidney problems" and was "very dizzy" that morning.

The trial court tried the defendant in his absence. The jury recommended a sentence, but the trial court issued a capias for the defendant rather than imposing a sentence. In 2018, the defendant was re-arrested and extradited to Virginia. He argued that the trial court improperly denied his request for a continuance and improperly tried him in his absence, but the trial court overruled his objections.

Held: Affirmed. Regarding the defendant's claim that he had been deprived of his right to counsel, the Court countered that a deprivation of choice of counsel claim requires that the counsel of choice be authorized to practice before the tribunal. In this case, the defendant stated that he wanted to hire an attorney from California. In addition, when, as here, a defendant's invocation of his right to counsel of his choice necessarily would require delaying a scheduled trial, the Court explained that a trial court may deny the motion to substitute counsel of choice so long as the denial does not represent "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay."

The Court agreed that so long as the trial court considered not only the problems for witnesses caused by the defendant's absence, but also the "economic prejudice caused by the delay along with other factors, such as the absence of any evidence showing a reasonable likelihood that the trial could

soon take place with the defendant's presence," it is permissible for it to find sufficient prejudice to justify denying a continuance and proceeding with trial. In this case, considering all of the circumstances, including significant inconvenience to the witnesses (one of whom lived several hours away), disruption of the trial court's docket, the already lengthy passage of time between the offense and the trial, and the lack of any reason to believe the defendant would ever appear voluntarily, the Court agreed that the record more than sufficiently established prejudice to the Commonwealth if the continuance had been granted.

Regarding the defendant's trial in absentia, the Court repeated that, although the Sixth Amendment grants the accused a right to be present during his trial, a "defendant can forfeit his right to be present if he voluntarily absents himself from trial." In this case, the Court found no question that the defendant had notice of the trial date and knew that he would be tried in his absence if he failed to appear. The Court rejected the defendant's claim that his "kidney problem" made his absence involuntary, noting the lack of evidence thereto.

In a footnote, the Court acknowledged that § 19.2-259 provides that a "person tried for felony shall be personally present during the trial," but because the defendant's assignment of error raised only a constitutional claim, the Court declined to address the statute in this appeal.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0713204.pdf

Court Records & Sealing

Virginia Supreme Court

In Re: Bennett: April 21, 2022

Facts: The Judicial Inquiry and Review Commission (JIRC) suspended Judge Adrianne Bennett, a J/Dr Judge in Virginia Beach. In May 2021, the judge petitioned the Virginia Supreme Court under its original jurisdiction for writs of mandamus and prohibition in connection with the JIRC matter. The Court denied the petition one day later, and ordered the record of the case sealed, including the order disposing of Judge Bennett's petition and sealing the proceedings. Later, the Richmond-Times Dispatch filed a petition to intervene for the limited purpose of obtaining access to the order sealing the records in this case.

Held: Granted in Part, Denied in Part. Although the Court unsealed the remainder of the filings in the case, the Court concluded that the records of the Judicial Inquiry and Review Commission attached to the mandamus petition should remain under seal.

The Court first explained that judicial power includes the inherent authority to control court records, and that this inherent authority includes the power to unseal a record previously ordered sealed. The Court explained that once a court orders documents before it sealed, the court continues to

have authority to enforce its order sealing those documents, as well as authority to loosen or eliminate any restrictions on the sealed documents.

The Court then concluded that the same qualified right of access to proceedings and records that the Court has recognized in criminal cases should also be recognized in civil trials and to their related proceedings and records. In the interest of openness and transparency, the Court unsealed the remainder of the case, except for the attachments to the petition for a writ of mandamus. The Court wrote: "Mandamus proceedings have a long tradition of openness. We see no reason to seal the petition and other pleadings."

However, the Court reached a different conclusion with respect to the attachments filed with the mandamus petition, which were records of a then-pending proceeding before the Judicial Inquiry and Review Commission. The Court noted that, per § 17.1-913(A), records of proceedings before the Commission are kept confidential.

Judges Kelsey and Chafin dissented, contending that everything in this case should be unsealed.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1210489.pdf

Discovery & Brady

Fourth Circuit Court of Appeals

U.S. v. Blankenship: December 7, 2021

W.Va.: Defendant appeals his conviction for Violation of Coal Mine Safety Standards on *Brady* Due Process grounds.

Facts: An explosion at a mining company's coal mine killed 29 miners. Prior to the explosion, the government had repeatedly cited the company with respect to that mine for violations of the Federal Mine Safety and Health Act, such that it received the third-most serious safety citations of any mine in the United States. The defendant was the Chairman of the Board and CEO at the time of the explosion. Investigators discovered that the defendant willfully failed to address numerous notices of mine safety violations that the company had received to produce more coal at a lower cost. The defendant was charged with and convicted of conspiring to willfully violate mandatory federal mine safety and health standards.

After trial, the defendant alleged that the federal prosecutors violated his due process rights in failing to produce documents favorable to him before trial. The suppressed documents fell broadly into two categories. The first was memoranda of interviews conducted of seven company employees. Each of the five witnesses interviewed held high positions in the company and, from those positions, interacted closely with the defendant, indeed engaging with him on some of the very issues raised in his prosecution.

The second category was internal emails and documents of the Mine Safety and Health Administration ("MSHA") showing, among other things, some MSHA employees' hostility to the defendant and his company. With respect to the internal MSHA documents that were suppressed — consisting primarily of emails between and among agency employees and disciplinary records for three MSHA employees that stemmed from an internal agency review conducted after the mine explosion — the defendant contended that they should have been produced to allow him to demonstrate, most notably, that the MSHA was biased against him and the company.

Held: Affirmed. Regarding the witness interviews, the Court concluded that this case "falls squarely under the principle that the *Brady* doctrine is not available where the favorable information is available to the defendant and lies in a source where a reasonable defendant would have looked." The Court explained that "when assessing the defendant's role in preparing his defense, he should not be allowed to turn a willfully blind eye to available evidence and thus set up a *Brady* claim for a new trial. In this manner, we distinguish the burden of due diligence — which the defendant need not carry in asserting a *Brady* claim — from the common-sense notion of self-help imputable to a defendant in preparing his case."

Regarding the internal documents, the Court pointed out that none of the MSHA employees who wrote the "bias" emails testified. The Court explained that the suppression of these documents and the other MSHA records did not violate *Brady* and *Giglio*. The Court concluded that the bias of individual MSHA employees could not be accepted to show agency bias unless it was shown that the employees spoke for the agency or had some responsibility in regard to the prosecution, which the defendant had not been able to show.

The Court pointed out that the core issue at trial did not relate to the validity of the mine safety citations or to MSHA conduct. Instead, it focused on the defendant's state of mind — whether he conspired to willfully violate mine safety standards. Thus, the Court concluded that the suppression at issue — both with respect to the individual categories of documents and when they are considered cumulatively — did not undermine confidence in the verdict. The Court found that the verdict that the defendant conspired to willfully violate mandatory mine standards was supported by ample evidence, and there was not a reasonable probability that the jury's conclusion would have been altered by the documents' disclosure.

Full Case At:
https://www.ca4.uscourts.gov/opinions/206330.P.pdf

U.S. v. Caldwell: August 3, 2021
7 F.4th 191 (2021)
N.C.: Defendant appeals his convictions for Bank Robbery and Firearm Possession on Fourth Amendment and *Brady* Discovery grounds.

Facts: The defendant arranged a bank robbery with two other men. The two men entered the bank and robbed it at gunpoint, while the defendant waited outside in the getaway vehicle. Officers

tracked the stolen cash using GPS and saw three individuals fleeing the getaway car on foot. Using a police dog, officers found the defendant hidden in brush on top of a bag containing a GPS tracker and the money that had been stolen.

Officers also located the getaway car at the site where they had followed the GPS trackers immediately after the robbery. Police observed that the vehicle had an invalid temporary license plate, with a permanent license plate on its back seat. They located a black hooded sweatshirt, a glove, loose currency, a cash wrapper, and a second GPS tracker on the ground near the vehicle, and a ski mask on the ground next to it. They observed a revolver and black jacket in plain view on the back seat. The clothing and revolver matched the general description of that used by the robbers. The defendant claimed that he had been carjacked in the car.

Two weeks after impounding the vehicle, detectives returned to the impounded vehicle, jump-started the car's battery, and searched the trunk. The trunk contained a firearm and incriminating clothing. Prior to trial, the defendant moved to suppress the search, but the trial court denied the motion.

Police spoke with one of the co-conspirators. At the time of the interview, the co-conspirator denied knowing the defendant. During that interview, the co-conspirator's mother and her boyfriend, separately, entered the interrogation room during breaks in officers' interrogations and spoke with the defendant. Roughly six months later, the co-conspirator implicated the defendant and became a cooperating witness. During discovery, the government revealed who the individuals were, but declined to provide their contact information.

Prior to trial, the defendant demanded that he needed the contact information for the mother and boyfriend because he did not know how the witness' mother and her boyfriend had information about the defendant or "how or when/where law enforcement provided them with the information allegedly" about the defendant that was used to attempt to induce the witness to cooperate with law enforcement; "what other [undisclosed] information these people or law enforcement ha[d] about" the defendant; and "what kind of pressure was put" on the witness to change his story from not knowing the defendant to naming the defendant as the ringleader. The trial court denied the defendant's request.

At trial, another co-conspirator testified against the defendant. The trial court had appointed an attorney to represent the co-conspirator. However, another attorney in the co-conspirator's counsel's office previously represented the defendant in one of the previous state versions of these bank robbery charges. The defendant objected and asked the trial court to disqualify the co-conspirator's attorney. The district court conducted a *voir dire* interview of the attorney and determined that he "knew nothing about" his office's earlier representation of the defendant and did not have access to the files. The trial court refused to disqualify the co-conspirator's attorney.

Held: Affirmed. First, regarding the search of the car, the Court ruled that, when detectives returned to the impounded vehicle two weeks after impoundment and searched the trunk, they were justified in doing so without obtaining a warrant. Like in *Gastiaburo*, the Court concluded that the passage of time did not interfere with the applicability of the automobile exception. Despite the two-week delay, the Court agreed that the automobile exception still applied as long as probable cause remained to justify the search. The Court explained that, when a warrantless search of a vehicle could

have been conducted on the scene pursuant to the automobile exception, a warrantless search is also justified after the vehicle has been impounded and immobilized if probable cause still exists.

The Court also agreed that probable cause existed to believe that the vehicle contained evidence related to the bank robbery.

Regarding the *Brady* issue, the Court concluded that the defendant failed to make a showing of materiality under either *Brady* or the less onerous standard for *in camera* review. The Court explained that the fact that the two had knowledge of the defendant does not necessarily mean they obtained that information from the police in a concerted effort to pressure the cooperating witness. The Court also highlighted that the cooperating witness did not the implicate the defendant until six months later. Accordingly, the defendant's argument that the contact information was relevant because the cooperating witness' mother and her boyfriend would be able to shed light on police interview tactics was, for the Court, "pure speculation lacking any specificity, and is insufficient to support a finding of materiality under Brady or to require an *in camera* review."

Lastly, regarding the co-conspirator's counsel, the Court was satisfied that no actual conflict jeopardized the integrity of the proceedings. The Court agreed that, with the district court's permission, the attorney could ethically represent the co-conspirator during his testimony and withdraw afterward. Given the broad discretion conferred on the court and the court's finding that the attorney had not been exposed to any confidential information related to the defendant, the Court concluded that the trial court acted within its discretion when it allowed him to represent the co-conspirator for purposes of his testimony.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194019.P.pdf

Virginia Court of Appeals
Unpublished

Wright v. Commonwealth: May 10, 2022

Henry: Defendant appeals his convictions for Distribution, 2nd offense, on *Brady* and discovery grounds.

Facts: The defendant sold drugs on three occasions to a confidential informant (CI). Law enforcement monitored all three sales and recorded them on video. Prior to trial, the Commonwealth did not disclose that the CI was conducting undercover buys with other individuals on the same street.

However, the defendant knew, prior to trial, that the CI had purchased narcotics from others on the street during the relevant time frame. In fact, he used that information during his cross-examination and the CI admitted that he had been buying drugs from one person on the street at the time of the instant offenses. The defendant also alluded to that while cross-examining the officer, asking him if the CI was working with other suspects on the street. The defendant then used the evidence, including the CI's admission, in arguing his hypothesis that someone else had sold the CI the drugs.

Later, the defendant sought a mistrial, arguing that the Commonwealth failed to meet its disclosure obligations under *Brady*. The trial court denied the motion. Post-trial, the defendant again moved to set aside the verdict, and contended that that if the Commonwealth had disclosed the fact that the CI "was conducting undercover buys with at least three other individuals" on the same street, it is "possible and likely that had this information been disclosed that one or more of these cases would have been dismissed." He specifically identified the other sellers in his motion.

Held: Affirmed. The Court concluded that the record failed to show the defendant could not have obtained the other sellers' names before trial through the exercise of diligence. The Court wrote: "by identifying them at his post-trial hearing, [the defendant] demonstrated he had the ability to discover the names of [the other sellers] without the assistance of the Commonwealth.

The Court then found that there was not a reasonable probability of a different result because the defendant used similar information at trial to no effect. "Given the similarity between the information that Wright claims was withheld and the information he actually used as impeachment evidence at trial, we conclude that there is not "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.""

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0566213.pdf

Tucker v. Commonwealth: April 26, 2022

Petersburg: Defendant appeals his convictions for Felony Assault and Use of a Firearm on *Brady* Discovery grounds.

Facts: The defendant and two other men repeatedly shot and permanently wounded the victim while he was laying on the ground. After the attackers fled, the victim called 911, and then called his girlfriend and left a message identifying the defendant and two other men as the shooters. The victim testified at trial and the Commonwealth introduced the voicemail as evidence.

After the trial court convicted the defendant, the Commonwealth notified the defendant that both the victim and his girlfriend had prior convictions that were not previously disclosed. The defendant moved to set aside the conviction on *Brady* grounds. The defendant also requested a new trial based on after-discovered evidence. At a hearing, the defendant called the victim to testify, during which time he stated that he "can't recall" that the defendant shot him and that it was just the two other men. However, the victim also testified that he had received threats related to his testimony and coming to court. The trial court denied the motion.

Held: Affirmed. The Court held that the alleged late disclosures of evidence did not violate the requirements of *Brady* nor was the alleged newly discovered evidence a basis for a new trial.

First, the Court agreed that the victim's prior convictions were exculpatory evidence that was not disclosed to the defendant before trial. The Court repeated that evidence of the prior convictions of

a witness is impeachment evidence under *Brady*. Second, the Court agreed that the withholding of evidence satisfied the second prong of *Brady*. The Court explained that, though the Commonwealth was unaware of the prior convictions at the time of trial, it had the means to obtain such information.

The Court agreed that "It certainly would have been prudent" for the Commonwealth to conduct a search of the criminal histories of its witness. "But instead, the Commonwealth must now bear the consequences of Brady scrutiny of their inaction. Thus, although the Commonwealth was not aware of the histories of Fisher and Manson, it failed to affirmatively take action to identify the available exculpatory evidence. Whether willful or inadvertent, we find that the non-disclosure satisfies the second prong of Brady."

However, the Court did not agree that the defendant was prejudiced by the non-disclosure. The Court first noted that the defendant himself agreed that the girlfriend's prior convictions were not material. Regarding the victim, even though he was the sole eyewitness who testified at trial, the Court noted that the victim's testimony at trial was consistent with his contemporaneous statements made to police at the scene and in his voicemail to his girlfriend immediately after the shooting, both of which we view as offering sufficient indicium of reliability. The Court wrote that the victim's "prior criminal history does not tarnish his dying declarations, nor does it establish any basis or motive for" him to lie.

Regarding the defendant's motion for a new trial, the Court repeated that a new trial will only be granted based upon newly discovered evidence if:

(1) the evidence was discovered after trial;
(2) it could not have been obtained prior to trial through the exercise of reasonable diligence;
(3) it is not merely cumulative, corroborative or collateral; and
(4) is material, and as such, should produce an opposite result on the merits at another trial.

In this case, given the victim's equivocal statements at the post trial motion and the fact that he made those statements after being threated, the Court agreed with the trial court that the victim's new testimony was not material to the trial outcome.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0553212.pdf

Lassiter v. Commonwealth: July 20, 2021

Norfolk: Defendant appeals his conviction for Robbery on *Brady* Due Process grounds.

Facts: The defendant, armed with a gun and wearing a mask, robbed a convenience store. At trial, in rebuttal to the defense's evidence, the Commonwealth called one of the defendant's former cellmates. The Commonwealth had originally told the defendant that she would not call the witness unless the defendant testified, but the Commonwealth changed its strategy that morning. The Commonwealth told the defendant that it had no exculpatory information regarding the witness, apart from his criminal record. The Commonwealth provided the witness' criminal record to the defendant just before calling the witness.

The defendant contended that the Court should not allow testimony from the rebuttal witness because the Commonwealth's mid-trial *Brady* disclosure violated the defendant's due process rights and deprived him of a fair trial. The defendant argued that he was "ambushed" because he did not know what the witness was going to say, whether the defendant and the witness were, in fact, housed together, whether the witness saw information on the news, and whether he was made an offer for leniency.

The witness testified, over the defendant's objection. He admitted that he had eleven prior felony convictions and two pending felony charges. He testified that he shared a cell with the defendant for a weekend but did not know anything about the defendant or his charges beforehand. He also stated that he had never testified for the Commonwealth previously, and although he hoped to receive "some leniency" in his upcoming cases, he had not been promised anything in exchange for testifying, such as a favorable disposition of his pending charges. On cross-examination, the defendant extensively questioned the witness about the convictions and pending charges on his record during cross-examination and repeatedly referred to the record during his closing argument.

Held: Affirmed. The Court concluded that the only favorable evidence known to the Commonwealth that was subject to disclosure was the witness' criminal record. Because the defendant received that record in time to effectively use it at trial, the Court held that the trial court did not err by allowing the witness to testify in the Commonwealth's rebuttal case

The Court rejected the defendant's argument that the fact that the witness was a "jailhouse informant" constituted impeachment evidence that was subject to disclosure. The Court repeated that, when a person does not receive a benefit from providing such information, and later testifies as a prosecution witness, the mere fact of his prior cooperation with the government agents does not constitute impeachment evidence subject to disclosure under *Brady*.

The Court also rejected the defendant's argument that he was entitled to any and all information about the witness, repeating that "*Brady* is a disclosure rule, not a discovery rule." The Court found that the defendant's mere speculation that he may have discovered additional exculpatory or impeachment material stemming from the disclosure of the witness' anticipated testimony was insufficient to prove the favorable character of any evidence he claimed had been improperly suppressed.

The Court then found that the Commonwealth's disclosure was timely because the defendant had ample opportunity to review the witness' record and use it to impeach the witness' credibility. In a footnote, the Court explained that, because the defendant had failed to prove that the Commonwealth suppressed the witness' criminal record in violation of *Brady*, the Court did not address whether the defendant was prejudiced by the timing of that record's disclosure.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0422201.pdf

Fifth Amendment: Double Jeopardy

Fourth Circuit Court of Appeals

U.S. v. Ball: November 18, 2021

E.D.Va: Defendant appeals his conviction for Possession of a Firearm by Felon on Double Jeopardy and Due Process grounds.

Facts: During an automobile stop in Richmond, the defendant engaged in a struggle with a law enforcement officer. The defendant had incorrectly believed there was a warrant for arrest and, that day, had repeatedly stated "If anybody get in my way . . . I'm killing anybody!" During the struggle, the defendant shot the officer in the forehead at close range, killing him. Virginia prosecutors charged him with capital murder. The defendant pled guilty. The trial court sentenced the defendant to life imprisonment with all but 36 years suspended.

Shortly after that state sentence was imposed and following community outrage over the inadequacy of the sentence, federal prosecutors charged the defendant with possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). The federal trial court sentenced the defendant to the statutory maximum of 10 years' imprisonment and, as a variance, required that the 10 years be served consecutive to the state sentence.

The defendant appealed, arguing that his federal indictment should have been dismissed because that prosecution violated the Double Jeopardy Clause of the Fifth Amendment and constituted vindictive prosecution under the Due Process Clause of the Fifth Amendment because the federal prosecution and sentence were — in his view — intended to punish him for negotiating a favorable deal with state prosecutors.

Held: Affirmed. The Court first addressed the defendant's Double Jeopardy argument, concluding that the defendant's federal prosecution did not violate his rights under the Double Jeopardy Clause.

The Court noted that the U.S. Supreme Court had repeated, in *Gamble*, that a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute, and vice versa. The Court also applied the *Blockburger* test and pointed out that the state murder violation requires proof of a killing, whereas the federal firearm violation does not. Conversely, the federal firearm violation requires proof that the defendant was a felon, while the state murder violation does not. Therefore, under the *Blockburger* test, the Court found that the crimes were not the same offense.

The Court also analyzed this case under Collateral Estoppel. The Court found that the elements of the defendant's § 922(g)(1) conviction — his felon status, possession of a firearm, and knowledge of both — were not "issue[s] of ultimate fact" resolved in the state prosecution. Moreover, the Court repeated that the state and federal proceedings did not involve the same parties. The Court could find no precedent supporting the proposition that collateral estoppel can be used to circumvent the dual-sovereignty doctrine.

Regarding the defendant's claim of prosecutorial vindictiveness, the Court ruled that the defendant had failed to present evidence sufficient to rebut the presumption that his federal

prosecution was legitimate. The Court repeated that, to establish prosecutorial vindictiveness, the defendant must "carry the heavy burden of proving that [his] prosecution 'could not be justified as a proper exercise of prosecutorial discretion.'" Specifically, he must show that "(1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus."

In the context where a defendant is prosecuted by two distinct sovereigns in relation to the same incident — such as when a federal prosecutor initiates a criminal prosecution after a state prosecution — the Court noted that each prosecution is the result of a distinct sovereign's initial charging decision. The Court then found that, because the federal prosecution is not a retrial, but rather the federal government's first and only action to redress a perceived violation of federal criminal law, it is, under the principles noted above, entitled to the presumption of legitimacy.

Full Case At:
https://www.ca4.uscourts.gov/opinions/204340.P.pdf

Virginia Supreme Court

Commonwealth v. Mintee: December 16, 2021
Unpublished
Rev'd Court of Appeals Ruling of December 8, 2020

Facts: During the defendant's jury trial for multiple robberies, the trial judge suffered a back injury that made him unable to continue to preside over the trial. The next day, the chief judge declared a mistrial at the trial judge's request. The chief judge asked the parties if they would like to put anything on the record before it declared a mistrial and dismissed the jury; Both the Commonwealth and the defendant objected to the mistrial on the grounds that they were ready to proceed and had witnesses ready to testify on that day. The chief judge made no findings at the time.

Prior to the second jury trial, the defendant moved to dismiss on Double Jeopardy grounds, but the trial court overruled the objection. The Court of Appeals reversed and dismissed the case on Double Jeopardy grounds, ruling that the trial court abused its discretion when it declared a mistrial over the defendant's objection without detailing its consideration of less drastic alternatives for the record.

Held: Court of Appeals ruling reversed, case re-instated. The Court held that the defendant had waived his challenge to the manifest necessity of the mistrial, and consequently, the trial court's ruling on the motion to dismiss on double jeopardy grounds stands.

The Court ruled that the contemporaneous objection rule required the defendant to object not only to the mistrial, but to the precise point that a manifest necessity did not exist to declare the mistrial. The Court explained that if the defendant had made a timely objection on such grounds, the chief judge would have had an opportunity to consult with the trial judge. Based upon the judge's detailed statements during the hearing regarding his reasons for determining that a mistrial was necessary, the Court speculated if the defendant had made a timely objection, the judge would have

been able to find there was manifest necessity to declare a mistrial and discharge the jury under § 8.01-361.

The Court remanded this case to the Court of Appeals for consideration of the defendant's claims regarding the trial court's denial of his motion to dismiss on statutory and constitutional speedy trial grounds and his motion to recuse.

Tags: Double Jeopardy – Mistrial – Manifest Necessity

Full Case At:
https://www.vacourts.gov/courts/scv/orders_unpublished/210031.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1054192.pdf

Virginia Court of Appeals
Unpublished

Tipton v. Commonwealth: May 24, 2022

Pittsylvania: Defendant appeals his convictions for Felony Murder and Adult Abuse and Neglect on Double Jeopardy grounds.

Facts: The defendant's mother died due to the defendant's criminal neglect. A grand jury indicted the defendant on one count of felony murder and one count of elder abuse or neglect resulting in death, in violation of § 18.2-369(B). The defendant filed a pre-trial motion to dismiss the indictment for felony murder on grounds that a prosecution for that offense violated her "right to be free of double jeopardy." The trial court denied the motion.

After obtaining convictions under both statutes, the Commonwealth asked that the elder abuse or neglect charge be merged with the felony murder conviction for purposes of sentencing. The trial court granted that motion and denied the defendant's objection that the Commonwealth was required to elect § 18.2-369 for sentencing.

Held: Affirmed. The Court held that the trial court did not err in denying the defendant's pre-trial motion to dismiss the felony murder indictment or in merging the conviction for § 18.2-369 into the conviction for felony murder for purposes of sentencing. The Court ruled that the defendant failed to show that her right to be free from double jeopardy was violated because she was not sentenced for more than one offense.

The Court repeated that a prosecutor has the discretion to decide under which of several applicable statutes' criminal charges shall be instituted. "Undeniably, a prosecutor is 'free to indict an individual for as many separate crimes as the Commonwealth, in good faith, thinks it can prove.'" The Court added that, "the Commonwealth is free to charge the commission of a single offense in several different ways in order to meet the contingencies of proof." However, the Court also repeated that

where multiple indictments effectively charge a single offense, the Commonwealth must "seek to obtain only one punishment" upon conviction.

In this case, the Court reasoned that the facts fit within the proscriptions of both statutes, and therefore the Commonwealth could seek indictments against the defendant for both felony murder and elder abuse or neglect. Thus, the Court concluded that the prosecution's election to indict the defendant for both offenses was appropriate, and the trial court did not err in denying the defendant's pre-trial motion to dismiss the felony murder indictment.

The Court then rejected the defendant's argument that the Commonwealth was required to elect § 18.2-369 for sentencing. The Court quoted the U.S. Supreme Court's ruling in *Batchelder*: "Just as a defendant has no constitutional right to elect which of two applicable statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentenced."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0673213.pdf

Commonwealth v. Murphy: October 26, 2021

Nelson: The Commonwealth appeals the dismissal of a charge on Double Jeopardy grounds.

Facts: The defendant drove while intoxicated in a manner that endangered another person on a license revoked due to a previous DUI and while declared a habitual offender. The Commonwealth indicted the defendant with operating a vehicle in such a manner as to endanger the life of another while his license was revoked in violation of § 46.2-391, and with driving while under the influence of alcohol while his license was revoked in violation of the same code section. The Commonwealth also separately charged the defendant with driving after being declared a habitual offender whose driving privileges were revoked, and with driving after being declared a habitual offender endangering another person after his license was revoked in violation of § 46.2-357(B)(1), (2).

The defendant moved, pretrial, to dismiss the indictments alleging violations of § 46.2-391 on double jeopardy grounds, arguing that he could not be punished under both § 46.2-391 and § 46.2-357. The trial court granted the defendant's motion and dismissed the two § 46.2-391 indictments.

When it accepted the appeal, the Court of Appeals also asked the parties to brief the following question: "What effect, if any, does the repeal of Code § 46.2-357, effective July 1, 2021, have upon the current proceedings against appellee in the trial court?"

Held: Reversed. The Court held that the trial court erred by dismissing the § 46.2-391 indictments.

The Court first clarified that, in this proceeding, the trial court was required to conduct a hearing and announce a contingent ruling on the defendant's motion. The Court explained that dismissing an indictment pretrial for violating a defendant's right to be free from multiple punishments was premature, and the Court ruled that the trial court erred by doing so.

The Court then applied the *Blockburger* test to determine whether charging both offenses violated the Double Jeopardy clause of the Constitution. Under the *Blockburger* test, the Court found that both § 46.2-357 and § 46.2-391 contain an element that the other does not. Accordingly, the Court concluded that the two offenses are not the "same" for double jeopardy purposes. The Court explained that "this conclusion resolves any constitutional concerns with [the defendant's] punishment if convicted of violations of both Code § 46.2-357 and Code § 46.2-391."

The Court then acknowledged that, while the *Blockburger* test is dispositive in determining if two offenses are the same for constitutional double jeopardy purposes, that test is unhelpful to a statutory construction analysis of whether the General Assembly nevertheless intended to restrict punishment for multiple offenses. However, in this case, the Court concluded that the legislative history does not clearly reflect legislative intent to prohibit multiple punishments. The Court also noted that, in other situations when the General Assembly has sought to prohibit multiple punishments as a matter of policy rather than constitutional prohibition, it has used clear language to express that intent.

Finally, the Court agreed that, despite the recent repeal of § 46.2-357, the Commonwealth may proceed with its prosecution under § 46.2-357 due to the language of Code § 1-239, which provides:

> "No new act of the General Assembly shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new act of the General Assembly takes effect . . . .

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0596213.pdf

Fifth Amendment: Interviews & Interrogations

Virginia Supreme Court

Jones v. Commonwealth: June 4, 2021
Unupublished
Aff'd Ct. App. Ruling of January 14, 2020
Alexandria: Defendant appeals his conviction for Possession of a Firearm by Violent Felon on Fifth Amendment and sufficiency grounds.

Facts: The defendant, a convicted murderer, possessed a handgun. He drew witness' attention by firing it in a residential neighborhood, and video surveillance captured him carrying the gun after the shooting. Police investigated but did not recover the firearm. However, officers found cartridge casings consistent with the firearm that was on video.

Police located and arrested the defendant. Almost immediately upon entering the interview room, the defendant asked the officers, "Hey, can you call my wife to tell her to call my lawyer for me?"

He provided the officers with his wife's number. As an officer left the room, the defendant asked, "You're gonna make the phone call," and the officer stated he would. Another officer entered and obtained a *Miranda* waiver from the defendant. The defendant admitted that he was in the area on the night in question and was the person on video entering the apartment building. He denied that he had possessed a gun.

The defendant moved to suppress, arguing that his request that police call his wife was an invocation of his right to counsel. The trial court denied the motion, and the Court of Appeals affirmed that denial, finding no indication in the defendant's words that he wanted an attorney present for his interrogation.

Held: Affirmed. Regarding the question in this case, the question of whether the defendant's statement — "Hey, can you call my wife to tell her to call my lawyer for me?" — was an unequivocal and unambiguous invocation of his right to counsel, the Court held that even if the trial court erred in admitting the evidence obtained during Jones's custodial interrogation, such error was harmless. In this case, the Court reasoned that, given the clarity of the video, the key contention at trial was not the identity of the man in the video, but rather whether the dark object in the man's hand was a handgun. The defendant's statement did not contribute to that key factual question, and thus the Court found that the exclusion of that testimony would not have changed the jury's conclusion that the object was a firearm.

The Court also concluded that the evidence was sufficient to prove the defendant guilty.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/200243.pdf
Original Court of Appeals Ruling at:
http://www.courts.state.va.us/opinions/opncavwp/1359184.pdf

Virginia Court of Appeals
Unpublished

Fourth Amendment – Search and Seizure

U.S. Supreme Court

Lange v. California: June 23, 2021
593 U.S. __ , 141 S.Ct. 2011 (2021)
California: Defendant appeals his conviction for DUI on Fourth Amendment grounds.

Facts: The defendant drove while intoxicated. He drew an officer's attention by playing music very loudly and repeatedly honking his horn. The officer signaled for the defendant to stop, but the

defendant continued drive up the driveway of his home and parked inside his garage. The officer followed the defendant into his garage, questioned him, conducted field sobriety tests, and arrested him for DUI.

The defendant moved to suppress, but the trial court denied his motion. On appeal, the California Court of Appeals ruled that an officer's "hot pursuit" into a house to prevent a suspect from frustrating an arrest is always permissible under the exigent-circumstances exception to the warrant requirement, even for a misdemeanor offense.

Held: Reversed. In a 9-0 ruling, the Court held that the pursuit of a fleeing misdemeanor suspect does not always or categorically qualify as an exigent circumstance. While the Court agreed that "a great many misdemeanor pursuits" involve exigencies that would allow warrantless entry, the Court ruled that whether a given case does so turns on the particular facts of the case.

The Court explained that the flight of a suspected misdemeanant does not always justify a warrantless entry into a home. Instead, an officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. The Court agreed that on many occasions, the officer will have good reason to enter— to prevent imminent harms of violence, destruction of evidence, or escape from the home. "But when the officer has time to get a warrant, he must do so— even though the misdemeanant fled."

While no judges dissented, several justices wrote concurring opinions in which they disagreed with the Court's reasoning. In a footnote, the majority characterized the difference in this way: "the only cases in which we and the concurrence reach a different result are cases involving flight alone, without exigencies like the destruction of evidence, violence to others, or escape from the home."

Justice Kavanaugh wrote a concurrence, where he reasoned that cases of fleeing misdemeanants will almost always also involve a recognized exigent circumstance—such as a risk of escape, destruction of evidence, or harm to others—that will still justify warrantless entry into a home. Thus, in his view, the Court's ruling will still allow the police to make a warrantless entry into a home "nine times out of 10 or more" in cases involving pursuit of a fleeing misdemeanant. He also noted that the Court's opinion does not disturb the long-settled rule, under *Santana,* that pursuit of a fleeing felon is itself an exigent circumstance justifying warrantless entry into a home. Thus, the police may make a warrantless entry into the home of a fleeing felon regardless of whether other exigent circumstances are present.

Justice Thomas also wrote a concurrence in which he argued that establishing a violation of the Fourth Amendment does not automatically entitle a criminal defendant to exclusion of evidence. Thus, in his view, even though officers cannot chase a fleeing person into a home simply because that person is suspected of having committed any misdemeanor, if the officer nonetheless does so, exclusion under the Fourth Amendment is not necessary.

Justice Roberts also wrote a concurrence where he criticized the Court's distinction between felonies and misdemeanors, finding it "famously difficult to apply." He also noted that, at oral argument, the defendant's attorney had acknowledged that "nine times out of ten or more" warrantless entry in hot pursuit of misdemeanants would be reasonable. Like Justice Thomas, Justice Roberts also contended that the common law did not recognize exclusion of evidence in a criminal case.

Full Case At:
https://www.supremecourt.gov/opinions/20pdf/20-18_cb7d.pdf

Fourth Circuit Court of Appeals

U.S. v. Perez: April 7, 2022

W.D.N.C.: Defendant appeals his convictions for Possession with Intent to Distribute and Possession of a Firearm on Fourth Amendment grounds.

Facts: The defendant possessed Methamphetamine for distribution along with a firearm. An officer observed that the defendant's vehicle had an expired registration and stopped the vehicle. The officer also observed that the tag appeared to be possibly fictitious. Another officer approached the defendant and asked him for his license, but soon told the original officer to take over the investigation while other officers waited for a K9 unit to respond.

The primary officer then began his investigation into the traffic offenses. No other officer assisted him in the investigation. The officer later testified at a motion to suppress that searching various law enforcement databases to investigate the licenses took about eight minutes and writing the summonses took another ten. He explained that he was not "a good multi-tasker" and had Internet connectivity issues that delayed him. He also explained that he delayed reporting the VIN number on the vehicle for safety reasons. The officer learned that the license plate was fictitious, and that the defendant was not the registered owner of the vehicle. He also learned that the defendant's license was suspended due to two previous DUI convictions.

After the officer had written several citations, but before he had written all the citations in this case, the K9 unit arrived and detected the odor of narcotics. Officers searched the vehicle and found a large amount of methamphetamine and a firearm. The defendant moved to suppress, arguing that the officers unconstitutionally prolonged the traffic stop to conduct the dog sniff. The district court denied the motion.

Held: Affirmed. The Court repeated that the "acceptable length of a routine traffic stop can't be stated with mathematical precision," but in this case ruled that the officers here were diligent enough to pass constitutional muster. The Court also pointed out that, under North Carolina law, a car with a fictitious tag would be towed from the scene, especially since the defendant was not the car's registered owner and was arrested during the stop.

Judge Motz filed a concurring opinion, in which she criticized the officers' "lack of diligence" during the stop at length. However, she ultimately acknowledged that a car with a fictitious tag would be towed in any event and thus agreed to affirm the lower court's ruling.

Full Case At:
https://www.ca4.uscourts.gov/opinions/204285.P.pdf

U.S. v. Buster: February 24, 2022

E.D.Va.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, carried a firearm. Officers responded to a report of a domestic assault where a firearm discharged in the air. Officers approached the defendant, who matched witness descriptions of the assailant, because they had seen the defendant outside the victim's apartment earlier that evening. They asked to speak to the defendant, but he fled on foot. Officers captured him. The defendant was wearing a bag strapped to his body, whose pouch was in front of the defendant when police caught him. Officers removed the bag from the defendant and handcuffed him. The bag felt hard to the touch, which the officers believed indicated a weapon. While the defendant was handcuffed and on the ground, a nearby officer opened the bag and found a gun and a box of ammunition.

The defendant moved to suppress the search, but the district court denied the motion.

Held: Reversed. The Court held that "a doctrine authorizing a limited warrantless search to protect officer safety cannot be stretched to cover situations where there is no realistic danger to officer safety."

The Court focused on the fact that, when the officer opened the defendant's bag, the defendant was handcuffed on the ground and had no access to it. The Court complained that the government offered no explanation for how the contents of the bag presented any credible threat to the officers' safety at the time they searched it. The Court wrote: "quickly frisking an unsecured suspect or a bag during a *Terry* stop is simply not the same as methodically searching the contents of a bag to which a suspect no longer has access—particularly where the suspect remained restrained and under the officers' physical control."

The Court contended that, even assuming the officer had reasonable suspicion that the bag contained a weapon, that fact alone could not generate reasonable suspicion that the defendant was "presently dangerous" after he was already restrained and no longer had access to the bag.

The Court distinguished this case from other situations, such as where a firearm was found on a suspect's person or a bag was opened before a suspect was subdued or while they were still within reach of the bag. The Court also declined to opine whether or when officers may search a bag before returning it once a *Terry* stop concludes.

Judge Richardson dissented on procedural grounds.

Full Case At:
https://www.ca4.uscourts.gov/opinions/214101.P.pdf

U.S. v. Hobbs: February 1, 2022

Baltimore: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, broke into a woman's home and committed an assault and a theft inside. The defendant threatened his girlfriend's life with a handgun and said he would not be taken alive by police. The defendant owned a rifle as well and was "obsessed with firearms." When police responded, the victim was trembling and distraught, explaining that the defendant was armed and had threatened to kill her, her minor daughter, other family members. Officers also knew that the defendant had a criminal history of violent offenses, including convictions for robbery and attempted murder.

After assessing that the victim's account was credible and observing the damage to her home, police requested the defendant's location data from T-Mobile, the defendant's cellphone provider, without a warrant, contending that the situation was an exigent circumstance. Within an hour, T-Mobile responded with real- time "pings" on the defendant's cell phone that alerted the police to every 15 minutes to the defendant's general location. Another detective used call logs obtained from T- Mobile to determine the defendant's location more precisely. Officers located the defendant, arrested him, and recovered his firearm.

The defendant moved to suppress, arguing that the officers unlawfully obtained his location without a warrant. At the motion to suppress, the officers testified that T-Mobile was known to be "notoriously slow" in responding to law enforcement search warrants and could take several days to produce the necessary cell phone location information. The district court denied the motion to suppress.

Held: Affirmed. The Court held that the officers reasonably concluded that use of the "exigent form" was necessary to obtain a prompt response from the cell phone provider when an armed and dangerous suspect was at large.

The Court noted that it had not previously considered the exigent circumstances exception in the context of police use of a cell phone "ping" along with call logs from a suspect's cell phone. The Court looked to the Second Circuit's analysis in *United States v. Caraballo* and concluded that, in this case, "the only way to get help from T-Mobile" in a timely fashion was by submitting an "exigent form." Under these circumstances, the Court held that the officers reasonably concluded that the defendant was armed and dangerous, that he posed an imminent threat to the victim, to her family members, and to law enforcement officers, and that these exigent circumstances required them to seek the cell phone location information from T-Mobile without delay.

In a footnote, the Court concluded that, given the undisputed evidence of the "notoriously slow" response of T-Mobile to law enforcement search warrants, as well as the facts recounted by the victim and the damage to her dwelling observed by the officers, the exigent circumstances exception still applicable in this case. The Court cautioned, however, that in the absence of such facts and circumstances the officers' "standard procedure" of bypassing the rigors of the warrant requirement would not satisfy the Fourth Amendment.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194419.P.pdf

U.S. v. McNeil: January 13, 2022

E.D.N.C.: Defendant appeals his convictions for Distributing Heroin Resulting in Death, Possession of a Firearm, and related offenses on Fourth Amendment grounds.

Facts: The defendant and his companion carried heroin in their car with the intent to distribute. Officers stopped the car for speeding and expired registration. The officer completed his speeding investigation in approximately 11 minutes. During this time, the officers questioned the defendant and his companion about their personal backgrounds and travel plans without prolonging the stop.

The officers made several observations that caused them to extend the stop and request a drug-detection K9. These factors included: the occupants' conflicting stories regarding the length of their visit to New Jersey and how long they had known each other, the defendant breathing heavily, his carotid artery pulsating, and continuing to stare at his phone when approached by the officer, which was abnormal and appeared evasive. The officers also pointed to the occupant's increasing nervousness, including his hand shaking when providing his license and beginning to sweat when the officer asked for consent to search the car, pinpoint pupils, and fresh track marks on both arms, indicating recent drug use. The officers also noted the men's known involvement in narcotics trafficking that was the subject of an ongoing investigation, and the defendant's criminal history involving drugs.

A K9 unit arrived and detected drugs in the car. Officers found the defendant's contraband. The district court denied the defendant's motion to suppress.

Held: Affirmed. The Court concluded that the district court did not err in finding that the officers had reasonable suspicion to extend the traffic stop for a dog sniff. The Court observed that the initial investigation was reasonably related to the speeding and registration violations. The Court repeated that, *Rodriguez*, an officer may permissibly ask questions of the vehicle's occupants that are unrelated to the alleged traffic violations, provided the conversation does not prolong the detention. The Court found that, unlike *Bowman*, the officers provided articulable reasons justifying their reasonable suspicion to prolong the stop.

Full Case At:
https://www.ca4.uscourts.gov/opinions/204289.U.pdf

U.S. v. Smith: December 17, 2021

N.C.: Defendant appeals his conviction for PWID Heroin and Possession of a Firearm on Fourth Amendment grounds.

Facts: The defendant rode as a passenger in a car. When the car arrived at a convenience store, the defendant left the vehicle and went inside the store. Police then surrounded the car and detained

the driver, a convicted felon, based on their incorrect belief that the license plate was fictitious. After an officer saw a firearm in the vehicle, they entered the vehicle and found the defendant's phone, firearm, and heroin. Later, the defendant told police that the car was not his and attempted to convince police that he was just an ordinary pedestrian buying an item at the gas station.

The defendant moved to suppress, arguing that leaving his phone in the car demonstrated his legitimate expectation of privacy and that stopping the car based on a mistake about the license plate was unreasonable. The defendant claimed that he submitted to the officer's show of authority by staying inside the convenience store instead of attempting to flee. The trial court denied the motion to suppress.

Held: Affirmed. The Court held that the defendant lacked a legitimate expectation of privacy in the car. The Court first pointed out that the defendant had no ownership interest in the car. The Court repeated that merely being in a car with the permission of its owner does not confer a legitimate expectation of privacy. In this case, the Court concluded that the defendant was merely an invited guest.

The Court then explained that when someone leaves personal belongings behind in another's car, he assumes the risk that the car's owner will consent to a search of the car or that the car's contents will come into plain view of the police. In this case, the Court ruled that the defendant had neither a privacy interest in the car nor a personal interest in being free from detention since he was nowhere in or near the car at the time of its seizure. Thus, he lacked standing and his motion to suppress was properly denied.

Regarding the defendant's argument that the police presence "detained" him, the Court noted that, although the Supreme Court has held that passengers in cars are seized during traffic stops, it has not extended that holding to former passengers who have since exited the vehicle. In this case, the Court found that the defendant's liberty was not restrained in the convenience store, and thus he had no more has standing to challenge the car's seizure than any other customer there.

Judge Wynn filed a concurring opinion.

Full Case At:
https://www.ca4.uscourts.gov/opinions/204290.P.pdf

U.S. v. Hall: December 3, 2021

S.C.: Defendant appeals his convictions for Drug Trafficking and Firearms offenses on Fourth and Fifth Amendment issues.

Facts: The defendant distributed drugs while possessing a firearm. Law enforcement arranged for an informant to purchase drugs from inside the residence. After apprising officers of drugs at the residence, the CI was searched prior to the controlled buy, and no drugs were on his person. Although the CI was not surveilled inside the residence, officers continuously surveilled his travels to and from the residence. Based on the drugs the CI purchased, officers obtained a search warrant for his residence. Inside his residence, police found drugs, money, and firearms.

While law enforcement prepared to execute the warrant, the defendant left the residence by car. Police followed the defendant and stopped him when he failed to use a turn signal. The officer asked the defendant to get out of the vehicle, took him to his patrol car, and gave him *Miranda* warnings. When questioned, the defendant stated that he lived at the residence subject to the search warrant and lived there alone.

Prior to trial, the defendant filed two motions to suppress. He first sought to suppress any evidence or statements obtained from the traffic stop. He also sought to have an evidentiary hearing and invalidate the search warrant under *Franks v. Delaware*, claiming that the investigator recklessly omitted material facts within his affidavit supporting the search warrant. He argued that various omissions about the CI negated a probable cause finding, including that he wanted to "work off" burglary charges, there was no audio or video of the drug purchase, and the CI purchased marijuana from an unidentified person within the residence. The trial court denied the motions.

Held: Affirmed.

Regarding the search warrant, the Court repeated that, after a *Franks* hearing in the omission context, suppression is only warranted if a defendant demonstrates, by a preponderance of the evidence, that (1) the affiant's omissions were made intentionally or recklessly; and (2) the omitted evidence is material. The Court noted that the CI's possession of drugs only occurred upon the controlled buy's completion establishes probable cause to search the residence when coupled with the CI's initial tip. In this case, the Court concluded that the defendant did not show that the omitted facts negated probable cause by a preponderance of the evidence and affirmed the district court's denial of the motion to suppress.

Regarding the affidavit, the Court noted that even if the officers believed that the CI was completing a controlled buy for the first time, there is no indication that the CI's "first- time" status or assistance in another "incident" would undermine his reliability, nor is there any sign that the CI's burglary charges would have done so either. Regarding omissions about the residence, the Court found that the defendant's emphasis on the unknown identity of the drug seller neglected that the search warrant was also for a residence, not just a person. Regarding the lack of video, the Court insisted that neither the Court of Appeals nor the Supreme Court have ever held that the existence or non-existence of audio or video recordings is necessarily decisive to a probable-cause determination.

Regarding the traffic stop, the Court repeated that a traffic stop's limited duration is determined by the seizure's mission—to address the traffic violation that warranted the stop, meaning that it may last no longer than is necessary to effectuate that purpose. Nevertheless, during traffic stops, the Court also allowed that officers may engage in unrelated activity, as long as that activity does not prolong the roadside detention for the traffic infraction. Thus, the officer was permitted to ask about the defendant's residence during the traffic stop if his questions did not prolong the detention.

The Court agreed that the defendant's failure to use a turn signal provided the officer with a sufficient justification, and even probable cause, to stop the vehicle. During the stop, the Court also agreed that it was constitutionally permitted to order the defendant out of the vehicle. Thus, even when ordered out of his own vehicle, the Court found that he was still only detained, not arrested, even though the officer cautiously provided *Miranda* warnings even though he was not yet required. The Court found that the officer's decision to offer *Miranda* is not necessarily a constitutional problem.

Judge Wilkinson and Judge Wynn both filed concurring opinions.

Full Case At:
https://www.ca4.uscourts.gov/opinions/204618.U.pdf

U.S. v. Coleman: November 9, 2021

W.D.Va.: Defendant appeals his convictions for Drug Trafficking and Possession of a Firearm on Fourth Amendment grounds.

Facts: A School Resource Officer responded to a high school administrator's report that, as students were arriving that morning, an unknown man (who was plainly a non-student) was parked erratically in the campus parking lot, "asleep or passed out" in his vehicle with a crossbow visible in the backseat. Concerned for the school's safety and believing that possession of the crossbow was illegal under § 18.2-308.1, the officer pulled behind the defendant's vehicle. The defendant's vehicle was running, had its brake lights engaged, and was haphazardly positioned and impeding a travel lane. However, when the officer opened the door of his police cruiser, the defendant began to drive away, and the officer then engaged his emergency lights, stopping the defendant.

The officer observed the defendant to be lethargic. The officer conducted a field sobriety test, while another officer searched the vehicle. That search revealed marijuana, crystal methamphetamine, individual baggies, a scale, a handgun, and the crossbow.

The defendant moved to suppress, arguing that the officer did not have reasonable suspicion to perform the investigative stop, because possessing a crossbow on school property is not illegal under Virginia law. The trial court denied the motion.

Held: Affirmed. The Court found that even if the defendant had not possessed the crossbow, the totality of the remaining circumstances nonetheless provided reasonable suspicion to conduct the investigative stop.

The Court agreed that the presence of an unidentified individual on a school campus is a valid safety concern. The Court also agreed that a reasonable officer could suspect that the defendant was trespassing on school grounds, in violation of the school board policy and § 18.2-128(b). In addition, the Court noted that a reasonable officer could determine that the defendant was committing a parking violation. Lastly, the Court determined that a reasonable officer could suspect that the defendant was unlawfully operating his vehicle under the influence, as he remained "asleep or passed out" during the bustling morning hours at the school.

Regarding the crossbow, the Court concluded that a reasonable officer could conclude that, though it may have been lawful, the defendant was in possession of a dangerous weapon on school grounds, which could be used to harm students, faculty, and/or staff at the school. To the Court, the legality of crossbow possession under Virginia law was "largely tangential" to the question of whether the officer's suspicion was reasonable. The Court examined the facts of the original *Terry* case and

observed that an officer could reasonably suspect that the defendant presented a credible threat of physical harm to students, faculty, and/or staff at the school by possessing a dangerous weapon.

In a footnote, the Court also found that reasonable minds could differ on whether § 18.2-308(A) encompasses crossbows. For instance, the Court thought that crossbows bear resemblance to slingshots, which are enumerated in the statute. "It could thus be argued that crossbows should be included as a like-kind weapon to a slingshot." Thus, the Court speculated that the officer might also have had reasonable suspicion because his belief that the defendant's crossbow was prohibited on school property was a reasonable, even if mistaken, assessment of the scope of § 18.2-308(A).

The Court ended by quoting a 2003 federal case from California called *Aguilera*: "[S]chool officials, when faced with the credible threat of [weapon] violence, must have flexibility to respond in the manner most appropriate to protect the lives of students. Indeed, would any reasonable parent . . . send her child to [school] if a suspected armed non-student could not be disarmed by school administrators? It simply defies common sense to tie the[ir] hands . . . when they reasonably suspect a non-student visitor, armed with a "weapon," threatens the lives and safety of students."

Full Case At:
https://www.ca4.uscourts.gov/opinions/204093.P.pdf

U.S. v. Moats: October 19, 2021
(Unpublished)
W.Va.: Defendant appeals his conviction for Possession of a Firearm on Fourth Amendment grounds.

Facts: The defendant is a felon who possessed a firearm while inside a home. Officers went to the home to arrest a woman for whom there was an outstanding warrant. After receiving consent to search the home, they found the woman in the basement. She and the defendant were asleep, side-by-side, in an oversized chair. The officers attempted to awaken both persons. The defendant woke first. The officers asked him to stand and move to the other side of the room.

When the defendant stood up, the officers observed the handle of a gun sticking out of his front pants pocket. Although mere possession of a firearm was not unlawful in West Virginia, an officer took possession of the gun for safety reasons and placed it inside his coat. Another officer escorted the defendant outside. Later, the officer looked at the gun and realized that someone had obliterated the serial number.

The defendant moved to suppress the seizure, contending that the officers unlawfully seized him when they awakened him and required him to stand. He argued that the officers should have picked up the sleeping woman, moved her to another location in the basement, then awakened and arrested her. He also argued that the seizure of the gun was unlawful because it is legal to openly carry a firearm in West Virginia. Additionally, the defendant contended that that he was unlawfully detained outside the house and that the gun was not lawfully seized under the "plain view" exception to the Fourth Amendment's warrant requirement. The district court denied the motion.

Held: Affirmed. The Court first reaffirmed that, when conducting a lawful search, law enforcement officers are authorized to temporarily detain individuals on the premises. The Court explained that, although the officer testified that it might have been possible to move the woman without waking the defendant, he also testified that, in the interest of officer safety, he did not do so to avoid startling either the woman or the defendant.

In addition, the Court concluded that the temporary seizure of the defendant, which occurred when the officer awakened him and instructed him to stand and move to a different area, was reasonable under the circumstances. The Court agreed that the officer acted reasonably by separating the defendant from the woman to "gain control of the area" and for officer safety. The Court rejected the argument that the officers detained him outside the home, noting that he was merely escorted out of the house while the officers arrested the woman.

Lastly, the Court found that the seizure of the firearm fell within the "plain view" doctrine. The Court pointed out that the officer was lawfully in the home and had consent from the resident to search the home. Because the firearm was discovered in plain view while the officer was acting within the scope of that consent, the officer had lawful access to the firearm—and lawfully seized it in the interest of officer safety during the arrest of the woman. The Court noted that, having lawfully seized the firearm and upon observing the obliterated serial number, the officer became immediately aware of the incriminating nature of the firearm.

Full Case At:
https://www.ca4.uscourts.gov/opinions/214002.U.pdf

U.S. v. Junkins: August 13, 2021
Unpublished
W.Va: Defendant appeals his convictions for Drug and Firearm offenses on Fourth Amendment grounds.

Facts: Police stopped the defendant on two separate occasions and recovered methamphetamine and firearms. The first stop took place in August 2017. Officers stopped the defendant for two reasons: first, littering, (a plastic straw flew out of the car's window), and second, an obstructed license plate. After stopping the vehicle, the officers sought to confirm that the defendant's vehicle was properly insured. While the officers were waiting for confirmation, a drug-detection dog arrived at the scene and alerted to the odor of drugs in the car. At a motion to suppress, the officers testified that they received the insurance verification while the sniff was underway, and that one of the officers was still writing citations when the dog alerted. Officers searched the vehicle and seized methamphetamine and a firearm.

The second stop took place in November 2018. Officers saw the defendant's vehicle parked and running in front of a convenience store. The only way to enter or leave the store was on a public road. The officers recorded the registration tag and confirmed with dispatch that it was expired. The officers stopped the vehicle for the expired tag. Officers searched the vehicle and seized again methamphetamine and another firearm.

The defendant moved to suppress the evidence seized during the August traffic stop because, he argued, the officers unlawfully extended the stop to allow for the canine unit to arrive on the scene. He also contended that the stop in November was unlawful. The trial court denied the defendant's motions to suppress in both cases.

Held: Affirmed regarding both cases.

Regarding the August traffic stop, the Court first reaffirmed that an officer does not need separate reasonable suspicion to justify using a canine during an otherwise legitimate traffic stop "because a dog sniff is not a search" for Fourth Amendment purposes. The Court agreed that the officers had probable cause to stop the car when they saw the two traffic violations. For the Court, the only question was whether the officers extended the stop beyond its initial scope to stall for the canine unit to arrive.

Regarding the August stop, the Court concluded that the officers didn't impermissibly extend the stop because, while the dog sniff was taking place, they were still conducting "ordinary tasks incident to a traffic stop including verifying the registration of a vehicle and existing insurance coverage." The Court then explained that, once the dog alerted, the officers had probable cause to search the car.

Regarding the November stop, the Court examined the location of the car, the fact that it was running, and the reality that the driver needed to use public roadways to reach the convenience store and found that those facts were objectively reasonable indicia that the defendant had violated West Virginia law by driving on a public roadway. Because the officers had reasonable suspicion that criminal activity had occurred, the Court ruled that the stop was "legitimate at its inception."

Full Case At:
https://www.ca4.uscourts.gov/opinions/204380.U.pdf

U.S. v. Caldwell: August 3, 2021
7 F.4th 191 (2021)
N.C.: Defendant appeals his convictions for Bank Robbery and Firearm Possession on Fourth Amendment and *Brady* Discovery grounds.

Facts: The defendant arranged a bank robbery with two other men. The two men entered the bank and robbed it at gunpoint, while the defendant waited outside in the getaway vehicle. Officers tracked the stolen cash using GPS and saw three individuals fleeing the getaway car on foot. Using a police dog, officers found the defendant hidden in brush on top of a bag containing a GPS tracker and the money that had been stolen.

Officers also located the getaway car at the site where they had followed the GPS trackers immediately after the robbery. Police observed that the vehicle had an invalid temporary license plate, with a permanent license plate on its back seat. They located a black hooded sweatshirt, a glove, loose currency, a cash wrapper, and a second GPS tracker on the ground near the vehicle, and a ski mask on the ground next to it. They observed a revolver and black jacket in plain view on the back seat. The

clothing and revolver matched the general description of that used by the robbers. The defendant claimed that he had been carjacked in the car.

Two weeks after impounding the vehicle, detectives returned to the impounded vehicle, jump-started the car's battery, and searched the trunk. The trunk contained a firearm and incriminating clothing. Prior to trial, the defendant moved to suppress the search, but the trial court denied the motion.

Police spoke with one of the co-conspirators. At the time of the interview, the co-conspirator denied knowing the defendant. During that interview, the co-conspirator's mother and her boyfriend, separately, entered the interrogation room during breaks in officers' interrogations and spoke with the defendant. Roughly six months later, the co-conspirator implicated the defendant and became a cooperating witness. During discovery, the government revealed who the individuals were, but declined to provide their contact information.

Prior to trial, the defendant demanded that he needed the contact information for the mother and boyfriend because he did not know how the witness' mother and her boyfriend had information about the defendant or "how or when/where law enforcement provided them with the information allegedly" about the defendant that was used to attempt to induce the witness to cooperate with law enforcement; "what other [undisclosed] information these people or law enforcement ha[d] about" the defendant; and "what kind of pressure was put" on the witness to change his story from not knowing the defendant to naming the defendant as the ringleader. The trial court denied the defendant's request.

At trial, another co-conspirator testified against the defendant. The trial court had appointed an attorney to represent the co-conspirator. However, another attorney in the co-conspirator's counsel's office previously represented the defendant in one of the previous state versions of these bank robbery charges. The defendant objected and asked the trial court to disqualify the co-conspirator's attorney. The district court conducted a *voir dire* interview of the attorney and determined that he "knew nothing about" his office's earlier representation of the defendant and did not have access to the files. The trial court refused to disqualify the co-conspirator's attorney.

Held: Affirmed. First, regarding the search of the car, the Court ruled that, when detectives returned to the impounded vehicle two weeks after impoundment and searched the trunk, they were justified in doing so without obtaining a warrant. Like in *Gastiaburo*, the Court concluded that the passage of time did not interfere with the applicability of the automobile exception. Despite the two-week delay, the Court agreed that the automobile exception still applied as long as probable cause remained to justify the search. The Court explained that, when a warrantless search of a vehicle could have been conducted on the scene pursuant to the automobile exception, a warrantless search is also justified after the vehicle has been impounded and immobilized if probable cause still exists.

The Court also agreed that probable cause existed to believe that the vehicle contained evidence related to the bank robbery.

Regarding the *Brady* issue, the Court concluded that the defendant failed to make a showing of materiality under either *Brady* or the less onerous standard for *in camera* review. The Court explained that the fact that the two had knowledge of the defendant does not necessarily mean they obtained that information from the police in a concerted effort to pressure the cooperating witness. The Court

also highlighted that the cooperating witness did not the implicate the defendant until six months later. Accordingly, the defendant's argument that the contact information was relevant because the cooperating witness' mother and her boyfriend would be able to shed light on police interview tactics was, for the Court, "pure speculation lacking any specificity, and is insufficient to support a finding of materiality under Brady or to require an *in camera* review."

Lastly, regarding the co-conspirator's counsel, the Court was satisfied that no actual conflict jeopardized the integrity of the proceedings. The Court agreed that, with the district court's permission, the attorney could ethically represent the co-conspirator during his testimony and withdraw afterward. Given the broad discretion conferred on the court and the court's finding that the attorney had not been exposed to any confidential information related to the defendant, the Court concluded that the trial court acted within its discretion when it allowed him to represent the co-conspirator for purposes of his testimony.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194019.P.pdf

U.S. v. Rose: July 9, 2021
3 F.4th 722 (2021)
N.C.: Defendant appeals his convictions for Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: The defendant imported cocaine using FedEx by having packages delivered to a friend's residence. The defendant did not live at the residence. The person whose name was on the package was deceased. One day, law enforcement officers noticed one of the packages at a FedEx facility. They examined it and found that the recipient did not live at the listed residence and was deceased. Officers alerted management at FedEx, who opened the package and found cocaine. Officers then discovered a second, similar package. They searched that package and found more cocaine.

Officers then arranged a controlled delivery of both packages to the listed address. The defendant later arrived to collect the package. He attempted to flee from police, but officers captured him.

Prior to trial, the defendant moved to suppress evidence of the cocaine found in the two searches conducted at the FedEx processing facility. The defendant argued that although he was neither the sender of, nor the named recipient on, the packages, he nonetheless had a reasonable expectation of privacy in those packages because he was their intended recipient. The Court denied the motion.

Held: Affirmed. The Court concluded that the defendant did not have a reasonable expectation of privacy in the packages. The Court explained that, when a sealed package is addressed to a party other than the intended recipient, that recipient does not have a legitimate expectation of privacy in the package absent other indicia of ownership, possession, or control existing at the time of the search. The Court found that the defendant's subjective interest as the intended recipient of the packages was insufficient on its own to warrant protection under the Fourth Amendment.

The Court acknowledged that individuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names. However, to demonstrate a reasonable expectation of privacy, the defendant must provide evidence that the fictitious name is an established alias. In this case, the Court observed that nothing about the packages, including the sender's name, the named recipient, the address, or the phone number listed on the packages signaled in an objective sense that the defendant had a protected interest in the packages.

The Court pointed out that, because the two packages bore another person's name and lacked objective indicia connecting the defendant to the packages as the intended recipient, he would not have been able to exercise at the FedEx facility any ownership rights or control over the packages. In the Court's view, "Absent any ability to exercise ownership, possession, or control of the packages at the time of the searches, Rose had no greater privacy interest in the packages than an airport bystander."

Judge Gregory, the chief judge, wrote an extensive dissent. He contended that the defendant had the necessary privacy expectation in the searched object to move to suppress the discovered evidence.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194755.P.pdf

Walker v. Donahoe: July 7, 2021
3 F.4th 676 (2021)
W.D.Va: Plaintiff appeals the dismissal of his lawsuit against police on Fourth Amendment grounds.

Facts: A week after the Parkland school shooting, a citizen saw the defendant walking along the road, dressed in a black sleeveless shirt and camouflage pants, in a suburban neighborhood within a mile of a local school while carrying an AR-15-style rifle. The citizen called 911 and officers responded. They saw the defendant and based on his appearance, each believed that he could be under the age of 18. Officers detained the defendant, learned he was an adult who lawfully possessed the firearm, and a criminal history check revealed no ground for his continued detention. They released the defendant. The entire encounter lasted less than nine minutes.

The defendant brought a lawsuit against the officers under 42 U.S.C. § 1983 for violation of his Fourth Amendment rights. On summary judgment, the district court ruled that there was reasonable suspicion supporting the investigatory detention, that the officers were also protected by qualified immunity, and awarded summary judgment to the defendants.

Held: Affirmed. The Court affirmed the summary judgment award on the ground that there was reasonable suspicion for the investigatory detention and therefore no constitutional violation. Thus, the Court did not reach and review the court's alternative qualified immunity ruling. The Court ruled that the circumstances of the defendant's firearm possession were unusual and alarming enough to engender reasonable suspicion.

Although openly carrying a rifle is lawful in West Virginia, the Court repeated that lawful conduct can contribute to reasonable suspicion. The Court rejected the argument that their decisions in

Troupe and *Black* meant that the act of openly carrying a firearm can never engender reasonable suspicion; instead, the possession of a firearm plus something "more" may "justify an investigatory detention."

In this case, the Court agreed that the officers had reasonable suspicion that the defendant was intent on perpetrating a mass shooting at the nearby school. The Court pointed out that the defendant was "dressed to look like a soldier," and carrying a type of rifle that has been "the weapon of choice for the deadliest mass shooters of the past decade," one that had just been used at Parkland school shooting one week before. The Court also noted that the fact that the defendant was walking rather than driving suggested that he might be a minor and perhaps a student at the nearby school.

The Court rejected the defendant's argument that the potential criminal activity was irrelevant because the officers did not mention it prior to litigation. The Court repeated the principle that "reasonable suspicion is an objective test" based on "the facts within the knowledge of" the officer and not the officer's "subjective beliefs."

Judge Richardson wrote a concurring opinion, stating that he would have affirmed the district court's grant of summary judgment based on the officer's qualified immunity.

Full Case At:
https://www.ca4.uscourts.gov/opinions/201547.P.pdf

U.S. v. Cox: July 8, 2021
Unpublished
W.Va.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: The defendant and another man sat inside a car outside of a home while the defendant, a convicted felon, had a firearm in the car. Officers, dressed in plain clothes and wearing badges, visited the home to serve subpoenas in an unmarked car. Officers had tried to serve the subpoenas once before and found live ammunition on the porch. This time, they saw a woman outside the home. The car appeared to be a car that the woman had been driving when one of the officers had stopped her previously. The officer recalled that the woman's father had reported the car as stolen recently and thought perhaps the woman was attempting to get revenge for the theft.

The officers noted that they would have their backs to the car as they attempted to serve the subpoenas at the house, so they decided to approach the car "to make sure [they] were safe first" and "let [the occupants] know that [they] were law enforcement." The officers began to approach the vehicle. However, while the officers were approaching the vehicle, the defendant's other occupant bent forward and off to his side. At that point, the officers directed the other occupant to show them his hands, a command that the man initially ignored, opting instead to continue reaching down inside the car. Officers drew their firearms and finally the men showed their hands to the officers.

After removing the men from the car, one of the officers spotted a handgun in the rear seat. They seized the gun and learned the defendant was a convicted felon. The defendant moved to suppress but the district court denied the defendant's motion.

Held: Affirmed. The Court rejected the defendant's contention that the gun was only visible following an illegal seizure in violation of his Fourth Amendment rights.

Initially, the Court observed that the fact that the officers displayed their badges likewise doesn't transform their approach into a seizure within the meaning of the Fourth Amendment. The Court also noted that the officers were dressed in plain clothes and riding in an unmarked vehicle.

The Court then agreed that the officers didn't seize the defendant until they removed him from the car, which occurred after the other occupant made sudden downward movements and failed to comply with the officers' commands that he raise his hands. The Court found that it was reasonable for the officers to infer that, when the other occupant saw the police approaching and immediately began reaching down inside the car, then ignored the officers' commands to show his hands and instead continued to reach down, the occupant could be reaching for a weapon or other dangerous object. Thus, the Court concluded that the officers had reasonable and articulable suspicion to detain both occupants.

In a footnote, the Court also reiterated that, regardless of whether the officers suspected the defendant of wrongdoing, they were not constitutionally required to give him an opportunity to depart the scene without first ensuring that, in so doing, they were not permitting a dangerous person to get behind them. The Court explained that the officers didn't violate the defendant's Fourth Amendment rights by refusing to let him leave the scene.

Full Case At:
https://www.ca4.uscourts.gov/opinions/204224.U.pdf

U.S. v. Gondres-Medrano: July 8, 2021
3 F.4th 708 (2021)
Baltimore: Defendant appeals his conviction for Drug Trafficking on Fourth Amendment grounds.

Facts: A known confidential informant with a track record of providing reliable information told law enforcement that the defendant was trafficking heroin and cocaine between New York and Baltimore. During the investigation, officers overheard a phone call between the informant and someone the informant identified as the defendant discussing trafficking cocaine between Maryland and New York. The officers also confirmed the defendant's identity and residence and learned of his prior drug conviction and immigration history.

The informant stated that the defendant would be transporting drugs from his residence on a particular day. That day, officers met with the informant, searched him and the car, then surveyed the defendant's house and told the informant when to arrive. When the informant pulled up to the residence, the defendant let him in, came out with a shoebox, and got in the car to drive away.

Officers stopped the car, searched it, and found heroin and fentanyl in the shoebox. The defendant moved to suppress, but the trial court denied the motion.

Held: Affirmed. The Court held that the known informant, who had a track record of providing reliable information to law enforcement, provided information that readily established probable cause, justifying the search. With probable cause, the police could search the shoebox under the automobile exception.

The Court reviewed the rules for evaluating an informant's information in detail. The Court pointed out that, in this case, the informant had given information that had led to several successful arrests. The Court also noted that the officers had also met with this informant and could evaluate his demeanor and hold him responsible for lying. The Court concluded that the fact that the defendant entered the informant's car with a shoebox at the time and place described showed the informant's firsthand knowledge and corroborated his story. For the Court, these circumstances established probable cause to believe that the defendant was trafficking drugs and had drugs in the shoebox.

The Court also found that the phone call that police overheard between the informant and the defendant provided probable cause to obtain a warrant to track the defendant's cellphone.

Full Case At:
https://www.ca4.uscourts.gov/opinions/204105.P.pdf

Leaders of a Beautiful Struggle v. Baltimore Police: June 23, 2021 (*En Banc*)
2 F.4th 330 (2021)
Reversed Panel Ruling of November 5, 2020
Baltimore: Plaintiffs appeal the denial of an injunction against police use of aerial surveillance.

Facts: The Baltimore Police Department operated a surveillance system (called "AIR") by flying three small planes over Baltimore during daytime hours, weather permitting. The AIR planes were equipped with cameras that cover about ninety percent of the city at any given time. The cameras employed a resolution that reduced each individual on the ground to a pixelated dot, thus making the cameras unable to capture identifying characteristics of people or automobiles. The program had several signification limitations:

- AIR flew only the daytime hours, weather permitting, and never at night.
- AIR used limited resolution cameras that identify individuals only as pixelated dots in a photograph. Analysts examining these photographs were not able to identify an individual's race, gender, or clothing.
- If a dot was seen entering a building in a photograph, analysts could not know if the same person was leaving the building when they saw a dot leave the building without the use of other surveillance tools.
- The cameras did not utilize zoom, infrared, or telephoto technologies.
- Analysts could not access photographs until they received a notification related to the investigation of a specific murder, non-fatal shooting, armed robbery, or carjacking.
- There was no live tracking of individuals. Analysts could only use AIR's photographs to look at past movements.

• If an arrest was made using the AIR technology, the photos related to the arrest would be given to the prosecutor and defense counsel. Otherwise, all photographs collected by AIR would be deleted after forty-five days.

Plaintiffs, in partnership with the ACLU, sought a preliminary injunction to stop the AIR program. In the intervening period, Baltimore stopped using the program and shut it down. The district court denied the preliminary injunction. A panel of the 4th Circuit affirmed.

Held: Reversed. In an 8-6 ruling, the Court held that, because the AIR program enabled police to deduce from the whole of individuals' movements, accessing its data was a search, and its warrantless operation violated the Fourth Amendment. The Court wrote: "The AIR program is like a 21st century general search, enabling the police to collect all movements, both innocent and suspected, without any burden to articulate an adequate reason to search for specific items related to specific crimes... Because that collection enables Defendants to deduce information from the whole of individuals' movements, this case is not "far from *Carpenter*"; indeed, it is controlled by it."

The Court observed that the "retrospective quality of the data" enabled police to "retrace a person's whereabouts," granting access to otherwise "unknowable" information. The Court analogized this case to *Jones* and *Carpenter*, where the Supreme Court had found that the surveillance surpassed ordinary expectations of law enforcement's capacity and provided enough information to deduce details from the whole of individuals' movements. The Court contrasted this case from what law enforcement can gather from a single, fixed camera, since such a camera generally only captures individual movements.

In a footnote, the Court explained that an order barring the Defendants in this case from "accessing" any file containing AIR data would not prohibit transferring such files to prosecutors, defense counsel, or the court in an individual prosecution. The Court wrote that an order barring "access" does not bar possession; the injunction Plaintiffs requested would not require BPD to destroy the remaining AIR data.

The Court criticized the Baltimore Police for launching the AIR program, complaining that disadvantaged communities in Baltimore "are over-surveilled, they tend to be over-policed, resulting in inflated arrest rates and increased exposure to incidents of police violence." Chief Justice Gregory wrote the Court's opinion, but also wrote an opinion concurring with his own opinion. In his concurrence, he criticized the dissent for taking "for granted that policing is the antidote to killing…. I am skeptical that this logic genuinely respects and represents the humanity, dignity, and lived experience of those the dissent ventures to speak for." Judge Wynn also wrote a concurrence in which he argued against "over-policing" the city and expressed his view that Baltimore is also "poorly policed."

Justice Wilkinson wrote a dissent in which he contended that "precipitous and gratuitous ruling will contribute to the continuation of a great human tragedy." Justice Niemeyer also wrote a dissent, writing that: "Our court's majority opinion in this case is the most stunning example of judicial overreach that I have ever witnessed on this court." He argued, as did Judge Diaz in another dissent, that the entire appeal was moot, as Baltimore had ended the program before the appeal.

Full Case At:
https://www.ca4.uscourts.gov/opinions/201495A.P.pdf

Original Panel Ruling At
https://www.ca4.uscourts.gov/opinions/201495.P.pdf

U.S. v. Buzzard, et. al.: June 11, 2021
1 F.4th 198 (2021)
W.Va: Defendants appeal their convictions for Firearms offenses on Fourth Amendment grounds.

Facts: The defendant and his compatriot were felons who carried guns in a car. One night, an officer observed the car commit a traffic violation and stopped the vehicle. The area was a high-crime area, where officers, including this officer, had previously made multiple arrests for narcotics. The officer had prior interactions with one of the defendants while on duty, noting that he had a history of drug addiction, had recently gotten out of prison, and was a convicted felon. The officer requested that backup officers join him.

While waiting, the officer observed that one defendant was moving around and not making eye contact in an unusual way. He asked the defendants whether "there was anything illegal in the car." They replied that they had drug paraphernalia. Other officers responded and patted down the defendants. One of the defendants then revealed that there were guns in the car.

The defendants moved to suppress, arguing that the officer violated their Fourth Amendment rights by asking if "there was anything illegal in the car" because (1) it wasn't related to the traffic stop's mission, and (2) it unlawfully prolonged the stop. The trial court denied the motion.

Held: Affirmed. The Court found that the question related to officer safety and thus related to the traffic stop's mission. The Court noted that the officer was outnumbered, and he asked the question because of the time of night and the high drug area, the one occupant's criminal history, and the occupant's behavior. The Court wrote: "Given the totality of the circumstances, it makes sense that he needed to know more about what [they] had in the car."

The Court acknowledged that the question "Is there anything illegal in the vehicle?" could be interpreted more broadly than one worded slightly differently (for example, "Is there anything dangerous in the vehicle?" or "Are there weapons in the vehicle?"). However, the Court explained that because "traffic stops are 'especially fraught with danger to police officers,' … we decline to require such laser-like precision from an officer asking a single question in these circumstances."

The Court also pointed out that the officer's question didn't extend the stop "by even a second." The Court noted that, at the time, the officer did not yet have the information he needed to perform the customary checks on the driver and vehicle, and he was waiting for an additional officer to arrive so he could safely proceed with the stop. Because he asked the question during a lawful traffic stop and the question did not prolong the stop, the Court found that the officer's question passed constitutional muster under *Rodriguez,* even if it exceeded the scope of the stop's mission.

Full Case At:
https://www.ca4.uscourts.gov/opinions/204087.P.pdf

U.S. District Court – E.D.Va.

U.S. v. Chatrie: March 3, 2022

E.D.Va Richmond: Defendant moves to suppress evidence obtained through a "Geofence" warrant on Fourth Amendment grounds.

Facts: The defendant robbed a bank of roughly $200,000 using a gun and a note claiming that he had the teller's family held hostage. Witnesses stated that the perpetrator had come from a nearby church. Law enforcement knew only that the perpetrator had a cell phone in his right hand and appeared to be speaking with someone on the device. After police failed to locate the suspect via reviewing camera footage, speaking with witnesses, and pursuing two leads, law enforcement obtained a "geofence" warrant from Google.

[*The Court's ruling describes how this technology works, how geofence warrants are executed by Google, and how Google stores the information. Rather than restate the Court's summary, it might be easier to just read the court's summary on pages 6, 10, and 11*].

In the warrant, a detective drew a circle with a 150-meter radius that encompassed the bank, the entirety of the church, and the church's parking lot. The circle covered 70,686 square meters of land around the Bank, located in a busy part of the Richmond metro area. The Government then obtained a warrant seeking the location information for every device within that area. The warrant stated that it would follow a three-step procedure when obtaining the data from Google:

Step 1: In this step, law enforcement would seek de-identified list of all Google users whose Location History data indicates were within the geofence during a specified timeframe.

Step 2: In this step, law enforcement would seek additional de-identified location information for a certain device or devices to determine whether that device or devices are relevant to the investigation, and additional location coordinates beyond the time and geographic scope of the original request to eliminate devices from the investigation.

Step 3: In this step, law enforcement would seek account-identifying information for the users the Government determined were relevant to the investigation.

The warrant described the three-step process but sought authority for all three steps in one single warrant. Under the warrant, law enforcement would determine for what users Google would produce additional data under Steps 2 and 3, without seeking any additional legal authority.

After receiving anonymized information on nineteen users at Step 1, a detective requested the additional location information under Step 2 and subscriber information under Step 3 for 19 device numbers produced in Step 1. Google denied that request, because it combined Steps 2 and 3 without using Step 2 data to narrow the data, per Google's guidelines. Law enforcement narrowed the request and Google complied. The data from the geofence warrant ultimately led law enforcement to the defendant.

The defendant moved to suppress the warrant on Fourth Amendment grounds. The Court held hearings, hearing from the Commonwealth's expert, F.B.I. S.A. Jeremy D'Errico, a defense expert, and witnesses from Google. [*Note:* Google argued in its brief that Google location history is not a business

record, but is "a journal stored primarily for the user's benefit" and is controlled by the user. This summary simply notes that argument because it is hilarious – *EJC*].

Held: Motion Denied. The Court concluded that, although the warrant was invalid for lack of particularized probable cause, the *Leon* good faith exception applied. The Court explained that, if law enforcement was to seek a geofence warrant in the future, it must obtain a separate search warrant at each step of Google's three-step process. The Court also indicated that the "geofences" must be limited in both size and time, and must respect innocent people's protected movements and residences.

The Court complained that, in this case, "the geofence warrant captured location data for a user who may not have been *remotely* close enough to the Bank to participate in or witness the robbery." "The largest confidence interval for a user located within the geofence had a radius of roughly 347 meters (longer than four football fields) – more than twice as large as the original geofence. Thus, the Geofence Warrant *could* have captured the location of someone who was hundreds of feet outside the geofence. Within this confidence interval – in addition to the Bank and the Church – are several buildings (with an unknown number of floors), including a Ruby Tuesday restaurant, a Hampton Inn Hotel, several units of the Genito Glen apartment complex, a self-storage business, a senior living facility, two busy streets (Hull Street and Price Club Boulevard), and what appear to be several residences near the southeast edge of the confidence interval."

The Court expressed concern that, at Step 2 of the process, the Government "obtained two hours of unrestricted location data for an individual who perhaps had only driven within the outer vicinity of the crime scene." The Court found it significant that a defense expert was able to access publicly available information such as tax records in conjunction with other publicly available information such as social media accounts, that would have allowed him to determine several individuals' likely identities with only a few data points.

The Court ultimately dodged the issue of standing. The Court wrote: "As this Court sees it, analysis of geofences does not fit neatly within the Supreme Court's existing "reasonable expectation of privacy" doctrine as it relates to technology." Citing *Carpenter,* "the Court expresses its skepticism about the application of the third-party doctrine to geofence technology." "This is especially so given the limited and partially hidden warnings provided by Google." In a footnote, the Court wrote "regardless of which entity's files the Government looked through, the users ultimately retain at least some joint interest in the location data their phones generate."

Because the Court denied the motion on good faith, though, "whether these individuals have an expectation of privacy in that data must be decided another day." The Court also acknowledged that "At best, these matters are best left to legislatures…. It is not within the Court's purview to decide such issues, but it urges legislative action."

Oddly, though, even though the Court did not make a ruling regarding standing, the Court still concluded that this geofence warrant violated the Fourth Amendment, due to a lack of particularity. The Court wrote: "The Fourth Circuit has clearly articulated that warrants, like this one, that authorize the search of every person within a particular area must establish probable cause to search every one of those persons. Here, however, the warrant lacked any semblance of such particularized probable cause to search each of the nineteen targets, and the magistrate thus lacked a substantial basis to conclude that the requisite probable cause existed."

Regarding particularity, the Court contended that "the warrant simply did not include any facts to establish probable cause to collect such broad and intrusive data from each one of these individuals." "A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." "To be sure, a fair probability may have existed that the Geofence Warrant would generate the *suspect's* location information. However, the warrant, on its face, also swept in unrestricted location data for private citizens who had no reason to incur Government scrutiny." The Court analogized this warrant to the N.D. Ill warrant in *In re Search of Information at Premises Controlled by Google*, 481 F. Supp. 3d 730 (N.D. Ill 2020).

In this case, the Court rejected the argument that the multi-step process was adequate, because "Steps 2 and 3 – undertaken with no judicial review whatsoever – improperly provided law enforcement and Google with unbridled discretion to decide which accounts will be subject to further intrusions. These steps therefore cannot buttress the rest of the warrant, as they fail independently under the Fourth Amendment's particularity prong."

For the Court, the multi-step process was problematic because of the lack of judicial review. "Even if this narrowing process cured any of the warrant's shortcomings as to particularized probable cause, this process cannot independently buttress the warrant for an entirely separate reason: clear lack of particularity… Steps 2 and 3 of this warrant leave the executing officer with *unbridled* discretion and lack any semblance of objective criteria to guide how officers would narrow the lists of users." "Stated plainly, Steps 2 and 3 'put no limit on the Government's discretion to select the device IDs from which it may then derive identifying subscriber information from among the anonymized list of Google-connected devices that traversed the geofences.

The Court complained: "This warrant, for instance, contains no language objectively identifying *which* accounts for which officers would obtain further identifying information. Nor does the warrant provide objective guardrails by which officers could *determine* which accounts would be subject to further scrutiny. Nor does the warrant even simply limit the *number* of devices for which agents could obtain identifying information. Instead, the warrant provided law enforcement unchecked discretion to seize more intrusive and personal data with each round of requests – without ever needing to return to a neutral and detached magistrate for approval."

In a footnote, the Court wrote: "The fact that data points obtained during Steps 1 and 2 are anonymized when Google reports them does not completely quell this Court's concerns about the invasiveness of this warrant. Even "anonymized" location data – from innocent people – can reveal astonishing glimpses into individual's private lives when the Government collects data across even a one or two hour period." The Court pointed to the defense expert's testimony that, "using two hours of only 'anonymized' data obtained through the warrant, he could observe each account's reported location, track each account to his or her home, and pinpoint each account's personal identity using publicly available resources without any Step 3 information."

The Court rejected the argument that the geofence warrant would have lawfully identified witnesses to the crime as well as a potential perpetrator, because the affidavit had made no such claim. "Even if this Court were to assume that a warrant would be justified on the grounds that a search would yield *witnesses* (some of whom had already been interviewed) instead of perpetrators, the Geofence Warrant is completely devoid of any suggestion that all – or even a substantial number of – the individuals had participated in or witnessed the crime…."

In a footnote, the Court rejected the analogy to previous cases involving "tower dumps," contending that in most of those cases, the courts never considered the "particularity" issue. Specifically, the Court rejected the analogy to *U.S. v. James*, an 8th Circuit case, because that case involved a series of robberies. "The Court similarly concludes here that the commission of a single crime – by itself, and with no narrowing measures or guardrails – is not sufficient to search geofence records "near the location of *every* crime."

Good Faith

The Court, however, found that the officer lawfully relied on the warrant in good faith; "in light of the complex legal issues that lead to this Court's conclusion, the Court cannot say that Det. Hylton's reliance on the Geofence Warrant was objectively unreasonable." Accordingly, the Court ruled that the *Leon* good faith exception applied, and the Court denied the defendant's motion to suppress evidence obtained as a result of the geofence warrant.

The Court explained that "the permissibility of geofence warrants is a complex topic, requiring a detailed, nuanced understanding and application of Fourth Amendment principles, which police officers are not and cannot be expected to possess." "Even accounting for his miscues, in light of the complexity of this case, Det. Hylton's prior acquisition of three similar warrants, and his consultation with Government attorneys before obtaining those warrants, the Court cannot say that Det. Hylton's reliance on the instant warrant was objectively unreasonable."

The Court refused to conclude that the magistrate "wholly abandoned" his role as a detached magistrate. The Court also rejected the argument that, because the Magistrate's college was not officially licensed in Florida and was not accredited by a regional higher-education agency, the warrant was invalid under Va. Code 19.2-37. The Court further concluded that "Virginia sufficiently trains its magistrates to determine probable cause." "The Court finds that suppression based on a technical defect of the magistrate's credentials would not serve to deter improper law enforcement conduct."

The Court did, however, step outside its ruling to share its opinion about Virginia law. "Frankly, however, it is not clear to the Court that *any* person just three years out of college should be burdened with the responsibility of approving or rejecting a warrant of this complexity and magnitude… Ultimately, it is for the General Assembly to review or change its magistrate practice given this new technology, and one hopes they would."

In conclusion, although the Court found the "good faith" exception prevailed in this case, the Court wrote: "the Court nonetheless strongly cautions that this exception may not carry the day in the future. This Court will not simply rubber stamp geofence warrants. If the Government is to continue to employ these warrants, it must take care to establish particularized probable cause. As the legal landscape confronts newly developed technology and further illuminates Fourth Amendment rights in the face of geofence practices, future geofence warrants may require additional efforts to seek court approval in between Steps, or to limit the geographic and temporal information sought."

Full Case At:
https://www.dropbox.com/s/l2nwsmgl5c1ukz9/United%20States%20v%20Chatrie.pdf?dl=0

Virginia Supreme Court

Merid v. Commonwealth: July 1, 2021
858 S.E.2d 825 (2021)
Aff'd Court of Appeals ruling of May 12, 2020
Alexandria: Defendant appeals his convictions for First Degree Murder and Abduction on Fourth Amendment grounds.

Facts: The defendant murdered a woman in her apartment. Officers responded the apartment for a dispatch about a possible suicide threat. The defendant's brother met the officers outside the apartment. He was very concerned for his brother, based on text messages where the defendant discussed "joining" his deceased mother and asked his brother to forgive him. The brother told the officers that he had not been able to reach the defendant all day. The brother indicated that the defendant's car was in the parking lot. Officers ran the tags on the car and discovered that it was not registered to the defendant; the brother explained that the defendant did not own the car.

The defendant did not come to the door despite repeated requests by the officers and the brother. The officers testified that although the defendant responded that he was "getting dressed" and did not need medics, they continued to hear an "alarming" sound that they described as "garble, throw up" and "coughing and moaning, like pain." The officers found a key and entered the apartment. Inside, the defendant was stabbing himself in the throat. Officers wrestled the defendant to confiscate the knife and treat his injuries. Soon thereafter, medics arrived to treat the defendant.

An officer noted that, from his point of view in the dining area, he was able to see the entire apartment, but for the bedroom. The officer stepped three or four feet to the bedroom, opened the door, and saw the victim's body lying on the ground. She was tied to a chair, her head was wrapped in plastic, and there was dried blood pooled on the floor all around her. The victim was the owner of the car in the parking lot and the only person listed on the rental agreement. The officer exited and notified other officers, who obtained a search warrant and learned that the defendant had murdered the victim.

The trial court denied the defendant's motion to suppress, finding that the "community caretaker" exception to the Fourth Amendment applied to the search and the evidence would have been inevitably discovered. The Court of Appeals affirmed in a published ruling, *Merid v. Commonwealth*, 72 Va. App. 104, 119 (2020).

Held: Affirmed. In a short, three-line ruling, the Virginia Supreme Court affirmed the judgment "for the reasons stated in the opinion of the Court of Appeals." In a footnote, however, the Court also found that the Court of Appeals' opinion was consistent with the U.S. Supreme Court's recent ruling in *Caniglia v. Strom*.

The Court of Appeals had held that, because the officers acted reasonably in entering to render emergency aid and in conducting a security sweep of the remaining area of the residence, their actions did not violate the Fourth Amendment. The Court of Appeals repeated that, under *Brigham City*'s emergency aid exception, "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." Instead

of adopting a *per se* rule either in favor of or against the constitutionality of a sweep under the emergency aid exception, the Court simply explained that officers must act in an objectively reasonable manner when acting without the authority of a warrant. The Court refused to impose a bright-line rule that would confine the police to the immediate physical space surrounding the emergency when they have entered to provide aid. Thus, the Court found that officers may conduct a cursory sweep of a residence after entering pursuant to the emergency aid exception, if reasonable.

To explain the basis for a "sweep" under the emergency aid rule, the Court cited cases from the Sixth and Tenth circuits, and from Delaware, Wisconsin, and Massachusetts. The Court favorably cited a two-part test in the Tenth Circuit's *Najar* ruling: "whether (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable."

In this case, the Court observed that the officers had an objectively reasonable basis for believing that a person within the apartment was in need of immediate aid—whether welcomed or not. The Court also observed that, once inside the apartment, the officers acted reasonably under all the circumstances. The Court noted that the officers' actions were minimally intrusive

The Court reasoned that, even though officers had restrained the defendant at the time that they entered the bedroom, it was not out of the realm of possibility—and indeed it was the case—that someone else in the apartment might have been subjected to violence. In addition, the officers knew that the car the defendant drove was registered to someone other than the defendant, which could have suggested that the car owner was in the apartment, too. Furthermore, the Court noted that the officers were aware that EMS was about to transport the defendant to a hospital.

The Court wrote: "As far as the officers were concerned, there might have been a pet, a child, or an adult in need behind that closed bedroom door. It was certainly reasonable for the officers to ensure that the premises and any other occupants were safe and secure before they left. In fact, it would have been irresponsible for them to have done otherwise."

The Court of Appeals had also cautioned that exclusion of evidence is only justified "to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence," such that the violation is "patently unconstitutional" could be characterized as "flagrant conduct."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1200799.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1145194.pdf

Virginia Court of Appeals
Published

Brown v. Commonwealth: May 10, 2022

Charles City: Defendant appeals his conviction for Abduction on Refusal to Disqualify a Prosecutor and sufficiency of the evidence.

Facts: The defendant, angry that a county employee had just driven onto his property, found her vehicle nearby and blocked it from pulling away by trapping her with his own car. He angrily confronted her and demanded "I'm not going to move the car. You're going to stay here and you're going to tell me what you're doing here." The victim tried to contact the police, but because they were in an isolated, rural area, she could not get a cellphone signal.

Meanwhile, however, the defendant also called the police, asked them to come to the scene to resolve the issue, and told the 911 dispatcher that he "got [the victim] blocked in." During this break, the victim was able to drive through a drainage ditch and escape.

Prior to trial, the defendant moved to disqualify the entire Commonwealth's Attorney's Office from prosecuting the case, alleging a financial conflict of interest between the victim and that office. In his motion, the defendant cited the fact that the County Administrator's office—where the victim worked—created the budget for the Commonwealth's Attorney's office. The Commonwealth's Attorney represented that even though the County Administrator's office prepared the budget for his office, it was the County Board of Supervisors who approved the budget, not the County Administrator's office. The victim also testified that even though she worked in the County Administrator's office, she had no hand in creating or working with the budget for the Commonwealth's Attorney's Office. The trial court denied the motion.

At trial, the defendant argued that he lawfully detained the victim, because she was a government agent who intruded onto his private property and searched for violations without a warrant in violation of § 19.2-59.

Held: Affirmed. The Court noted that by his own language and actions, the trial court could conclude the defendant intended to restrict the victim's freedom of movement. The Court also noted that it was not relevant that the victim was able to escape quickly, as the abduction statute does not contain a temporal requirement, which means a victim can be detained under the statute even if only for the briefest of moments.

In a footnote, the Court acknowledged that it has never decided whether a victim's fear of harm should be viewed through a subjective lens, a purely objective one, or some mix of the two. Because that issue was not relevant in this case, the Court wrote: "this Court leaves definitive resolution of the objective vs. subjective issue for another day."

The Court also rejected the defendant's reliance on §19.2-59, explaining that this statute merely creates a civil cause of action against a government agent who searches a person, place, or thing without a proper search warrant. "§19.2-59 does not permit the aggrieved party to detain the violating official. Nor would it make sense for it to do so, given that a violation of it constitutes a "malfeasance in office," not a crime that would subject the violator to arrest."

Lastly, the Court agreed that the defendant did not establish a financial relationship between the prosecutor and the victim, nor did he explain how the outcome of his trial would affect some financial interest the prosecutor held.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0598212.pdf

Walker v. Commonwealth: April 5, 2022

Prince William: Defendant appeals his convictions for Abduction for Pecuniary Benefit, Robbery, and Use of a Firearm, on Enhancement of his Subsequent Convictions, Admission of Identification, and Fourth Amendment grounds.

Facts: The defendant robbed a bank using a firearm. The defendant threatened tellers and several customers, including one man whom he struck across the face and neck with his right arm. In response to being hit, the victim said he threw himself to the ground "because I saw that person with a weapon and I was fearful, I felt threatened." The victim remained on the floor for the duration of the bank robbery because he was fearful of the defendant and the gun.

The defendant wore a mask, gloves, and a yellow vest. He abandoned the mask near the bank, and law enforcement later found the defendant's DNA on it. The bank's surveillance video captured an image of the defendant. Police captured the defendant during a traffic stop two days later and found the bank's stolen money in the car.

Officers also found a cellphone in the defendant's car. Officers obtained a search warrant for the phone on June 23. On July 5, the forensic unit requested the phone, which they received on July 8. The forensic extraction of the phone's data began on July 25 and ended on July 28. Officers filed a return on the warrant on July 28. The return stated that the warrant was executed on June 23. Examining the phone, officers found that the defendant had read an article about the robbery multiple times and also had googled the phrase "Do sweat have DNA."

Prior to trial, the defendant objected to any in-court identification by any eyewitness. He argued that no witness should be allowed to identify him in court without first successfully identifying him out of court in a double-blind array. The defendant also moved to suppress the search of the cellphone, arguing that the search of the cell phone was not executed "forthwith" as required by Code § 19.2-56. He also challenged the warrant as void because the search had not been conducted within fifteen days of the issuance of the warrant.

At trial, the jury found the defendant guilty of four counts of Use of Firearm. The trial court instructed the jury to impose a three-year sentence for the first charge of use of a firearm and separate five-year sentences for each of the other three counts of Use of a Firearm charges for which the jury had found him guilty. The defendant argued that the trial court should have instructed the jury to find him guilty of four first offenses.

On appeal, the defendant also argued that he was not guilty of abduction of the customer whom he struck.

Held: Affirmed. Regarding the abduction of the customer, the Court acknowledged that the blow to the customer's head and neck did not knock the customer to the ground and that the defendant did not verbally command the customer to the ground or to remain in place. However, the Court agreed

that, by his threatening actions, the defendant induced fear and exercised control over the customer, causing him to go to the floor and remain there for the duration of the robbery. Thus, the Court ruled that the evidence was sufficient to support the conclusion that the defendant seized or detained the victim within the intendment of § 18.2-47(A).

The Court also concluded that all the defendant's actions towards the victim, from striking him to waving the gun around, were designed to control the victim's movements so as to facilitate the robbery of the tellers. The Court rejected the defendant's argument that, because his overarching intention was to facilitate the bank robbery, he could not have possessed the necessary intent to restrict liberty. The Court found that the defendant's admitted intention to commit bank robbery does not negate that he simultaneously harbored the intent to restrict the victim's liberty.

The Court explained that to be guilty of abduction for pecuniary benefit in violation of § 18.2-48, the defendant had to possess both the intent to deprive the victim of his liberty and an intent to achieve pecuniary gain. Given the necessity of both intents existing simultaneously, the establishment of one does not negate the existence of the other. The Court agreed that the evidence presented at trial was sufficient to raise jury questions as to whether the defendant seized or detained the victim and whether he had the intent to deprive the victim of his personal liberty.

Regarding the Use of a Firearm convictions, the Court agreed that, under *Batts,* in the single prosecution context, a defendant cannot be sentenced to the enhanced five-year mandatory minimum for a second conviction without the trial court having convicted of a predicate first such offense. However, unlike the situation in *Batts*, in this case the Court noted that all of the Use of a Firearm charges were tried in a single prosecution, and therefore the Court ruled that the trial court did not err in instructing the jury at sentencing that the second, third, and fourth guilty findings were to be treated as second or subsequent convictions subject to the enhanced sentencing provision of § 18.2-53.1.11.

Regarding admission of the in-court identifications by the witnesses, the Court concluded that the trial court did not err in admitting the witness' in-court identification of the defendant as the perpetrator or in refusing the defendant's request to implement protective procedures. In a footnote, the Court wrote: "Allowing a victim to identify the perpetrator of the crime is not unfair" under Rule 2:403. The Court continued that "identity will be a matter 'in issue' in any case in which a defendant is challenging an identification. It is hard to see how an eyewitness' identification of the perpetrator would not be relevant under this standard. Thus, with the exception of rare cases such as those involving drug-induced testimony or testimony while under hypnosis … witness identifications are likely to be relevant under Rule 2:402(a)."

The Court then rejected the defendant's argument that either the Fourth Amendment or §19.2-56(A) provide for suppression of the evidence when officers do not download evidence from a cellphone within 15 days of the issuance of the warrant. The Court wrote: "Even if we were to agree with Walker that the warrant was not executed within the time frame set forth in Code § 19.2-56(A), he still would not be entitled to the remedy— suppression—that he seeks. A mere violation of state statutory law does not require that the offending evidence be suppressed, unless the statute expressly provides for an evidentiary exclusion remedy… Code § 19.2-56(A) provides for no such remedy." The Court continued, "the United States Supreme Court consistently has rejected arguments like Walker's that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs."

Judge Lorish dissented on two grounds. First, Judge Lorish contended an initial identification during trial is unnecessarily suggestive and that, therefore, the court should have applied the *Biggers* factors to determine whether, under the totality of the circumstances, the teller's identification of the defendant was reliable enough to be presented to the jury. Judge Lorish argued that the evidence in this case was not strong. The majority countered, however, that "on multiple occasions, the dissent relied upon dissenting opinions from non-Virginia courts. These citations are not only not the law in Virginia, but also are not the law in the jurisdictions in which they were rendered."

Judge Lorish then addressed the enhanced punishments for Use of a Firearm. She argued that the Court should overrule *Ansell* because "so-called recidivist penalties serve no purpose where the "subsequent" offense occurs at the same time as the initial offense." She cited several studies and reports to criticize the law as written and contended that the Court should substitute her policy judgment for that of the General Assembly by judicially re-writing the statute to eliminate the enhancement.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1211204.pdf

Ingram v. Commonwealth: December 14, 2021

Rockbridge: Defendant appeals her convictions for Animal Cruelty on Fourth Amendment and sufficiency grounds.

Facts: Police responded to reports of a dog running at large and a second dog that was struck and killed by a vehicle. When officers arrived at the location, they confirmed the above reports and approached the home to contact the owner of the animals. The officers went up the stairs and knocked at the door. The officers heard dogs barking inside, but no one answered the door. The officers left the front door, descended the stairs, and then noticed a dog perched up on an object and peering over a missing window frame in another, first-floor door.

An officer approached the first-floor door and observed the dog perched on an old toilet. The first floor was "filthy, [with] urine, feces, and tons of garbage all over the place." Also, inside the home, close to the base of the door, was a dead dog that the officer could see while standing outside. In a field on a nearby hill, officers found additional dogs that were neglected and malnourished. The hill was approximately forty to fifty yards from the home and was not enclosed. The hill contained no fencing, walls, or any other boundary marking. Officers could see the dogs in the field from the porch and driveway.

After examining the dogs on the hill, the officers obtained a search warrant, executed it, and seized ten live dogs and one deceased dog. They found one dog inside the house next to a dead animal with urine, feces, and garbage spread throughout the living space. Four dogs were crated in two dog crates that were too small for the dogs. The dogs were kept in rooms filled with feces and urine and did not have access to food or water. The animals were emaciated, and nine of the ten dogs taken to the SPCA had worms.

Prior to trial, the defendant moved to suppress the evidence. She argued that the officers violated the Fourth Amendment by exceeding the scope of the invitation of the driveway and the stairs, by looking through the window, and by walking around the house through the curtilage to examine the dogs in the field.

At trial, the Court convicted the defendant of thirteen misdemeanor counts of § 3.2-6570(A).

[*Good job to Tiffany Bennett, ACA, Rockbridge – EJC*]

Held: Affirmed.

Regarding the officers' approach to the home, the Court initially agreed that law enforcement officers may not enter a home's curtilage to gather evidence. However, the Court noted that there is a license "implied from the habits of the country" for the general public to approach a home in the hopes of speaking with a resident. Thus, if the officer's "behavior objectively reveals a purpose to conduct a search," then a warrantless search of the home has occurred.

In this case, the Court concluded that the officers acted within the scope of the implied license when they approached both the front door of the home and the first-floor door. The Court observed that the officer approached the home from a reasonable path that visitors would be expected to take, approached the front door in a direct manner, and knocked on the door. He then proceeded down the front stairs of the home and saw the first-floor door in such a location that a visitor "could reasonably expect to seek out residents." From outside the home, the Court also agreed that the officer was entitled to "keep his eyes open" and rely on his observations obtained from this lawful vantage point.

Regarding the officers' examination of the nearby field, the Court reaffirmed the so-called "open fields" doctrine from the *Oliver* case. The Court applied the test from *Dunn* to determine whether the space in the nearby field was the "curtilage" or a mere "open field", examining (1) "the proximity of the area claimed to be curtilage to the home," (2) "whether the area is included within an enclosure surrounding the home," (3) "the nature of the uses to which the area is put," and (4) "the steps taken by the resident to protect the area from observation by people passing by." The Court concluded that the hill was an open field for purposes of the Fourth Amendment, and any search conducted there was beyond the scope of the Fourth Amendment protection.

Regarding sufficiency, the Court explained that a conviction for § 3.2-6570(A) required the Commonwealth to present evidence either that the defendant (1) knowingly ill-treated or abandoned the dogs; (2) deprived them of necessary food, drink, shelter, or emergency veterinary treatment ("necessaries"); or (3) engaged or furthered any act of cruelty. In this case, the Court specially noted that the "images and video introduced by the Commonwealth of all the animals are striking." The Court even included a few pictures in its written opinion. The Court agreed that the evidence that the defendant neglected these dogs was substantial.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1131203.pdf

McCarty v. Commonwealth: November 9, 2021

Chesapeake: Defendant appeals his conviction for Possession of Heroin on Fourth Amendment and the Retroactivity of the Overdose "Safe Harbor."

Facts: In 2019, the defendant overdosed in a hotel room. An anonymous person called 911 regarding the overdose and police responded to the room. Finding the door slightly ajar, they saw the defendant on the floor, near the bed. The defendant was unconscious, pale in the face, cool to the touch, sweating profusely, and struggling to breathe. The officers believed the defendant was suffering from an overdose.

As medics attempted to revive the defendant without success, officers first conducted a cursory sweep of the motel room to see what they could find in plain view. They then opened the nightstand's drawer and discovered a clear baggie containing heroin. The officers informed the medics of the substance. Medics revived the defendant a few minutes later, and when asked by medics what substance he took, he admitted he had snorted heroin.

The defendant moved to suppress the search, but the trial court denied the motion. The trial court ruled that the officers' search was permissible under the community caretaker exception to the Fourth Amendment's typical warrant requirement. However, later, the United States Supreme Court ruled that the community caretaker exception does not extend to warrantless searches and seizures in the home in *Caniglia v. Strom*, 141 S. Ct. 1596, 1598 (2021).

The defendant also argued that § 18.2-251.03 precluded his prosecution because another individual sought medical assistance for him for his overdose, he remained at the scene and identified himself to law enforcement after their arrival, and the evidence the prosecution sought to use at trial was obtained as a result of the anonymous tip reporting his overdose and requesting medical attention. However, the Court rejected his argument, noting that in 2019, that Code section did not cover the defendant's case.

Held: Affirmed. The Court ruled that the trial court's denial of the motion to suppress was not in error. The Court also agreed that § 18.2-251.03's amendments did not apply retroactively.

The Court first addressed the effect of the *Caniglia* ruling. Because *Caniglia* made clear that the community caretaker exception does not apply to warrantless searches of the home, the Court held that the exception does not apply to motel rooms either. Consequently, the Court determined that the trial court erred in relying on the community caretaker doctrine to deem the officers' search of the defendant's motel room lawful. Nevertheless, the Court held that the "emergency aid" doctrine gives law enforcement some leeway to search areas beyond what is in plain view and that the officers' search here was within the scope of that leeway.

The Court agreed that the officers could have reasonably suspected that because a cursory survey of the room provided no clues as to the cause of the defendant's condition, a search of the nightstand next to the bed would. The Court observed "it very likely would have been irresponsible for the officers not to have searched the nightstand when considering that appellant's life was still in danger and EMS personnel had not identified the cause of appellant's circumstances … It would be an affront to that "commonsense rationale" to hold that the Fourth Amendment required the officers to throw up their hands and call it quits once the initial cursory survey provided no clues as to appellant's medical condition."

Thus, the Court found that the scope of the officers' search was strictly circumscribed to the emergency with which they were presented. Accordingly, the Court held that even though the trial court wrongly relied on the community caretaker doctrine in deeming the officers' search lawful, its judgment in denying the defendant's motion to suppress was nonetheless correct given the emergency aid exception's applicability to this case.

The Court then turned to the "safe harbor" overdose provision of the Code. The Court noted that under 18.2-251.03 as it existed in 2019, the defendant would not have satisfied the first element of the statute because he did not report his overdose or seek medical treatment on his own initiative. The Court then acknowledge that if the new version of § 18.2-251.03 applied, it presumably would have protected the defendant. The Court then examined whether the change to § 18.2-251.03 applies retroactively.

The Court repeated that a legislative intent to make a statute retroactive is "manifest" in one of two circumstances. The first is when the text of the statute contains "explicit terms" demonstrating its retroactive effect. The second is when the statute's amended terms affect "remedial" or "procedural" rights rather than "substantive" or "vested" rights. However, in circumstances where a statutory amendment effects a change in both substance and remedy (or procedure), the Court explained that it will not give a statute retroactive effect. Thus, even if aspects of § 18.2-251.03's amendments effected procedural or remedial changes, so long as the amendments effected any change in substantive rights, the Court explained that no court would be permitted to apply the statute retroactively.

In this case, the Court agreed that § 18.2-251.03's amendments plainly affected substantive rights because they changed the class of persons and range of conduct that is punishable under law. However, the Court concluded that § 18.2-251.03's amendments also effected a change in remedy. The Court explained that the dual nature of the statutory amendments is a roadblock, not an avenue, to applying the statute retroactively. Accordingly, because the statutory amendments effected substantive changes, and because they did not explicitly provide that they were intended to apply retroactively, the Court agreed that it was proper to refuse to apply them here.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1225201.pdf

White v. Commonwealth: October 12, 2021

Stafford: Defendant appeals his conviction for Drug Possession on Fourth Amendment grounds.

Facts: Police responded to a call for a man who had reportedly beat a woman in the street with a gun. Police responded within minutes and found a large crowd gathered but did not find the victim or the defendant. While some of the crowd indicated that the man had "just pointed" the gun at the victim's head, they further stated, "we are not going to get involved with this, we are not going to testify." However, other members of the crowd reported that a man had beaten a woman with a gun and that he had stomped on her head and then fled into a particular apartment.

Police knocked on the apartment door and received no response. After police knocked on the door hard enough to shake the door, the victim came to the door carrying a child; she had a "split lip" that was swollen but not bleeding. The victim initially denied any altercation. Officers confronted her with witness statements, but the victim indicated that there had been a verbal argument only. While officers believed that it was possible that others could have been present in the apartment, they had received no information to suggest that anyone else was in the apartment.

The officers asked her if they could come inside to speak to her about it, but she said no and "slid out of the apartment" in such a manner that would not allow the officers or anyone else to see into the apartment. The woman then immediately shut the door behind her. She did not cooperate with the investigation, and instead was evasive and refused to identify the man who attacked her or to tell whether he was inside the apartment. Later, she provided a false name for the man.

Within twenty minutes of the first call to 911, twelve to fifteen officers were on the scene. The officers set up a perimeter, positioning some officers near the windows at the rear of the apartment. Officers decided to wait to enter the apartment until they could obtain a ballistic shield, which had been approximately six miles away. Once the shield arrived, officers made a forcible entry. The forcible entry took place approximately 45 minutes after officers had first arrived on scene and approximately 30 minutes after the officers had persuaded the victim to leave the apartment.

Officers detained the defendant inside the residence. Officers then conducted a protective sweep of the apartment to ensure there were no other occupants. They observed drug paraphernalia in plain view. Officers decided to obtain a search warrant. The officers did not leave the scene to obtain the warrant. Rather, they called in the information necessary to obtain the search warrant, and the warrant was issued. Using the search warrant's authority, the officers searched the apartment and found a firearm and heroin.

The defendant moved to suppress the search, but the trial court denied the motion.

Held: Reversed. The Court wrote that "absent other facts, such as sounds emanating from the dwelling indicating criminality, urgency, or exigency, the decision of a dwelling's occupants to stand on their constitutional prerogatives to refuse to answer the door or to refuse to allow police to enter once they have answered the door does not provide a basis for concluding exigent circumstances exist." In rejecting the "exigent circumstance" argument in this case, the Court applied the ten factors from the *Verez* case in detail.

Regarding "urgency," the Court emphasized that the urgency inquiry is focused on whether there is an emergency, such as continuing criminal activity, a person requiring medical care, or the destruction of evidence, that likely will worsen if the officers take the time necessary to get a warrant. The Court explained that to the extent it appears that there is no imminent change to the circumstances about to occur and that the status quo largely can be maintained while the officers seek a warrant, the situation is not "urgent" for the purposes of an exigency analysis. In this case, with the removal of the woman from the apartment and the passage of time from the initial parking lot altercation potentially allowing the combatants to "cool off," the Court viewed the situation as less urgent when the officers entered without a warrant than when they first arrived.

The Court addressed the potential delay of obtaining a warrant, noting that according to the record, officers on the scene obtained a warrant without driving to and from the magistrate's office. The

Court explained that removing travel time from the calculus greatly reduces the potential need to act without a warrant. The Court theorized that, if officers had sought the warrant when they approached the apartment the first time, they may very well have had it when they entered forty-five minutes later, strongly suggesting that taking the step of obtaining a warrant would not have impeded the officers' eventual conduct in any meaningful way.

Regarding the "seriousness" factor, the Court agreed that a domestic altercation combined with the presence of a firearm is a serious offense. However, the Court also pointed out that the fact that the woman had been separated from the defendant and time had passed since the incident lessened the possibility of escalation.

The Court then addressed the defendant, who was armed and in the apartment. The Court agreed that there was "ample" provided probable cause to believe that the defendant had engaged in criminal activity and that he, along with evidence related to the potential activity (the gun), could be found in the apartment. However, the Court contended that there was "barely was even a theoretical possibility, let alone a likelihood" that the defendant could escape if the officers had taken the time to get a warrant. The Court noted that twelve to fifteen officers had formed a perimeter around the apartment, and the windows and the front door were the only means of ingress and egress from the third-floor apartment.

The Court discounted the role of the firearm. The Court stated that "the presence of a firearm, standing alone, is insufficient to establish exigent circumstances." In this case, the Court found no indication that the firearm, which had been displayed in an altercation forty-five minutes earlier, presented an immediate and active danger. The Court emphasized that to provide the basis for exigency, there must be some information suggesting that such use is immediate and more than theoretical. The Court wrote: "Here, no shots had been fired that evening, the other participant in the altercation had been separated by both time and space from [the defendant], and [the defendant] made no threats to anyone, verbal or otherwise, after officers arrived on the scene."

Instead, the Court concluded that nothing that the officers observed or learned during the forty-five minutes on scene suggested that an "imminent danger to life or public safety" existed. Furthermore, by waiting forty-five minutes before entering the apartment, the Court found that the officers' conduct also suggested that there was not "a compelling need for immediate official action" because no such immediate action was taken. Finally, the forty-five-minute delay, coupled with the ability of the officers to obtain a warrant relatively quickly without leaving the scene, established for the Court that the time necessary to obtain a warrant was not a significant impediment to the actions the officers wished to take and ultimately took.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0994204.pdf

Moreno v. Commonwealth: June 15, 2021
73 Va. App. 267, 858 S.E.2d 432 (2021)
Loudoun: Defendant appeals his conviction for Felony Murder and Hit & Run on Fourth Amendment grounds.

Facts: The defendant, angry at his sister, struck her with his car and killed her. A motorist saw the crash and tried to stop him by honking his horn and flashing his lights, but the defendant disregarded and continued driving. Witnesses later identified the defendant's vehicle and a photograph of the defendant to police.

Following the report of the crash, an officer drove to the defendant's residence, but did not find him there. The officer also called and texted the defendant's phone, but he did not respond. Consequently, an officer obtained the real-time "Cell-site location data" (CSLI) data for the defendant's cell phone through the service provider and located him at a casino in Maryland. Officers located his vehicle at the casino. When officers located the defendant in the casino, he asked "how's my sister?"

Prior to trial, the defendant filed a motion to suppress the evidence, in which he claimed that law enforcement officers violated his Fourth Amendment protections when they received the real-time CSLI data from his wireless provider without first obtaining a search warrant, citing *Carpenter v. United States.*

Held: Affirmed. The Court held that the acquisition of real-time CSLI data to locate a fleeing murder suspect in an exigent circumstance is permissible under *Carpenter*. The Court observed that when law enforcement obtained the CSLI data, they needed to pursue what reasonably appeared to be a fleeing murder suspect. Moreover, the Court noted, the defendant had possession and control of a significant piece of evidence—the vehicle —and every minute that passed afforded the defendant the opportunity to hide or destroy that evidence and evade apprehension.

The Court pointed out that the Supreme Court in *Carpenter* specifically declined to express a view on "real-time CSLI." However, even assuming without deciding that the acquisition of real-time cell-site location information generally requires a warrant, the Court held that probable cause and exigent circumstances justified the warrantless "ping" of the defendant's cell phone in this case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1801194.pdf

Mitchell v. Commonwealth: June 8, 2021
73 Va. App. 234, 858 S.E.2d 415 (2021)
Chesapeake: The Commonwealth appeals his convictions for Drug Possession on Fourth Amendment grounds.

Facts: The defendant, who was wanted on a warrant, was a passenger in a car that was registered to a person who was also wanted. An officer observed the car, ran the license plate, and learned that the owner was wanted. However, that wanted person was not present in the car; a third person was driving the car. The officer, who did not know what the wanted owner looked like, stopped the car. When officers learned that the defendant was also wanted, the defendant tried to escape and throw away his drugs, but officers arrested him and located his contraband.

The defendant moved to suppress, arguing that the information that the officer had when he initiated the stop was insufficient for him to form a reasonable belief that the registered owner was the driver of the vehicle. The defendant relied on an unpublished decision from 1996, *Worley v. Commonwealth*, where the Court of Appeals had concluded that an officer's knowledge that the registered owner of a vehicle is subject to seizure, without more, does not provide reasonable, articulable suspicion for the officer to stop that vehicle. The trial court denied the motion.

Held: Affirmed. The Court held that the officer possessed sufficient reasonable, articulable suspicion to initiate the vehicle stop in this case. The Court found that the *Glover* ruling "cannot survive the United States Supreme Court's decision" in 2020 in *Kansas v. Glover*. In *Glover*, the Court had ruled that an officer's belief that the registered owner is the driver of the car is a "commonsense inference which provides more than reasonable suspicion to initiate the stop" under the Fourth Amendment.

As the U.S. Supreme Court did in *Glover*, the Court cautioned that *Glover* does not allow an officer to stop a vehicle whose registered owner is subject to a lawful seizure in every instance. The reasonable, articulable suspicion inquiry still requires both officers and courts to consider the totality of the circumstances, and thus, "the presence of additional facts might dispel reasonable suspicion" arising from the commonsense inference. Thus, the Court explained that, if facts known to an officer negate the commonsense inference that the registered owner is in the car, the fact that the registered owner is subject to seizure would not provide an officer with sufficient reasonable, articulable suspicion to stop the vehicle.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1976181.pdf

Virginia Court of Appeals
Unpublished

Commonwealth v. Martinez: May 24, 2022

Virginia Beach: The Commonwealth appeals the granting of a Motion to Suppress on Fourth Amendment grounds.

Facts: The defendant lost consciousness in an Uber while carrying drugs. The driver called 911 and police responded. When they arrived, the defendant was alert and communicating. Officers suggested they move to the other side of the street to get out of the rain. One of the three officers asked for the defendant's identification, and the defendant gave the officer his driver's license. While that officer took the license across the street and ran the defendant's information, and before 911 arrived, officers asked the defendant for consent to search his person and he agreed. The officers searched him and located several illegal drugs.

The trial court initially denied the defendant's motion to suppress, finding that no police misconduct occurred, and the search was consensual. However, the defendant filed a motion to reconsider, and the trial court granted the motion.

Held: Affirmed, Motion Sustained. The Court ruled that the defendant's consent was involuntary, and the application of the exclusionary rule was the appropriate remedy for the Fourth Amendment violation. The Court relied on the fact that three officers surrounded him, an officer took his license and did not return it, and no officer told him he was free to leave. The Court concluded that a reasonable person would not have felt free to disregard the police. After finding that the defendant was illegally seized, the Court found that his consent to search was involuntary. "Because the exclusionary rule is necessary to deter such police misconduct in the future," the Court affirmed the trial court's decision.

The Court acknowledged that the consensual nature of an encounter may be restored if the officers a license back and tell the suspect that he is free to leave or that they can only search with the suspect's consent. However, in this case, the Court found that the defendant would have had to walk away from two officers without his license or walk back across the street to obtain the license from an officer who would momentarily be calling in a warrant check on his name.

The Court then ruled that the Fourth Amendment violation in this case merited suppression of the evidence. The Court wrote that the officers "committed misconduct in illegally seizing [the defendant] and coercing his consent when they knew, or should have known, that he was seized." The Court continued, "The act of coercing consent while [the defendant] was awaiting medical assistance, and while the officers themselves were supposed to be aiding him, is police misconduct meriting the use of the exclusionary rule." "It is objectively unreasonable for a police officer to not know that retaining a driver's license under the circumstances presented here constitutes a seizure of a suspect and that the consent following that seizure would be involuntary. A long line of cases has established precedent that is well known, or should be well known, to all police officers."

The Court complained that "There is no evidence that [the defendant] knew he had the right to withhold consent, and no officer informed him of that right. Most importantly, the officers on the scene took advantage of a medical emergency request to seize [the defendant] and acquire his consent to search before he had been treated by EMTs. That flagrant misconduct distorted the original purpose of the medical emergency, taking advantage of a person in need of assistance."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0061221.pdf

Davis v. Commonwealth: May 17, 2022

Chesapeake: Defendant appeals his convictions for Possession of a Firearm by Felon and Concealed Weapon on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, carried a concealed weapon while intoxicated and passed out in his vehicle, which was running and in the middle of the road, blocking traffic. Officers noticed the vehicle and approached, noting that the passenger side door was slightly open. Officers reached inside the vehicle and, for safety reasons, turned off the ignition. The defendant was disoriented and lethargic; his eyes were watery and glassy. When asked if he had been drinking, the defendant gave conflicting answers in quick succession. As the defendant exited, an officer saw part of a handgun sticking out of the defendant's pocket. Officers seized the gun and learned that the defendant was a convicted felon.

The trial court denied the defendant's motion to suppress.

Held: Affirmed. The Court concluded that the totality of the circumstances created a reasonable suspicion that, at the time of the seizure, the defendant might be breaking the law, justifying an investigatory stop. Thus, the officers were permitted to briefly detain the defendant to confirm or dispel their suspicions.

The Court agreed that the officers reasonably could have suspected that the defendant was in distress, invoking "the community caretaker exception." The Court also found reasonable suspicion that the defendant might have been violating traffic safety laws by parking his car in the middle of a street late at night.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0578211.pdf

Beverly v. Commonwealth: April 12, 2022

Rockbridge: Defendant appeals her conviction for Drug Possession on Fourth Amendment grounds.

Facts: The defendant possessed Methamphetamine in her home. Officers visited the home to serve an arrest warrant. When an officer encountered an occupant at the door, he observed that the occupant smelled strongly of marijuana. He removed the occupant from the home. An officer left the scene to obtain a search warrant. [*Note: This case took place in November 2019, prior to marijuana decriminalization/legalization – EJC*].

After the officer left, officers entered the home to check whether additional people were inside the home. Meanwhile, the other officer obtained a search warrant to search the home based on the odor of marijuana. However, the affidavit underlying the warrant stated that the odor emanated from within the residence, rather than from the occupant whom the officers had just removed from the home. Officers executed the warrant and found the defendant's Methamphetamine.

The defendant moved to suppress, arguing that since the search warrant affidavit stated that the smell of marijuana emanated from "within the residence," the unlawful "protective sweep" had to be the source of the key information leading to the granting of the warrant. However, the trial court ruled that the misunderstanding or error did not evidence intentional or reckless conduct and affirmed the search based on the officers' "good faith" reliance on the search warrant.

Held: Affirmed. The Court first concluded that the warrant authorizing the search of the defendant's home was defective and the "protective sweep" initiated by the officers prior to obtaining the warrant was improper. The Court then ruled that the search was lawful under the "good faith" exception to the warrant requirement.

Because there was nothing suggesting that the officers reasonably believed anyone was inside with the capability of destroying evidence or the inclination to do so, the Court agreed that the Commonwealth did not establish exigent circumstances to conduct a "protective sweep" of the home. The Court noted the lack of evidence to suspect there were other people in the house that were going to cause danger.

However, the Court relied on the trial court's finding of a misunderstanding regarding the source of the marijuana that pre-dated the protective sweep in finding that the error fell within "good faith" reliance on the search warrant.

Full Case At:
https://www.courts.state.va.us/opinions/opncavwp/0725213.pdf

Grangruth v. Commonwealth: April 5, 2022

Norfolk: Defendant appeals his convictions for Murder and Arson on Fourth Amendment grounds.

Facts: The defendant poured gasoline on his disabled wife and set her on fire, killing her. The defendant and the victim were the only residents of the home where the fire occurred. The victim was disabled and largely immobile. Firefighters responded and discovered the victim's body. They noted that the fire did not consume the entire home, but rather, was contained to a small area. Police and Fire Marshalls responded as well.

Investigators noted that, as the victim's primary caregiver, it was unusual for the defendant not to be at home and not to respond to attempts to contact him. They also found that the defendant had a history of mistreating the victim, including past complaints of domestic violence, including one incident where the defendant had threatened to burn down the house.

Police took the defendant into custody, and he later confessed to the offense. The defendant moved to suppress, arguing that police lacked probable cause to arrest him and that the search warrant lacked probable cause as well. The trial court denied the motions.

Held: Affirmed. The Court first repeated that probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity" and that it does not demand any showing "that such a belief be more likely true than false." The Court also repeated that "not even a 'prima facie showing' of criminality is required" to establish probable cause. The Court then concluded that reasonable police officers could view the totality of the circumstances and conclude both that it was likely that the victim had been killed in an intentionally set fire and that the defendant was the person who set that fire.

The Court explained that, once the firefighters lawfully entered, the defendant lost any expectation of privacy that would shield from police knowledge of the existence of things that were in the plain view of the firefighters. In addition, the Court found that the officers' knowledge of the corpse further diminished the defendant's reasonable expectation of privacy in his home. The Court wrote: "It is not objectively reasonable to expect emergency responders encountering a charred corpse in a private home to simply shrug their shoulders and ignore it; the reasonable thing to do is to immediately investigate the corpse further, and the Fourth Amendment was not violated when the police, the medical examiner, and the fire marshal did so.

Regarding the investigation after the fire, the Court concluded that the entries of the police, the medical examiner, and the fire marshal onto the premises were not unreasonable within the meaning of the Fourth Amendment. The Court found that the scope of the pre-warrant searches by the police, the medical examiner, and, ultimately the fire marshal, were largely limited to areas over which the initial firefighters already had trod and were largely confined to things that were already exposed to having been seen. The Court noted that little time had elapsed between the firefighters' initial entry to deal with the suspected fire and the subsequent entry by other government officials, with less than five hours separating the initial entry and the execution of a search warrant. Furthermore, there was no time during that period when government officials were not present on the premises. Finally, the Court pointed out that at no point during that time was there any attempt by the defendant to assert control over the premises or to secure it from view.

The Court then examined the search warrant. The Court emphasized that a finding of probable cause does not require finding that it is "more likely true than false." Instead, a magistrate "need only conclude that it would be reasonable to" believe that a crime may have been committed and that there may be evidence of that crime in the place indicated in the affidavit." The Court concluded that there was both a reasonable belief that there was probable cause to believe an arson had occurred and a reasonable belief that the search warrant issued by the magistrate to investigate that possibility was valid.

The Court rejected the defendant's reliance on the presumption that a fire is accidental and not arson. The Court wrote: "it would be nearly impossible to ever obtain a search warrant to investigate a possible arson because the authorities would have to prove that an arson occurred before they could obtain a warrant allowing the collection of evidence that might sustain that proof. Simply put, the existence of the presumption did not prevent a reasonable officer in Noel's position from forming a reasonable belief that there was probable cause to believe an arson had occurred or that he could rely upon the search warrant issued by the magistrate in this case."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0401211.pdf

Commonwealth v. Noakes: March 29, 2022

Wise: The Commonwealth appeals the granting of a Motion to Suppress on Fourth Amendment grounds.

Facts: Officers responded to an apartment regarding a complaint that someone in the apartment was selling drugs. The apartment is owned by the County, and the lessee was not present at the time. A babysitter answered the door and appeared to be intoxicated. An officer could see a man inside who appeared to be intoxicated and unconscious. The officer entered to check on the man and found illegal drugs and paraphernalia in the open near a child who was playing. Officers found the defendant in a nearby bedroom and detained the defendant. They found methamphetamine near him, including in a container that had his name on it.

The defendant moved to suppress the evidence. The trial court granted the motion, characterizing the defendant as "a person utilizing a friend's apartment as a place of rest during the middle of the day" and finding that he "had a reasonable expectation of privacy in the apartment that was searched without a warrant, and thus has standing to assert a Fourth Amendment violation."

Held: Reversed. The Court ruled that the record failed to establish that the defendant had a sufficient reasonable expectation of privacy in the lessee's apartment to allow him to assert Fourth Amendment protections related to entry into and subsequent search of the apartment.

The Court noted that the record contained no direct evidence that the defendant knew the lessee, that the lessee had invited the defendant to the apartment, that the defendant and the lessee were friends, or that the lessee was even aware that the defendant was present in the apartment. The Court also complained that there was no testimony or other evidence was offered to explain how the defendant came to be present in the apartment or any permissions that the lessee (or anyone else) may or may not have given regarding the defendant's use of the apartment. The Court also found that the record was devoid of any evidence regarding when the defendant came to be in the apartment and when he intended to leave, or whether the defendant had clothes or luggage with him, to suggest that the defendant's presence was intended to last more than a short, non-overnight period.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1110213.pdf

Gubari v. Commonwealth: January 11, 2022

Greensville: Defendant appeals his conviction for Cigarette Trafficking on Fourth Amendment grounds.

Facts: The defendant purchased untaxed cigarettes in North Carolina and smuggled them to New York to sell unlawfully. A police officer stopped the defendant while the defendant was carrying cigarettes along Interstate 95. The initial basis for stopping the vehicle was a window tint violation. The officer knew that criminals often equip vehicles with illegal window tint to conceal contraband from law enforcement. The officer noted that when he activated his emergency lights to initiate the traffic stop, the car was slow to pull over, and when he first approached the car on foot, the driver was "nervous" and had "a scared look on his face." The defendant and the driver were breathing heavily, and the pulse in their necks was "visible" and "rapid." During the stop, an officer saw suspected khat, an illegal

narcotic, on the center console. He knew that traffickers sometimes use khat to remain awake while driving long distances.

The officer confirmed that the window tint exceeded the legal limit. Both occupants of the vehicle produced New York IDs but lacked valid driver's licenses. They claimed to have been visiting family in South Carolina but provided conflicting information. The defendant's statement regarding their itinerary appeared to be a lie. The officer also learned during the stop that the defendant had rented the car for about six months, which seemed "excessive." The officer also suspected that the defendant had personally applied the window tint. The officer knew that traffickers often use a rental vehicle to protect a personal vehicle from seizure if the criminal activity is detected.

The officer detained the vehicle and summoned a K9. The dog alerted to the odor of narcotics coming from the car. Searching the vehicle, police found 467 cartons of cigarettes, for a total of 4,670 packs of cigarettes, none of which bore a Virginia or other tax stamp proving payment of the state's excise tax.

Held: Affirmed. The Court held that reasonable suspicion supported the ongoing detention that led to discovery of the cigarettes. For the Court, the facts, viewed together, provided reasonable suspicion permitting the officer to briefly extend the detention of the defendant and the car for additional investigation to confirm or dispel his suspicion that it was carrying illegal contraband. The Court agreed that the circumstances permitted extending the stop for the brief additional time necessary to conduct the dog sniff, which produced the canine's alert for narcotics. The alert, in turn, justified the vehicle search and discovery of the contraband.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0416212.pdf

Commonwealth v. Davis: November 30, 2021

Richmond: The Commonwealth appeals the suppression of evidence on Fourth Amendment grounds.

Facts: Officers stopped a car in which the defendant, a convicted violent felon, was a rear-seat passenger. The traffic stop took place at night in an area known for high rates of violent crime and narcotics use and distribution. Prior to this traffic stop, the officer was already familiar with the defendant. He knew the defendant to be a member of a criminal street gang whose members were known to carry firearms. He also knew that the defendant had a prior conviction of malicious wounding stemming from a shooting that had occurred three years earlier. Nearly three months before the traffic stop, the officer had seen the defendant with a bulge in his waistband that appeared to be in the shape of a firearm. The defendant ran from the officer. Officers captured the defendant but found no firearm. Later that same day, though, the defendant posted a video to his Instagram account, stating that the police "would never catch him dirty" and depicting what appeared to be a firearm.
On the day of this traffic stop, the officer had just seen many recent pictures and videos on social media of the defendant handling firearms, including a video the day before the traffic stop that showed the

defendant with a pistol and a semiautomatic rifle. The officer noticed that the defendant was shaking, and his heartbeat could be seen through his shirt and in his neck. The defendant called his mother to tell her that the vehicle had been stopped by police.

The officer asked the defendant to get out of the vehicle three times. The officer did not tell the defendant why he was being asked to exit the vehicle or that the driver had given consent to search. When the defendant repeatedly refused to exit the vehicle, the officer took hold of the defendant's wrist to remove him of the vehicle and handcuffed him. The officer conducted a pat down and felt what he believed to be a firearm. The officer removed it and discovered a handgun.

The defendant moved to suppress the evidence. The trial court found that, had the officer communicated with the defendant regarding why he was being asked to exit the vehicle, the pat down would have been valid, stating: if the officer "had talked and communicated with him, this is all fine." Based on the lack of communication, the trial court deemed the search unreasonable and suppressed the evidence.

Held: Reversed. The Court held that the trial court erred in granting the motion to suppress. The Court explained that multiple factors supported the officer's reasonable suspicion that the defendant was armed and dangerous, including the officer's personal knowledge of the defendant's criminal history and social media posts. The factors in this case, such as the location of the stop, the time of day, the defendant's demeanor, the defendant's involvement in a past shooting, and multiple social media posts gave the officer reasonable suspicion to believe that the defendant was armed and dangerous.

The Court cautioned that knowledge of an individual's criminal history, standing alone, will not always suffice to establish reasonable suspicion. However, in this case, the Court observed that the officer's knowledge of the defendant's gun involvement was extensive.

The Court rejected the trial court's conclusion that the officer's failure to communicate with the defendant regarding the search of the vehicle made the pat down unconstitutional. Instead, the Court countered that the critical inquiry is whether there is a lawful stop and reasonable suspicion that a person is armed and dangerous. Thus, the Court explained, an officer's failure to communicate does not invalidate an otherwise proper pat down performed in the context of a lawful stop, legitimate consent to search the vehicle, and reasonable suspicion that the individual to be frisked is armed and dangerous.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0599212.pdf

Clark v. Commonwealth: November 3, 2021

Richmond: Defendant appeals his conviction for Possession with Intent, 2nd offense, on Fourth Amendment grounds.

Facts: The defendant carried cocaine for sale, after having a prior conviction for that offense. Officers learned about the defendant's cocaine from an informant, with whom they had worked and from whom they had received information for over a year before. The informant had two pending

charges for possession with intent to distribute cocaine and heroin. The informant had provided reliable information in the past to make controlled purchases of illegal narcotics and had obtained search warrants based on information "in conjunction with" those purchases.

Officers observed the defendant in real time at the identified intersection wearing an outfit described by the informant. They approached the defendant in an area known for drug distribution, the offense alleged by the informant. When the officers approached, they saw a second man walk away from the defendant with currency in his hand. As the officers spoke with the defendant, they noticed him frequently looking in both directions and moving his hands around a fanny pack that was attached to his waist.

The officers knew that firearms are often associated with drug distribution and specifically that "fanny packs" are used to carry firearms. An officer asked the defendant to stop reaching around the fanny pack. Despite the demand, the defendant repeatedly continued to move his hand around the bag. Consequently, the officers handcuffed the defendant and conducted a pat down for weapons.

Five minutes later, an officer arrived with a K-9 unit. The dog alerted officers that the defendant had illegal narcotics. They searched him and found the defendant's cocaine.

Held: Affirmed. The Court agreed that the circumstances permitted the officers to lawfully seize and detain the defendant briefly to determine whether he possessed illegal drugs with the intent to sell them. The Court held that the totality of the circumstances supported the conclusion that the detectives had a reasonable and articulable suspicion of illegal activity supporting the investigatory detention. Further, the Court held that the record established that when the detectives initially detained the defendant, the encounter was an investigative detention and not an arrest.

The Court also repeated the warning from *Simmons* that "[a] police officer [is] not . . . required to ask of a person whom he reasonably suspects is engaging in criminal activity . . . to explain his conduct and run the risk of receiving a bullet in answer to his questions." In this case, the Court noted that the fact that three armed detectives were present may have reduced but did not remove the threat that the defendant's possession of a weapon could have presented.

In a footnote, the Court addressed the defendant's argument that the use of handcuffs is permissible during an investigatory stop only if the encounter occurs under specific conditions, which he argued were not present. However, the Court repeated that the decision of whether the methods of restraint were reasonable is not determined by any bright-line rule. Instead, the Court explained that it conducts its analysis by looking at the circumstances involved in the specific detention and determines whether the officers' actions were reasonable under those facts. In another footnote, the Court stated that the detectives were not required to remove the handcuffs after the pat down while the investigation was ongoing.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0824202.pdf

Futrell v. Commonwealth: July 6, 2021

Hampton: Defendant appeals his convictions for Attempted Malicious Wounding, Possession of Firearm by Felon, and related offenses on Fourth Amendment grounds.

Facts: During a dispute at a restaurant with staff members, the defendant demanded that staff retrieve his phone from inside the restaurant. Before they could comply, the defendant produced a gun and began shooting at them. A security guard shot back at the defendant and the defendant fled the scene, leaving his cellphone behind. The defendant never returned that night to retrieve the cell phone. Instead, he began using a new cell phone after the incident.

Police responded and located the defendant's phone, which was not locked with any passwords or any other security. An officer was able to find the cell phone's IME and phone numbers using the "settings" feature on the phone. After finding these numbers, the officer put the phone in "airplane mode" and returned it to the police department's property and evidence department. The officer did not attempt to view call logs, text messages, or applications on the phone. The officer did not have a search warrant when he turned the phone on and located the IME and phone numbers.

To find out which phone company was associated with the phone number, the officer entered the cell phone number into "LInX," a program that consolidates police reports throughout the region. The program indicated that there was "some kind of association with" the defendant's name and the cell phone number and provided a photograph of the defendant. The restaurant staff identified the defendant in a photo lineup shown using the photograph.

The defendant moved to suppress the search of the phone, arguing that officers must always obtain a search warrant to search a phone under *Riley v. California,* but the trial court denied the motion.

Held: Affirmed. The Court concluded that *Riley v. California* does not prevent courts from considering whether cell phones have been abandoned for Fourth Amendment purposes. In this case, the Court agreed that the evidence supported the trial court's determination that the defendant abandoned his cell phone. Thus, the Court concluded that the search of the phone violated no protected Fourth Amendment right.

In a footnote, the Court pointed out that, on appeal, the Commonwealth did not assert that the defendant lacked a subjective or reasonable expectation of privacy in the "settings" area of his cell phone where the IME and cell phone numbers were stored. Therefore, the Court simply assumed, without deciding, that the defendant met his burden in establishing that he had both a subjective and reasonable expectation of privacy in those numbers and decided only whether the Commonwealth met its burden in proving that the defendant abandoned the phone.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0470201.pdf

Local Circuit Court Rulings

In the Matter of the Search of Information Stored at the Premises Controlled by Google: February 24, 2022

Fairfax: Detective seeks a "geofence" warrant from the court.

Facts: During a party, a shooting broke out between several individuals. Before the shootings, video surveillance captured those individuals using cellphones. Fairfax County Police sought a geofence warrant to identify those individuals.

In the warrant, police created a virtual fence surrounding the motel, its parking lot, and adjoining spaces. The warrant sought electronic communications devices in the zones for specified dates and times, roughly a three-hour period. The warrant sought to implement Google's three-step process but sought authority for all three steps in a single warrant. The warrant also sought the following authority:

"If additional location information for a given Device ID is needed in order to determine whether that device is relevant to the investigation, law enforcement may request that Google provide additional location coordinates for the Time Period that fall outside of the Target Location."

Held: Warrant Denied. The Court held that the warrant would be unconstitutional in this case. The Court declined to rule on whether a geofence search warrant is constitutional in general, but principally cited the two well-known geofence cases from the Northern District of Illinois as examples.

The Court found, under *Carpenter,* that "one has a privacy interest in one's physical location." In this case, the Court concluded that the warrant application affirmatively targeted the location information of the innocent motel guests along with the shooters. "They are explicitly targeting their data and, thus, need probable cause to search them." The Court likened the innocent motel guests to the innocent bar patrons in *Ybarra*, and argued that police may not search the innocent motel guests any more than they can search innocent bar patrons, even if the officers have probable cause to believe that there is evidence somewhere at the bar or the motel.

The Court also found that the application was overbroad and not particularized. The Court wrote: "It is geographically too large, the search time is too long, and the nature of the place to be searched is too sensitive." The Court complained that the warrant was not restricted to the times when the suspects appeared in the video footage.

The Court also criticized the warrant for giving the police too much discretion at "step 2" of the geofence process. The Court noted that "police here are not limited in their discretion in selecting cell phones they deem relevant. The police are left with considerable discretion to select any cell phone without any meaningful limits on which cell phones they may choose." Regarding the authority to enlarge the zone on request to Google, the Court complained that the warrant would let law enforcement "unilaterally: (1) determine cell phone relevancy, and (2) enlarge the Court-authorized search zone."

Lastly, the Court objected to the discretion at "step 3" to "unilaterally tell Google which cell phones it wants to unmask." The Court wrote that, instead, "the Court must be the entity to approve or deny the unmasking and disclosure of the personal identifying information of people to be searched."

Full Case At:
https://www.dropbox.com/s/z4tf8r4wtt6a5oj/Fairfax%20Circuit%20Court%20Geofence%20Ruling%202.24.22.pdf?dl=0

Guilty Pleas - Withdrawal

Virginia Court of Appeals
Unpublished

Bingham v. Commonwealth: May 17, 2022

Gloucester: The defendant appeals his convictions for Arson and Animal Cruelty on Refusal to Withdraw his Guilty Plea.

Facts: The defendant became angry at his live-in girlfriend and set her bedroom on fire. The fire set a cat in the room on fire, killing the cat. The fire spread throughout the house, killing two pet dogs as well. The defendant confessed to police that he set the fire. He later pled guilty to the offenses. At the guilty plea hearing, the defendant's counsel asked to clarify the facts, adding that the defendant told the police that the cat was on the bed when he set the fire and that the cat itself then caught on fire and ran around the room until it "stopped whining." In addition, his counsel said the defendant explained that he tried to extinguish the fire and that he left the back door open for the dogs to escape.

However, the defendant later moved to withdraw his guilty plea. In arguing his motion, the defendant explained that he only pled guilty because he thought that he would receive time served and he testified that it would be "dumb" to set the house on fire as the result of an argument because the house contained his own property. The trial court denied the motion.

Held: Affirmed. Regarding the defendant's attempt to withdraw his guilty plea, the Court affirmed the trial court's decision to deny his motion because there was significant evidence against him, and the defendant did not make a prima facie showing of any reasonable defense to the charges. The Court noted that neither the defendant nor his counsel mentioned other witnesses. The Court also noted that, when asked about his earlier confession to the police, the defendant did not deny the confession but claimed he did not remember it because he was under the influence of drugs when he spoke to the officer. Lastly, the Court pointed out that the defendant not only accepted the Commonwealth's statement of facts but added to it as well.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1396211.pdf

Cecil v. Commonwealth: April 5, 2022

Giles: Defendant appeals his convictions for Armed Burglary, Robbery, Conspiracy, and related charges on Refusal to Permit Withdrawal of a Guilty Plea.

Facts: The defendant and his confederate planned an armed robbery to steal money and drugs from a residence. Together, they kicked in the door of the residence and exchanged gunfire with the occupants. The defendant then fled, but his confederate died of a gunshot wound.

The defendant pled guilty to the offense, but prior to sentencing, he moved to withdraw his guilty plea and claimed that he was not competent to stand trial. The trial court found the defendant incompetent to proceed in the case and ordered mental health treatment to restore his competency. The trial court later found that the defendant had been restored to competency. At the hearing on his motion to withdraw his guilty pleas, the defendant testified that he did not remember entering the guilty pleas and he did not understand the charges to which he pled. He claimed that he could not remember whether he discussed an insanity defense with his former counsel.

The trial court denied the defendant's motion to withdraw his guilty plea.

Held: Affirmed. The Court ruled that, even assuming, without deciding, that the defendant did establish a good-faith basis for both entering into and withdrawing from his guilty pleas, the defendant still failed to meet his burden of showing a reasonable defense. Distinguishing the *Hernandez* case, in this case the Court complained that in this case, the defendant presented no evidence tending to establish that, at the time of the offense, he was suffering from a mental disease or defect such that he did not know the nature and quality of his acts, that he did not know what he was doing was wrong, or that he was totally deprived of the mental power to control or restrain his actions. The Court wrote: "Cecil's vague, claimed history of mental health issues in the past does not support a conclusion of insanity at the time of his offenses."

The Court pointed out that competency to stand trial and insanity at the time of the offense are not synonymous legal or factual concepts. Thus, for the Court, the mere fact that the trial court found that the defendant was not competent to proceed with sentencing nearly two years did not tend to prove legal insanity at the time of the offense. The Court also found that the defendant's claim that he did not recall or understand his guilty pleas had no bearing on his sanity at the time of the offense one year prior.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0448213.pdf

Martin v. Commonwealth: March 22, 2022

Norfolk: Defendant appeals his conviction for Murder and related offenses on denial of his Motion to Withdraw his Guilty Plea.

Facts: The defendant shot and killed a man and wounded another. On the morning of trial, the defendant pled guilty to second-degree murder, use of a firearm during the commission of a felony, and

malicious wounding. The defendant's brother, though, went to trial and was acquitted. One month later, the defendant moved to withdraw his guilty plea, claiming that, when he pled guilty, he had not realized that an important witness for the Commonwealth had not been located and was not going to testify. The trial court denied the motion, finding that the defendant was trying to manipulate the justice system. It also found that the evidence presented at the brother's trial was "overwhelming" against the defendant.

Held: Affirmed. The Court applied the three-pronged test under *Justus* and observed that there were indications that the defendant tried to manipulate the system and only wanted to withdraw his guilty pleas after he learned how things were going in his brother's trial. Therefore, the Court agreed that the trial court did not abuse its discretion in its factual finding that the defendant failed to demonstrate that he had the requisite good faith to withdraw his guilty pleas.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1268201.pdf

Belmonte v. Commonwealth: August 3, 2021

Arlington: Defendant appeals her conviction for Felony Hit & Run and Driving Revoked on Refusal to Permit Withdrawal of a Guilty Plea.

Facts: The defendant, driving on a suspended license, crashed and fled the scene. The defendant pled guilty to the offenses pursuant to a plea agreement. Under the plea agreement, the charge of driving suspended, third offense, was reduced to a misdemeanor, first offense. The agreement did not contain an agreement or recommendation from the Commonwealth as to sentencing. The trial court conducted a lengthy plea colloquy and accepted the agreement.

Several months later, the parties asked the trial court to revoke the defendant's bond and continue sentencing to the trial court's next sentencing docket. The parties explained that the basis of the revocation was in furtherance of an agreement, which included an agreement to serve time, that would lead to a reduction of the felony hit and run charge. The trial court questioned the parties about what was intended by this new agreement. Both parties agreed it was a modification of the original plea agreement. The trial court then asked what the new agreement was going to say and questioned whether it was to be a new plea agreement or a recommendation as to sentencing. The parties agreed that the new agreement was a recommendation as to sentencing.

At the sentencing hearing, the trial court rejected the recommendation and sentenced the defendant to more than the recommendation, noting the defendant's eleven misdemeanor convictions over the last nine years, a probation violation, and new charges filed during the pendency of the case. Two months later, the defendant filed a motion to withdraw her guilty plea, arguing that she should be allowed to withdraw her plea to correct a manifest injustice. The trial court denied the motion.

Held: Affirmed. The Court applied the "manifest justice" standard, noting that the defendant did not argue that she was innocent or that she had a defense to the crimes charged. The Court also noted that the defendant did not challenge the circumstances of her original plea agreement, where there was no agreed upon or recommended sentence. Instead, the Court pointed out that the defendant only contended that the trial court should have accepted her second "agreement," where she negotiated a better deal.

The Court repeated that the "manifest injustice" standard is intended to avoid motions for withdrawal based on "disappointment in the terms of the sentence." The Court found no manifest injustice in this case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0889204.pdf

Indictment

Virginia Court of Appeals
Published

Mackey v. Commonwealth: March 1, 2022

Rockbridge: Defendant appeals his conviction for Internet Solicitation of a Child on Amendment of the Indictment.

Facts: The defendant traded messages on Facebook Messenger with a child. The Commonwealth indicted the defendant under § 18.2-374.3(C), which concerns soliciting a child younger than 15 years of age. At trial, however, the Court found the evidence regarding the child's age to be equivocal and, *sua sponte*, decided to convict the defendant of § 18.2-374.3(D), which concerns soliciting a child 15 years of age or older. The defendant objected that subsection (D) was not a lesser-included offense of subsection (C), but the trial court contended that it was. In post-trial motions, the trial court ruled that it had simply "amended" the indictment on its own.

Held: Reversed. The Court repeated that an accused cannot be convicted of a crime that has not been charged, unless the crime is a lesser-included offense of the crime charged. In this case, the Court concluded that subsection (D) contains an element that the charged offense does not contain and is not a lesser-included offense of subsection (C).

The Court agreed that the trial court has the power, subject to certain procedural requirements, to amend the indictment before a verdict under § 19.2-231 and charge the accused with another crime. However, the Court further noted that, under § 19.2-231, "[a]fter any such amendment the accused shall be arraigned on the indictment . . . as amended, and shall be allowed to plead anew thereto . . . ." Since, in this case, trial court never actually ruled it was amending the indictment during trial, the trial court's acquittal on the original charge left no remaining charges in this case.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0355213.pdf

Virginia Court of Appeals
Unpublished

Brown v. Commonwealth: May 17, 2022

Petersburg: Defendant appeals his convictions for Abduction and Use of a Firearm on Variance in the Indictment.

Facts: During an argument, the defendant threw the victim, the mother of his child, into a closet and repeatedly punched her in the face and shot her repeatedly. While the victim's child tried to rescue the victim, the defendant called someone and said that he had killed the victim. The victim successfully begged for her life and survived.

The indictment charged that the defendant "did by force, threat, intimidation, or deception and without legal justification or excuse, seize, take, transport, detain, or secrete the person of [the named victim] and [the minor child], with intent to deprive him/her of his/her personal liberty, in violation of § 18.2-47 of the Code of Virginia (1950) as amended."

At trial, the defendant moved to strike, arguing that there was a fatal variance between the indictment for abduction and the evidence presented at trial because the Commonwealth failed to prove that the defendant abducted both the victim and her minor child. The trial court denied the motion.

Held: Affirmed. The Court held that any variance here was not fatal because the defendant was not prejudiced by the indictment as written, and the inclusion of the child in the indictment was merely a "duplicitous charge." The Court noted that the defendant was put on notice that he would need to defend against the charge of abducting the victim because her name was specified in the abduction indictment. Under § 18.2-47, the crime was complete when the defendant abducted the victim alone. The Court wrote: "Because the integrity of the trial was not harmed by the inclusion of [the] child in the indictment, we decline to hold that there is a fatal variance in this case…"

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0562212.pdf

Milsap v. Commonwealth: May 10, 2022

Norfolk: Defendant appeals his conviction for Burglary on Variance with the Indictment

Facts: The defendant broke into the victim's apartment and attacked the victim, beating her and leaving her with numerous injuries. The burglary indictment charged him with violating § 18.2-91 by entering the dwelling in the daytime "with intent to commit larceny or a felony related to arson."

On appeal, the Commonwealth conceded that the defendant's conviction should be reversed because there was a fatal variance between the indictment and the proof at trial.

Held: Reversed. The Court held that there was a fatal variance and reversed the conviction. The Court agreed that, normally, statutory burglary includes "intent to commit assault and battery," but in this case, the scope of § 18.2-91 was narrowed by both the specific reference to the intent to commit larceny or arson and the omission of any reference to the intent to commit assault and battery. Thus, the stated intent in the indictment described the offense and had to be proved as charged.

In a footnote, the Court took no position regarding whether the defendant may be retried under a new indictment charging burglary based on an intent to commit assault and battery, such as under § 19.2-293.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0794211.pdf

Ineffective Assistance

Fourth Circuit Court of Appeals

Witherspoon v. Stonebreaker: April 8, 2022

S.C.: Defendant seeks *Habeas* relief on his conviction for Distribution of Cocaine on Ineffective Assistance grounds.

Facts: The defendant distributed Cocaine to a police informant on video. At trial, the jury was initially unable to arrive at a verdict, so the jury requested to view an enlarged, still frame from the informant's video, to show the seller's face reflected in a vehicle's side-view mirror. The defendant's trial counsel did not object to that request, and the court granted it. The jury then requested that the defendant stand beside the enlarged image. The court inquired if the defendant's counsel had any objection, to which counsel replied, "I would, Your Honor, but . . . ." The court interjected and directed the defendant to stand as the jury wished. The jury convicted the defendant shortly thereafter.

The state court denied the defendant's appeal, and the district court denied the defendant's *Habeas* petition.

Held: Reversed. The Court concluded that the defendant's trial counsel's failure to object to the stand-up order constituted objectively deficient performance, that her performance prejudiced the defendant's defense, and that she thereby rendered constitutionally ineffective assistance. The Court noted that, under South Carolina law, submitting evidence not admitted during trial to a jury during its

deliberations unfairly prejudices the defendant, oftentimes entitling him to a new trial. The Court wrote: "trial counsel cannot be found to have operated within the admittedly broad scope of Strickland's measure of competence when she only attempted — and thereby failed — to object to the stand-up order."

Judge Rushing wrote a dissenting opinion

Full Case At:
https://www.ca4.uscourts.gov/opinions/197276.P.pdf

Joinder & Severance

Virginia Court of Appeals
Unpublished

Virginia Court of Appeals
Unpublished

Sims v. Commonwealth: May 24, 2022

Newport News: Defendant appeals his convictions for Burglary, Assault, and related offenses on denial of his Motion to Sever.

Facts: The defendant kicked in the door of the victim's residence assaulted the victim. Police obtained warrants charging the defendant with burglary, assault and battery, and destruction of property. The defendant told another person: "Man I oughta shoot this bitch," referring to the victim, and "If I shoot this bitch, I ain't got no charges."

Two days later, someone kicked in the door of the victim's residence and shot and killed the victim while she was at home with her family. This person also shot a witness, who survived his injuries and identified the defendant as the shooter. The defendant was ultimately charged with first-degree murder, malicious wounding, armed burglary, discharge of a firearm in an occupied building, and use of a firearm in the commission of a felony, connected to this second incident.

The defendant moved to sever the two offenses, arguing that the "dates of offense are different," the "cases are different," and "[t]hey are not related and trying them together would result in prejudice to the defendant." He also argued that "these are two completely separate incidents, and they should not be tried together." The trial court denied the motion. At trial, the defendant was acquitted of the murder and related charges but was convicted of the earlier burglary and assault offenses.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion in finding the offenses were sufficiently connected considering that the victim was the same and that the first offense provided a motive and rationale for the second offense.

The Court first reviewed Rule 3A:10(c) and agreed that that the events were close in time (two days apart), the location was the same, and the means of commission was the same (in both the door was kicked in). The victim was also the same, and the evidence presented to the court was that the victim's reporting of the first incident, and the issuance of warrants to arrest the defendant for those offenses, are what caused the second incident. The Court also distinguished this case from *Cousett*.

The Court then analyzed the case by applying the law regarding "prior bad act" evidence. The Court concluded that evidence of the first incident would have been admissible in a separate trial on the second charges to prove motive as well as to establish the prior relations between the defendant and the victim.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0895211.pdf

Jury Selection

U.S. Supreme Court

U.S. v. Tsarnaev: March 4, 2022

1st Circuit: Defendant appeals his convictions for several Capital Murders and related offenses on Jury Selection issues

Facts: The defendant and his brother planted and detonated two homemade bombs near the finish line of the Boston Marathon, killing three people and wounding hundreds. While fleeing, they murdered a campus police officer, carjacked a student, and fought a street battle with police during which the defendant inadvertently ran over and killed his brother. Police later arrested the defendant.

Prior to trial, the parties proposed a 100-question screening form, which included several questions regarding whether media coverage may have biased prospective jurors. The District Court declined to include a proposed question that asked each prospective juror to list the facts he had learned about the case from the media and other sources. The First Circuit reversed the conviction, ruling that the District Court abused its discretion by failing to put the defendant's proposed media-content question to the jury.

Held: Conviction Affirmed. In a 6-3 ruling, the Court reaffirmed that a trial court's broad discretion in jury selection includes deciding what questions to ask prospective jurors. The Court found no blanket constitutional requirement that a trial court must ask each prospective juror what he heard, read, or saw about a case in the media. Instead, the Court explained, the court's duty is to conduct a thorough jury selection process that allows the judge to evaluate whether each prospective juror is "to be believed when he says he has not formed an opinion about the case."

In this case, the Court opined that the trial court recognized the significant pretrial publicity concerning the bombings, and reasonably concluded that the proposed media-content question was

"unfocused," risked producing "unmanageable data," and would at best shed light on "pre-conceptions" that other questions already probed. The Court noted that, at voir dire, the trial court had explained that it did not want to be "too tied to a script" because "every juror is different" and had to be "questioned in a way that was appropriate" to the juror's earlier answers. The Court rejected the 1st Circuit's contention that district courts presiding over high-profile cases must ask about the "kind and degree of the prospective juror's exposure to the case or the parties."

Justice Barrett wrote a concurring opinion, in which she expressed skepticism that the Court of Appeals has any supervisory authority to impose procedural rules on district courts. Justice Breyer wrote a dissenting opinion, where he addressed an unrelated sentencing issue concerning the Federal death penalty statute that was also at issue in this case.

Full Case At:
https://www.supremecourt.gov/opinions/21pdf/20-443_new_2d8f.pdf

Virginia Court of Appeals
Unpublished

Villareal v. Commonwealth: May 24, 2022

Newport News: Defendant appeals his convictions for Child Sexual Assault regarding Refusal to Strike a Juror for Cause and sufficiency of the evidence.

Facts: The defendant sexually assaulted the victim for many years, beginning when she was six years old and ending when she was about eleven years old. The victim explained her reasons for not telling anyone as a child when she testified at trial that she was "afraid of people knowing what happened" to her, that she "felt ashamed" and "felt embarrassed," and that the defendant had threatened to kill her when the family lived in Hawaii if she ever told anyone.

During jury selection, the prosecutor asked the prospective jurors if any of them would "need[] more than just one witness" in order to convict. One of the prospective jurors indicated that she would have trouble believing only one witness. She stated that "just to hear from one person without seeing if other persons can state something completely different about this person, it is hard. . . . [H]ow can I make a decision based on what one person thinks has happened?" Defense counsel asked the potential juror, "[I]f you heard the alleged victim say this happened and there's no additional evidence to refute it, you wouldn't be able to convict…?" The potential juror replied, "It would be hard. How can – how can you believe just one person?" The Commonwealth moved to strike that potential juror from the venire for cause. The trial court granted the Commonwealth's motion and excused the potential juror for cause, over the defendant's objection.

At trial, the victim in this case testified that the assaults "happened frequently" and "happened often," but could not provide specific dates. She stated: "it was just a, you know, a routine" that "just every morning . . . just before PT, he would – he would have me do something for him." The defendant argued that the victim's testimony did not establish a clear timeline of when the offenses occurred.

Held: Affirmed. Regarding the victim's testimony about when the offenses took place, the Court wrote: "Simply put, the fact that she struggled to recall the precise timeline of repeated instances of sexual abuse that happened when she was six years old certainly does not mean that her testimony was "so manifestly false that reasonable men ought not to believe it.""

Regarding the juror struck for cause, the Court agreed that the potential juror's statements during voir dire amounted to a clear indication that she would have struggled to apply firmly established Virginia law if she had been selected as a member of the jury.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0736211.pdf

Nolle Prosequi

Virginia Court of Appeals
Published

Hammer v. Commonwealth: January 18, 2022

Waynesboro: Defendant appeals his conviction for Abduction on Permitting the Commonwealth to Withdraw a Motion to Nolle Prosequi.

Facts: The defendant forcibly abducted his wife and fled from police, accelerating to speeds over 100 mph, driving the wrong way on a divided highway and forcing an oncoming car off the road to avoid a head-on collision. Police terminated the pursuit for safety, but the defendant then crashed and fled on foot. The victim gave a full statement to police, implicating the defendant.

The defendant elected to represent himself at trial. The day of trial, the victim failed to appear, having been subpoenaed and despite an outstanding capias for a prior failure to appear. The defendant stated that he did not believe she would appear. When the trial judge said he would not continue the abduction charge, the prosecutor orally moved for a nolle prosequi. The Commonwealth proffered that it had made various efforts to locate the victim and secure her attendance, without success. The defendant objected, asking that the court instead dismiss the abduction charge. The trial judge orally granted the Commonwealth's motion, finding that the Commonwealth had made every reasonable effort to secure the victim's testimony.

The victim, however, arrived a few minutes afterwards, thirty-five minutes late to court. With the victim now present, the Commonwealth asked for leave to withdraw the oral nolle prosequi motion. The trial court granted the motion over the defendant's objection and proceeded to trial, where the jury convicted the defendant.

Held: Affirmed. The Court first noted that the trial court never entered a written order regarding the nolle prosequi motion. However, the Court also explained that, even if the trial judge had entered a

written nolle pros order, the order could have been "modified, vacated, or suspended for 21 days after the date of entry" under Rule 1:1(a). Thus, the nolle prosequi ruling below did not become "incapable of reconsideration." The Court pointed out that there is no rule "that a written order entering a nolle prosequi, let alone an oral pronouncement, becomes irrevocable the moment the trial judge incants the Latin phrase."

In a footnote, the Court also repeated that under the "statute of jeofails," § 19.2-227, a judgment in a criminal case will not be set aside "upon any exception or objection made after a verdict to the indictment or other accusation, unless it be so defective as to be in violation of the Constitution." Thus, although the Virginia Constitution provides that "in criminal prosecutions a man hath a right to demand the cause and nature of his accusation," that provision does not mandate an indictment as the mode of presenting the accusation, and the right to "demand" an indictment can be waived.

Tags: Nolle Prosequi – Withdrawal

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1033203.pdf

Juror Misconduct

Fourth Circuit Court of Appeals

Porter v. White: January 12, 2022

E.D.Va: Defendant seeks *habeas* relief from his Capital Murder conviction on juror misconduct issues.

Facts: The defendant shot a police officer in the head, killing him. When asked at voir dire whether any jurors had relatives in law enforcement, a juror did not disclose that his brother was a law enforcement officer in the adjacent jurisdiction. The juror also did not disclose information about family members who had been victims of violent crimes or family members who had been arrested and prosecuted. The defendant discovered that fact after his conviction and sought *habeas* relief, arguing that the juror was biased, and that the juror committed misconduct by failing to disclose a potential basis for a strike for cause. The state and federal courts denied his petition.

The Fourth Circuit reversed in 2018, sending the matter back for a hearing regarding why the juror did not truthfully answer the questions at voir dire. The Court remanded the case with instructions that the district court allow discovery and hold an evidentiary hearing on the defendant's two separate juror bias claims.

On remand, the district court concluded that the juror did not knowingly fail to disclose this information in response to the voir dire question about whether he or any of his family members or close friends had been victims of violent crimes. The district court also concluded that the juror did not intentionally fail to disclose that his son, his brothers, and his niece had all been prosecuted for various criminal offenses many years before. Instead, the district court found that the juror may have been

"careless in considering his responses" to the voir dire questions, but the evidence did not indicate partiality.

Held: Affirmed. The Court affirmed the district court's finding that the juror was credible when he testified that he did not intentionally withhold information in response to those questions. The Court noted that the defendant had failed to identify any evidence suggesting that the juror withheld information when answering the voir dire question about whether he or any of his family members or close friends had been victims of violent crimes, whether the juror or any of his family members or close friends had ever been arrested or prosecuted for a criminal offense, or that his cousins worked for law enforcement agencies, to conceal bias or to secure a seat on the jury, and failed to identify evidence that the juror intentionally failed to disclose information when answering those questions in order to conceal bias or to secure a seat on the jury.

The Court also agreed that there was no evidence that the juror was biased solely because he failed to disclose information in response to the three voir dire questions. The Court also held that the defendant had failed to establish that the juror would have been dismissed for cause if he had not withheld any information in response to the three voir dire questions. The Court noted that the juror's true answers did not reveal any bias and rejected the argument that the juror's failure to fully answer the questions was itself evidence of actual bias.

Full Case At:
https://www.ca4.uscourts.gov/opinions/2013.P.pdf
Original Fourth Circuit Ruling At:
http://www.ca4.uscourts.gov/opinions/1618.P.pdf

Juveniles

U.S. Supreme Court

Virginia Court of Appeals
Published

Ritchie v. Commonwealth: February 8, 2022

Augusta: The defendant appeals his order to Register as a Sex Offender on Jurisdictional grounds.

Facts: The defendant entered an *Alford* plea to forcible sodomy in Juvenile Court, and the court ordered the defendant to register as a sex offender. Ten days later, the defendant filed a motion to amend his sentence, asking the court to relieve him of the registration requirement, which, pursuant to § 9.1-902(D), is discretionary for juvenile offenders over the age of thirteen. Twenty-one days after

entering its sentencing order, the JDR court held a hearing on the defendant's motion and entered an additional order, which stated: "The requirement that [the defendant] register is changed as follows. He does not have to register at this time and the motion to require that he register is taken under advisement."

Over the next year, after numerous continuances, the defendant repeatedly failed to attend treatment or complete a polygraph. A year after suspending the registration requirement, the J/Dr court finally held that he was required to register as a sex offender. The defendant appealed to the circuit court, contending that the final order was void *ab initio*, arguing that if the J/Dr Court wanted to maintain jurisdiction under § 16.1-242 in this case, the JDR court had to directly cite to that statutory provision in its order if it wished to retain jurisdiction. The circuit court denied the motion.

Held: Affirmed. The Court held that § 16.1-242 is a statutory exception to Rule 1:1 and the rule and the statute are not in conflict. The Court explained that § 16.1-242 provided the J/Dr court authority and discretion to retain jurisdiction over the entire case, including the sentencing and conviction. It also allows a court to retain jurisdiction over a discrete issue, like here with the sex offender registration requirement.

In this case, the Court found that, by relieving the defendant of the obligation to register as a sex offender "at this time," taking the registration requirement under advisement with an established continuance date, and by adding additional probation conditions, the J/Dr Court's order modified and suspended a portion of the defendant's sentence and was interlocutory in nature. The Court rejected the defendant's argument that the court must directly cite § 16.1-242 in its order.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0204213.pdf

Restitution

Virginia Court of Appeals
Published

Slusser v. Commonwealth: May 10, 2022

Montgomery: Defendant appeals a Restitution award on sufficiency of the evidence.

Facts: The defendant burned down the victim's rental home. At sentencing, the trial court heard evidence on restitution. The Commonwealth introduced the tax assessment for the home and a letter from the insurance company. The insurance company offered two insurance benefits: an "estimate of repair" and a "replacement cost benefit." The estimate of repair was to be the actual cash value of repairs, while the replacement cost benefit was to be the actual cost of repairs. The victim then testified that he received the "estimate of repair" amount, then sold the empty parcel without rebuilding the

home. The trial court awarded the victim restitution in the amount of the "replacement cost benefit" and his deductible, less the proceeds of sale from the empty property.

Held: Reversed. The Court contended that, without differentiating what the two insurance benefits covered, the trial court could not have determined that it had to combine them to measure "the value of the property" lost by the victim under § 19.2-305.2(A).

The Court complained that "the replacement-cost benefit was never paid. And the possibility that it might have been paid does not explain what that benefit would have paid for. In fact, the record does not explain the scope of either of the two State Farm benefits, let alone show how those benefits relate to each other or to [the victim's] actual loss." The Court agreed that the second benefit would have covered the construction of a brand-new house but noted that the record did not say what kind of house.

The Court also noted that it was not considering whether Virginia law permits the "collateral-source" rule to be extended to criminal-restitution cases. Lastly, the Court noted that Virginia sentencing law does not require the trial court to consider the defendant's inability to pay when awarding restitution.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0772213.pdf

Virginia Court of Appeals
Unpublished

Omeni v. Commonwealth: September 28, 2021

Hampton: Defendant appeals the restitution award in her sentence for Grand Larceny.

Facts: The defendant stole a car from a car dealership and abandoned it in New Jersey. At sentencing, the Commonwealth proffered documents from the victim regarding restitution. Those documents included invoices and receipts for vehicle tracing and repossession services, including the labor, fuel, and toll expenses required to have the car driven back to Virginia, the dealership's invoices for the costs of re-keying the vehicle, and the dealership's invoices for the costs of servicing, cleaning, and detailing the car. The sums itemized in these documents totaled about $2,500. An additional document from the dealership —an unlabeled paper slip bearing only a column of printed numbers— reflected a further, non-itemized expense in the amount of roughly $2,500. The trial court awarded the full amount, roughly $5,000.

Held: Affirmed in part, reversed in part. The Court affirmed the trial court's judgment awarding restitution for itemized expenses but reversed the trial court's judgment awarding restitution for the unspecified expenses.

Regarding the itemized expenses, the Court explained that the victim could not have been made whole for the defendant's offense without paying the necessary costs to regain possession of the car that the defendant had unlawfully obtained and removed. Thus, the Court found that the victim's specific, itemized vehicle recovery expenses were directly, rather than indirectly, caused by the defendant's offense.

However, regarding the un-itemized expenses, the Court noted that nothing in the record indicated what the roughly $2,500 represented or in what manner, if at all, it was a loss attributable to the defendant's unlawful conduct. Thus, the Court found that the trial court erred by so including it.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0827201.pdf

Sanity

Virginia Court of Appeals
Unpublished

Johnson v. Commonwealth: May 17, 200

Loudoun: Defendant appeals his conviction for Attempted Capital Murder of a Law Enforcement Officer and related offenses on Exclusion of Expert Testimony.

Facts: Police responded to 911 calls from the defendant's daughter, reporting that he assaulted her, and from the defendant himself, who wanted police to eject the daughter from the home. The defendant tried but failed to lock the daughter in the basement before police arrived. The defendant concealed multiple, loaded firearms in readily accessible locations before the officers arrived but falsely assured the 911 dispatcher that his firearms were not loaded and that he would not touch them. When officers attempted to arrest the defendant for domestic assault, the defendant repeatedly shot and wounded both officers.

Prior to trial, the defendant's retained expert evaluated the defendant's mental status at the time of the incident and produced a report detailing his findings and conclusions. The report stated that the defendant had previously researched how to successfully commit suicide, purchased a firearm to shoot himself, and planned where he would commit suicide. In addition, the defendant admitted to the expert that he "always has a plan" for suicide and, at the time of the offenses, "ran through his plan" before entering the closet and retrieving the loaded handgun.

The defendant contended that he had established "a prima facie case for an insanity defense based upon irresistible impulse." The Commonwealth moved in limine to exclude the report and testimony and the trial court granted the motion.

At sentencing, which took place during COVID restrictions, the defendant moved to continue the sentencing "until a time that all members of the public who wish to be present can be present." The defendant also asked to move the sentencing to a larger courtroom. The trial court denied both

motions. The defendant contended that the trial court erred by limiting the availability of spectator seating during his sentencing hearing and effectively closing the proceedings to the public.

Held: Affirmed. The Court first agreed that the expert's proffered testimony failed to establish prima facie evidence of the defendant's insanity at the time of the offenses under the irresistible impulse doctrine. The Court found that the defendant's proffered evidence established that he acted in accordance with a premeditated plan—not an irresistible impulse—when he shot the officers. Thus, the Court ruled that the defendant's proffered evidence precluded "as a matter of law" any finding that he acted under an irresistible impulse and consequently, the expert's testimony regarding the defendant's mental state at the time of the offenses was "irrelevant," and therefore inadmissible. [*Note: This case took place before § 19.2-271.6 permitted "diminished capacity" evidence]*.

Regarding the defendant's "public trial" argument, the Court concluded that the defendant failed to make a prima facie showing that the trial court "closed" his sentencing hearing to the public. The Court noted that no evidence in the record reflected how many people were already present in the courtroom or how many seats were available.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1279204.pdf

Cecil v. Commonwealth: April 5, 2022

Giles: Defendant appeals his convictions for Armed Burglary, Robbery, Conspiracy, and related charges on Refusal to Permit Withdrawal of a Guilty Plea.

Facts: The defendant and his confederate planned an armed robbery to steal money and drugs from a residence. Together, they kicked in the door of the residence and exchanged gunfire with the occupants. The defendant then fled, but his confederate died of a gunshot wound.

The defendant pled guilty to the offense, but prior to sentencing, he moved to withdraw his guilty plea and claimed that he was not competent to stand trial. The trial court found the defendant incompetent to proceed in the case and ordered mental health treatment to restore his competency. The trial court later found that the defendant had been restored to competency. At the hearing on his motion to withdraw his guilty pleas, the defendant testified that he did not remember entering the guilty pleas and he did not understand the charges to which he pled. He claimed that he could not remember whether he discussed an insanity defense with his former counsel.

The trial court denied the defendant's motion to withdraw his guilty plea.

Held: Affirmed. The Court ruled that, even assuming, without deciding, that the defendant did establish a good-faith basis for both entering into and withdrawing from his guilty pleas, the defendant still failed to meet his burden of showing a reasonable defense. Distinguishing the *Hernandez* case, in this case the Court complained that in this case, the defendant presented no evidence tending to establish that, at the time of the offense, he was suffering from a mental disease or defect such that he

did not know the nature and quality of his acts, that he did not know what he was doing was wrong, or that he was totally deprived of the mental power to control or restrain his actions. The Court wrote: "Cecil's vague, claimed history of mental health issues in the past does not support a conclusion of insanity at the time of his offenses."

The Court pointed out that competency to stand trial and insanity at the time of the offense are not synonymous legal or factual concepts. Thus, for the Court, the mere fact that the trial court found that the defendant was not competent to proceed with sentencing nearly two years did not tend to prove legal insanity at the time of the offense. The Court also found that the defendant's claim that he did not recall or understand his guilty pleas had no bearing on his sanity at the time of the offense one year prior.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0448213.pdf

Sixth Amendment: Ineffective Assistance

Fourth Circuit Court of Appeals

Walters v. Martin: November 18, 2021

W.Va.: Defendant seeks Habeas relief from his convictions for Robbery, Burglary, and Assault alleging Ineffective Assistance of Counsel

Facts: The defendant forcibly broke into a woman's home, threatened her, struck her with a hammer, and stole money from her. While awaiting trial, the defendant repeatedly told his attorney and others that he "didn't think the punishment should exceed maybe three years tops in his mind."

Prior to trial, the prosecution made the defendant a plea offer of twenty years to serve. Defense counsel did not convey the offer to his client until several months after the offer expired. When he did convey the offer, he told his client that he could ask the prosecutor to renew the offer. However, he cautioned his client that it would be "a waste of time to call if you will not accept the plea offer. There's no use getting an offer back on the table if you're not going to take it." The defendant did not ask his attorney to renew the offer.

Six months later, the plea the defendant ultimately accepted resulted in a longer sentence (forty-three to sixty-five years) than the one included in the original plea offer (twenty years). After his conviction, the defendant filed a habeas claim, seeking relief for alleged ineffective assistance of counsel. The habeas court rejected his claim, finding that the defendant's willingness to accept the sentence in the original offer came only after six months of a pending indictment and an impending trial date and after his attempts to seek a less-severe sentence failed.

Held: Affirmed. The Court found that the defendant failed to establish prejudice, in that he failed to demonstrate a reasonable probability that he would have accepted the original plea offer.

The Court repeated that, under *Strickland*, to establish ineffective assistance of counsel, a petitioner must prove: (1) his counsel was deficient in his representation; and (2) he was prejudiced as a result. To show prejudice in this case, the Court explained that the defendant would have to demonstrate a reasonable probability that (1) he would have accepted the earlier plea offer had they been afforded effective assistance of counsel, and (2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.

In this case, the Court explained that, to demonstrate a reasonable probability that he would have accepted a plea, the petitioner's testimony that he would have done so must be credible. In this case, the Court noted that the state habeas court reasonably found the defendant's testimony not credible, concluding that he could not establish a reasonable probability that he would have accepted the plea offer had he timely known of it.

Full Case At:
https://www.ca4.uscourts.gov/opinions/197391.P.pdf

Wright v. Woodson: June 21, 2021
Unpublished
Reversed Virginia Supreme Court Ruling of October 18, 2018
Rockingham: Defendant seeks *Habeas* relief from his conviction for Grand Larceny, arguing that it is not a lesser-included offense of Robbery.

Facts: During a robbery trial, the victim did not testify to feeling intimidated or threatened during the robbery. The defendant's attorney did not object to the trial court's instruction to the jury that listed Grand Larceny as a lesser-included offense of Robbery. The jury convicted the defendant of Grand Larceny. During a *Habeas* hearing, the attorney explained that he agreed to the jury instruction because a conviction on the grand larceny offense would allow the jury to impose a lesser sentence. In an unpublished order, the Virginia Supreme Court dismissed the defendant's *Habeas* petition. The Court concluded that, based on his explanation, the attorney's decision was not objectively unreasonable.

Held: Reversed. The Court ruled that the Virginia Supreme Court applied the wrong legal standard in assessing trial counsel's performance under *Strickland*. The Court concluded that the defendant's trial counsel's performance fell below prevailing professional norms when he failed, without justification, to inform himself of state law critical to his client's case. The Court further concluded that, had his trial counsel been adequately informed, there was a reasonable probability that the outcome of his trial would have been different, establishing prejudice under *Strickland's* second prong.

The Court observed that the Grand Larceny instruction was plainly improper, allowing the jury to convict on a charge for which the defendant had not been indicted. The Court also reasoned that it was highly likely that a jury instructed only on robbery would have acquitted the defendant. Because there was a "reasonable probability" that counsel's deficient performance – his unreasonable failure to

inform himself of the law – affected the outcome of the trial, the Court found that the defendant was entitled to relief on his Sixth Amendment claim of ineffective assistance of counsel.

The Court remanded the case to grant relief on the claim of ineffective assistance of counsel.

Full Case At:
https://www.ca4.uscourts.gov/opinions/197447.U.pdf
Original Virginia Supreme Court Order At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/170163.pdf

Virginia Supreme Court

Guarino v. Clarke: July 1, 2021
Unpublished
Chesterfield: Defendant seeks *habeas* relief for his convictions for Drug Manufacturing and Possession of a Firearm on Ineffective Assistance grounds.

Facts: The defendant manufactured with intent to distribute more than a pound of marijuana and possessed a firearm. Prior to trial, the defendant rejected several plea offers from the Commonwealth. At the beginning of his jury trial, the defendant assured the trial court that he understood his charges and the possible penalties. The defendant affirmatively stated that he fully discussed his charges and possible defenses with his attorney, and that he was entirely satisfied with his services. The defendant further assured the trial court that he was entering his pleas of "not guilty" freely and voluntarily. The Commonwealth and the defendant confirmed that several plea bargain offers had been communicated to the defendant.

At trial, the jury found the defendant guilty and recommended a ten-year sentence. Later, on *habeas,* the defendant claimed he was denied the effective assistance of counsel because the Commonwealth offered him a plea agreement pursuant to which he would serve a total of six months for all charges pending against him. The defendant alleged that he would have accepted the agreement but for his attorney's advice to refuse the plea agreement because he "could beat the case against him."

The trial court denied and dismissed the *habeas* petition without holding an evidentiary hearing. Specifically, the trial court explained that the defendant represented at trial that he (1) "understood the charges against him, that he had had sufficient time to discuss those charges with defense counsel," (2) "had discussed with counsel the elements of the offenses and what the Commonwealth had to prove, as well as any possible defenses," (3) "had discussed with counsel his possible plea and had decided for himself to plead not guilty," (4) "was entirely satisfied with his attorney's representation," and (5) "decided for himself to have a jury trial after discussing that decision with his attorney."

Held: Affirmed. The Court found that the defendant had failed to adequately demonstrate a valid claim of ineffective assistance. In an extensive footnote, the Court agreed that the defendant had failed to proffer in his *habeas* petition a specific and valid reason why he should be allowed to disavow

the statements he made during his plea colloquy. Therefore, the Court agreed that the circuit court was not required to receive additional evidence beyond that in the record.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/200192.pdf

Sixth Amendment: Right to Self-Representation

Fourth Circuit Court of Appeals

U.S. v. Roof: August 25, 2021
10 F.4th 314 (2021)
South Carolina: Defendant appeals his conviction and death sentence for Murder and related offenses on various grounds, including Improper Self-Representation, Competency, and Mistrial grounds.

Facts: In 2015, the defendant shot and killed nine black members of a church in Charleston, South Carolina during a bible-study meeting, after the group had welcomed him into their meeting. The defendant, who was white, had intended to foment racial division and strife across America, using his crimes as a catalyst. He sought wide publicity and, to that end, purposefully left one person alive in the church "to tell the story." When apprehended, he fully confessed. A jury convicted him on nine counts and unanimously recommended a death sentence.

Prior to trial, the trial court considered the defendant's competency to stand trial. The Court heard from several witness, including a doctor who opined that the defendant's unwillingness to cooperate with defense counsel was not the result of an underlying "widespread psychosis," but was instead rooted in "a deep-seated racial prejudice" that the defendant did not want "blurred" by a mental health defense. The trial court concluded that the defendant had both cognitive and rational abilities that made him competent to stand trial.

After learning that his lawyers planned to present evidence of mental illness, the defendant sent a letter to the prosecution the night before jury selection, accusing his lawyers of using "scare tactics, threats, manipulation, and outright lies" to push a trial strategy that he did not agree with: namely, presenting him as mentally ill. He said, "what my lawyers are planning to say in my defense is a lie and will be said without my consent or permission." The trial court conducted a hearing and ruled that the "decision concerning what evidence should be introduced in a capital sentencing is best left in the hands of trial counsel, and reasonable tactical decisions by trial counsel in this regard are binding on the defendant."

In response, the defendant filed a motion to discharge his lawyers and proceed *pro se*. The trial court granted his motion and appointed standby counsel. The defendant represented himself during voir dire. Still, standby counsel filed three motions during voir dire seeking to ask potential jurors additional questions. The district court denied the motions because it "would not allow the defense to speak with two voices."

Shortly before the start of the guilt phase of trial, however, the defendant moved to allow his standby counsel to represent him during the guilt phase, but to return to self-representation for the penalty phase if he were convicted. The trial court granted that motion. The defendant proceeded again to represent himself during the penalty phase and did not present any mental health mitigation evidence. At the penalty phase, he delivered an opening statement, argued against aggravating factors, challenged the prosecution, and made a closing argument.

At trial, the one survivor, who had watched the defendant murder her aunt and held her own son in her arms as he died, testified that the defendant was "evil" and would go to "the pit of hell." The defendant moved for a mistrial, claiming that this testimony violated his Eighth Amendment rights, but the trial court denied the motion. The trial court gave a curative instruction instead.

After trial had concluded, the defendant moved to set aside the verdict. Regarding competency, the defendant argued that the district court improperly characterized his expectation of a racial revolution as racist, rather than delusional. He claimed that his psychotic delusions made him incompetent to stand trial. He also contended that, even if he was competent to stand trial, he was not competent to represent himself because he is what the Supreme Court has called a "gray-area defendant."

The defendant also claimed that the trial court erred in allowing him to represent himself during the penalty phase of his trial. He contended that the Sixth Amendment granted him the right to counsel who will honor his desire to forgo the presentation of mental health mitigation evidence. He also argued that the Sixth Amendment right to self-representation does not extend to sentencing proceedings. After trial, he criticized the trial court for not correctly assessing whether he was a "gray-area" defendant, meaning that he was competent to stand trial but not competent to represent himself; and not allowing standby counsel to take a more active role during jury selection.

In addition, the defendant argued that his waiver of counsel before voir dire was invalid because he was misinformed about the role of standby counsel and because he was not informed that he could "proceed with counsel at jury selection and guilt and self-represent at penalty. He contended that his waiver was neither knowing nor intelligent because the district court told him that standby counsel would be available to assist him if he desired that assistance, without defining what "assist" means.

Held: Affirmed. In a ruling issued by three judges sitting by designation from the Third, Sixth, and Eighth Circuits, the Court's opinion was extensive and ruled on many issues. [*Please note that the discussion below is abbreviated and only discusses a few of the issues in this case – EJC.*]

Regarding competency, the Court concluded that the trial court's decision to accept the evaluator's evaluation of the defendant's competency was not "against the great preponderance of the evidence." The Court rejected the defendant's argument that the trial court relied too heavily on his in-court statement denying his delusional beliefs.

Regarding the defendant's objection to his attorney's mental-health evidence, the Court first agreed that if the defendant employed counsel, then counsel would have "exclusive authority over presentation of penalty-phase evidence." The Court repeated that, when one "chooses to have a lawyer manage and present his case," he cedes "the power to make binding decisions of trial strategy in many areas." "The presentation of mental health mitigation evidence is, in our view, 'a classic tactical decision left to counsel, even when the client disagrees.'" The Court explained that acknowledging mental health

problems, and bearing any associated stigma, is simply not of the same legal magnitude as a confession of guilt. The Court acknowledged that confessing guilt is of such enormous legal and moral consequence as to properly be reserved to the defendant's sole discretion. By contrast, in the Court's view, mental health evidence presented at sentencing as a form of mitigation is far less consequential, even if very important.

The Court then ruled that the defendant was entitled to represent himself at the penalty phase. The Court also held that the Sixth Amendment protects the right to self-representation at capital sentencing even when, as here, the defendant chooses not to present a mitigating factor to the jury. The Court concluded that the Sixth Amendment right to self-representation remains firmly in effect through capital sentencing and noted that the Supreme Court has not indicated that the Eighth Amendment, or any other Amendment, requires mitigation evidence.

The Court then concluded that the defendant did not base his self-representation decision on a misunderstanding about the role of standby counsel. Regarding the trial court's explanation of the role of standby counsel, the Court explained that the trial court was not obligated to precisely define the role of standby counsel. Instead, the Court credited the district court's assurance that standby counsel could assist the defendant and with the court's confirmation that the defendant retained the obligation to make as-needed motions or objections, ask questions, and make arguments. The Court also pointed out that, faced difficulties with the logistics of self-representation, the district court twice gave the defendant the option of withdrawing from self-representation. The Court also ruled that the trial need not have informed the defendant of the ability to selectively use counsel for different parts of the case.

The Court then addressed the defendant's claim that he was a "gray-area" defendant, who was competent to stand trial but not to represent himself. The Court explained that to be a gray-area defendant, the defendant would have to lack the mental capacity to perform the basic tasks of self-representation. However, in this case, the Court pointed out that the defendant's IQ of 125 was in the 95th percentile of the general population, despite average processing speed and was not suffering from any such debilitating illnesses. Even though the defendant's experts described him as suffering from "disorganized thinking, reduced processing speed, memory problems, and difficulty integrating new information," almost all as a result of "mild frontal system dysfunction," the Court repeated that defendants can suffer "mental illness while having the intellectual capacity to self-represent."

The Court repeated that a trial court has wide-ranging discretion to determine the appropriate role of standby counsel and the extent of accommodations for pro se defendants. In this case, the Court noted that the trial court allowed standby counsel to recommend questions, give advice, and even suggest objections. The Court agreed that the trial court did not unreasonably deny additional accommodations, such as shorter trial days, intermittent breaks, and advance- notice of government testimony.

Regarding the survivor's comments about the defendant, the Court ruled that her improper remarks were not so egregious as to "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice.

The Court concluded: "No cold record or careful parsing of statutes and precedents can capture the full horror of what Roof did. His crimes qualify him for the harshest penalty that a just society can impose."

Full Case At:
https://www.ca4.uscourts.gov/opinions/173.P.pdf

U.S. v. Ziegler: June 14, 2021
1 F.4th 219 (2021)
W.Va.: Defendant appeals his conviction for Impersonating a Federal Officer on Permitting Self-Representation at Trial.

Facts: The defendant drove under the influence recklessly without insurance, a driver's license, or vehicle registration on Federal property. An officer arrested the defendant for his offenses. During the arrest and before the Federal Magistrate, the defendant repeatedly claimed that he was an Assistant United States Attorney and demanded that the charges be dropped. At the impound yard, the defendant also demanded that the yard release his vehicle, again claiming to be an AUSA. The defendant was neither an AUSA nor a lawyer.

Prior to trial, the defendant sought to represent himself at trial and asked the trial court to remove the public defender from his case. In an *ex parte* proceeding, the Court conducted a colloquy to determine whether the defendant knew the charges against him, understood the process, knew his rights, had some experience in the law, was warned that proceeding *pro se* was a bad idea, and understood the consequences of waiving his right to counsel and proceeding on his own. The defendant espoused that he knew cases and jury instructions in the area, explained some of his rights, claimed that he had a degree in criminal justice, "knew all 27 amendments," and had helped prisoners and been involved in several cases. The defendant also claimed that he knew the rules of evidence and listed several (noting that states had similar rules), listed several writs, and asserted that he understood criminal procedure.

The defendant also revealed that the Michigan Court of Appeals had reversed an earlier conviction of his because the trial court had failed to follow proper statutory procedures in allowing his self-representation before that trial court. The trial court in this case questioned whether the defendant intended to represent himself, only to again claim that his waiver of counsel was invalid (just as he had done in the previous case). The defendant claimed that he had no such intention and the trial court permitted him to represent himself.

After his conviction, the defendant claimed that his waiver of counsel was invalid.

Held: Affirmed. Based on the court's observations during the proceedings, the defendant's statements about experience and competency, and the public defender's representations, the Court found that the district court properly permitted the defendant to represent himself. The Court agreed that the evidence of the defendant's ability demonstrated that he had both the capacity to consult with a lawyer and a rational understanding of the case against him, which was all that was required to allow a defendant to waive counsel and realize his right to self-representation.

Regarding the defendant's outlandish behavior at trial, the Court wrote: "Many great trial lawyers are combative and a bit full of themselves, if not outright narcissists. And 'persons of unquestioned competence have espoused ludicrous legal positions.'" The Court also rejected the

argument that the defendant appeared to have a mental illness, finding that the claims of mental illness, raised after the jury had returned its verdict, failed to create a reasonable cause to believe that mental disease rendered him mentally incompetent.

The Court wrote that the defendant's conduct in his prior case and here "exemplifies the difficult dance that district courts must perform in zealously guarding the rights of a defendant who wants to represent himself. But at least here, the court stayed close enough to the line to have not abused its discretion."

Full Case At:
https://www.ca4.uscourts.gov/opinions/194832.P.pdf

Sixth Amendment: Speedy Trial

Virginia Court of Appeals
Published

Ali v. Commonwealth: May 31, 2022

Fairfax: Defendant appeals his conviction for Unlawful Wounding on Speedy Trial grounds

Facts: The defendant stabbed the victim and was arrested in October 2019. On March 9, 2020, the district court found probable cause to certify the charge to the grand jury. The grand jury issued an indictment on March 16, 2020. Also on March 16, 2020, the Supreme Court of Virginia issued its first judicial emergency order in response to the COVID-19 pandemic, restricting trials and non-emergency proceedings as a result.

Later in October 2020, the defendant made a motion to dismiss the charges against him on constitutional and statutory speedy trial grounds. The trial court denied the motion. The defendant's jury trial, the very first one held in the circuit following implementation of its approved pandemic protocols, began November 9, 2020. At trial, the defendant did not contest that he stabbed the victim. Instead, his defense was that the victim attacked him first.

Held: Affirmed. The Court held that the trial court did not err by ruling that the defendant's statutory speedy trial rights under § 19.2-243 were not violated. The Court concluded that the pandemic met the requirements for a natural disaster under § 44-146.16, and the Supreme Court entered orders tolling the statutory speedy trial statute based on the pandemic as authorized by § 17.1-330. The Court explained that the Court's orders covered most of the period at issue, and only seven days of the statutory speedy trial period ran between the defendant's preliminary hearing on March 9, 2020, and his trial on November 9, 2020.

Regarding statutory speedy trial, the Court noted that the Virginia Supreme Court's orders extended the judicial emergency until after the defendant's November 2020 trial commenced and specifically provided that the "tolling of the running of any statutory speedy trial period applicable to

criminal prosecutions . . . continued." The Court also noted that under § 17.1-330 and § 44-146.16, the word "disaster" includes various "natural disaster[s]" such as "any communicable disease that presents a public health threat," although it specifically did not address the argument that pandemic would have tolled the speedy trial statute "even absent" the Supreme Court's judicial emergency orders.

The Court similarly concluded that the trial court did not err by rejecting the defendant's claim that his constitutional speedy trial rights were violated due to the eleven-month delay. The Court found that the portion caused by the pandemic was valid delay, and the defendant was tried on the very first day that the circuit was able to resume holding jury trials. Additionally, regarding the remaining time, the Court agreed that the Commonwealth did not engage in any willful or negligent acts that contributed to the delay in trying the defendant. Instead, the Court concluded that the delay, which amounted to eight months at most, occurred in the ordinary course of the administration of justice. Finally, the Court ruled that the defendant did not prove the requisite prejudice from the delay.

Regarding Constitutional speedy trial, the Court acknowledged that the defendant remained in custody for 399 days, which was presumptively prejudicial under *Barker v. Wingo*'s four-factor test, triggering a review of the length of the delay in combination with the remaining factors. The Court also noted that the delay not attributable to the defendant was about eleven months (335 days), and that delay was assigned to the Commonwealth for Constitutional speedy trial purposes.

However, the Court concluded that the pandemic made it unsafe for all witnesses and other trial participants to come to court, rendering them justifiably absent to protect their "health and safety." The Court wrote: "The ongoing nature of the global pandemic supported the continuation of restrictions until such time as circumstances permitted the resumption of jury trials in a manner that protected both the health and safety of all participants and the constitutional rights of criminal defendants."

Regarding the defendant's claim of prejudice, the Court complained that the defendant did not offer evidence to prove his allegations of prejudice or explain any specific ways in which these alleged limitations impaired his ability to prepare his defense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0434214.pdf

Virginia Court of Appeals
Unpublished

Commonwealth v. Murphy: August 10, 2021

Chesterfield: The Commonwealth appeals the dismissal of an indictment for Malicious Wounding and Use of a Firearm on Speedy Trial grounds.

Facts: The defendant faces charges of Malicious Wounding and Use of a Firearm. After arrest, the defendant waived preliminary hearing. On March 16, 2020, the day the grand jury was scheduled to act on the charges, the Supreme Court of Virginia issued its first judicial emergency order in response to the COVID-19 pandemic. That order restricted trials and non-emergency proceedings due to the

pandemic, and the meeting of the grand jury was postponed. In the months that followed, the Supreme Court issued additional emergency orders that suspended jury trials entirely for a period of about eight weeks.

In May 2020, around the time that jury trials were suspended, the defendant, through court-appointed counsel, stated his intent to enter a guilty plea. However, in June, when the defendant appeared in court for entry of the plea, he demanded a jury trial and requested new counsel. The court appointed new counsel and scheduled a jury trial for September.

By mid-September, the defendant's second attorney withdrew as counsel due to a conflict, and the court appointed a third attorney for the defendant. The trial court obtained approval to resume jury trials in early November, and the defendant's jury trial was scheduled for January 2021.

As of January 4, 2021, however, the jail pod that housed the defendant was under quarantine, and pursuant to the judicial emergency orders of the Supreme Court, the defendant could not be transported or allowed to enter the courthouse. Consequently, his jury trial was reset for February 26, 2021. In mid-January, he was released on bail, and on February 22, he filed a motion to dismiss on constitutional speedy trial grounds.

In his motion to dismiss, the defendant claimed that he had learned through the initial prosecution's discovery responses that two witnesses had identified him by as knowing the location of the firearm used to commit the malicious wounding. The defendant stated, however, that these two individuals discussed a third witness' possession of the firearm in a recorded jail call. The defendant further asserted that the firearm was crucial evidence and that due to the witness' death in November 2020, he was deprived both the witness' testimony and any ability to locate the firearm. The defendant suggested that if he had obtained the firearm, he "could get prints and other [unspecified exonerating] evidence" from it.

The trial court granted the motion to dismiss on constitutional speedy trial grounds, and it later denied the Commonwealth's motion to reconsider. The Commonwealth noted an appeal.

Held: Dismissal reversed; case reinstated. The Court held that the trial court erred in ruling that the defendant's constitutional right to a speedy trial was violated.

In analyzing the defendant's constitutional right to speedy trial, the Court applied the test from *Barker v. Wingo,* which requires balancing four main factors—the length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant. The Court concluded that, although the overall length of the delay was presumptively prejudicial, the reason for much of it was attributable to the defendant and the pandemic.

The Court first analyzed the length of the delay. The Court made clear that delays due to the defendant's change in plea and changes in counsel counted against him for speedy trial purposes. Thus, the delay between the date scheduled for his guilty plea and the new date scheduled for trial was attributable to him for speedy trial purposes. In addition, the Court also attributed the delay that occurred when his second attorney withdrew due to a conflict to the defendant.

In sum, of the almost fourteen months between his arrest and the dismissal of the charges, the Court concluded that a period of a little over three months was attributable to the defendant due to his decision to request a jury trial rather than plead guilty. Of the remaining time, the Court found that just under five months were attributable to the pandemic, and about six months were attributable to the

Commonwealth. The Court explained that the portion of the delay caused by the pandemic was an appropriate, justifiable delay and did not count against the Commonwealth. Because the Commonwealth was not at fault in any way in causing the delay due to the pandemic, the Court found that the time attributable to the Commonwealth was only 181 days or approximately six months.

Regarding the reason for the delay, the Court held that the trial court erred when it weighed the reason for the pandemic-related delay "significantly in the defendant's favor." Instead, the Court found that the trial court should have classified the cause for the delay attributable to the pandemic as valid and unavoidable because it was outside the Commonwealth's control. The Court examined the history of the pandemic and concluded that the pandemic was "a valid reason" that "justified appropriate delay." The Court wrote: "The ongoing nature of the global pandemic supported the continuation of restrictions until such time as circumstances permitted the resumption of jury trials in a manner that protected both the health and safety of all participants and the constitutional rights of criminal defendants." In a footnote, the Court cited many cases from other jurisdictions that reached the same conclusion.

Regarding the defendant's assertion of his rights, the Court acknowledged that the defendant made repeated requests for a jury trial, but explained that, as a matter of law, requesting a jury trial is qualitatively different from asserting one's right to a speedy trial.

Lastly, regarding prejudice, the Court explained that, because the delay was due to the pandemic, the defendant could establish a constitutional speedy trial violation only if he proved specific prejudice. The Court acknowledged that, if witnesses die or disappear during a delay, or are unable to recall "distant" events accurately, the prejudice is "obvious." However, in this case, regarding the dead witness, the Court held that the defendant's proffer amounted to no more than speculation and was insufficient to establish specific prejudice. The Court found that the defendant's assertion of such prejudice failed because his allegations regarding how the testimony of the deceased witness, or any evidence the defendant might have obtained from the firearm believed to be in that potential witness' possession, would have aided him in his defense were speculative at best.

Regarding the now-deceased witness, the Court observed that, while the witness was alive, the defendant and his attorneys either did not believe the witness was a material witness or did not know how to find him. The court wrote: "If they could not find him prior to his death to question him or subpoena him for either trial, it was this inability to locate him that caused any potential prejudice, not the delay in the defendant's trial." In a footnote, the Court pointed out that the defendant had never subpoenaed the now-deceased witness.

Further, the Court complained that the defendant did not allege that the deceased witness was a witness to any relevant events, only that he knew where the gun was located. The Court also complained that the defendant could not articulate how fingerprint or DNA evidence obtained after that length of time, during which the gun had been in the possession of the deceased witness and perhaps others, was likely to exonerate him.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0197212.pdf

Barksdale v. Commonwealth: July 20, 2021

Campbell: Defendant appeals her convictions for Murder and Use of a Firearm on Speedy Trial and Refusal of an Insanity Defense

Facts: In 2016, the defendant shot and killed her husband. The J/Dr Court certified the charge in June 2017. The Grand Jury indicted the defendant in July 2017. The parties continued the first appearance in circuit court on joint motion. In August 2017, the court set the matter for an October jury trial. The defendant filed an insanity claim.

In September, however, 107 days after the initial probable cause determination, the defendant requested that the trial date be continued. The Court continued the trial until November 2017, which was outside the statutory speedy trial deadline. Thereafter, the parties requested and were granted numerous continuances and multiple trial dates were set, culminating in a January 2019 trial date being selected. All the continuance orders entered between November 2017 and January 2019 reflect that the continuances were requested by the defendant, were the result of a joint motion, and/or that the defendant waived speedy trial for the period of the continuance.

In November 2018, the defendant elected to represent herself and withdrew her insanity claim. Given the significant change in the focus of the case, the Commonwealth sought a continuance of the January 2019 trial date, which the trial court granted over the defendant's objection. The Court set the matter for trial in March 2019. Although the Commonwealth believed that the trial would take place within the speedy trial deadline, the Commonwealth entered a *nolle prosequi* as a precaution in March 2019 and re-indicted the defendant.

Thereafter, a July 2019 order setting the trial in January 2020 expressly reflects that continuing the matter to that date was done because of a joint "motion of the defendant and the Commonwealth." The order further provides that the defendant agreed to waive her speedy trial rights under § 19.2-243 or any other applicable provisions of the Code of Virginia for the period from January 2019 through January 2020.

However, forty-eight days before trial, the defendant's counsel again raised his desire to present evidence of insanity. The Court conducted a hearing and reviewed the options available to it under § 19.2-168. The trial court ruled that the defendant was barred from introducing evidence at trial of her alleged insanity due to her failure to comply with § 19.2-168's notice requirement. The trial court also dismissed the defendant's motion to dismiss on speedy trial grounds.

Held: Affirmed. Regarding speedy trial, the Court concluded that the January 2020 trial commenced within the speedy trial period, even if it calculated that period from the initial finding of probable cause that led to the initial murder indictment.

The Court first acknowledged that the joint continuance of the scheduling date in July 2017 did not toll the speedy trial clock because an initial trial date had yet to be selected. However, the Court then noted that when the defendant requested a continuance in September 2017, the speedy trial clock was tolled. Further, given that the trial was continued at the defendant's request, the speedy trial clock, absent intervening circumstances, would have remained tolled until the rescheduled trial date.

The Court also noted that, even if it were to determine that the continuance caused by the defendant's change in strategy otherwise would be charged to the Commonwealth, only the period between the granting of the continuance in January 2019 until the date later in January 2019 mentioned in the July 2019 order could be charged to the Commonwealth, due to the language of the July 2019 order.

Regarding the Commonwealth's motion to *nolle prosequi*, the Court explained that, if there were no statutory speedy trial violation, there was no reversible error regarding the granting of the motion for nolle prosequi. Accordingly, the trial court did not err in refusing to dismiss the indictments or in granting the motion to nolle prosequi.

Regarding the defendant's insanity defense, the Court held that the trial court's decision to bar the evidence given the failure to comply with § 19.2-168 was a reasonable one, and therefore, the trial court did not abuse its discretion in prohibiting such evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0736203.pdf

Blackwell v. Commonwealth: July 20, 2021

Amherst: Defendant appeals his conviction for Failure to Register as a Sex Offender on Prosecutorial Misconduct and Sixth Amendment Speedy Trial grounds.

Facts: In October 2018, the Commonwealth indicted the defendant on two counts of failure to register as a sexual offender. Under the "speedy trial" act, the Commonwealth was required to commence prosecution on or before January 14, 2019. The defendant requested a bench trial in this case. The Court set the case for trial in early January 2019.

In November 2018, the defendant was scheduled to be tried in a bench trial for separate sexual offenses. However, the defendant asked for a jury on the morning of trial and that matter had to be continued. Later that same day, the trial court arraigned the defendant in this case. The trial court explained that it would have to reschedule the bench trial previously set in this case because the trial judge had to schedule another matter in a different county that day.

The defendant insisted that he wanted to proceed to bench trial on the January trial date, even though the judge was not available. On the other hand, the Commonwealth requested that the trial court re-set the matter with a jury. The trial court explained that it would have been difficult to schedule a jury trial in December. The trial court had no remaining dates for a jury trial before the January 14, 2019, speedy trial deadline.

Considering the speedy trial issue, the Commonwealth moved to *nolle prosequi* the indictments, concerned that it could not get a jury trial before the speedy trial deadline. The Commonwealth pointed to the fact that the defendant asked for a jury on the morning of the trial for the separate sexual offenses, and the Commonwealth did not "want this to happen again." The trial court granted the motion over the defendant's objection.

In December 2018, the grand jury returned a new indictment on the count of failure to provide sex offender registration information. The Court tried the defendant in May 2019. Prior to trial, the defendant moved to dismiss the indictment on constitutional speedy trial grounds. He argued that the delay in prosecution was the result of prosecutorial vindictiveness in response to his request for a jury in the other case. He also contended that the delay prejudiced him because he could not obtain a certain witness, a transient person who could not be located. The trial court overruled his motion.

Held: Affirmed. The Court first addressed the trial court's decision to grant a *nolle prosequi*. Here, the Court concurred with the trial court's decision to grant the motion for nolle prosequi. The trial court reiterated that a defendant and the Commonwealth both have the right to request a jury trial at any time. The Court found good cause to grant the motion for nolle prosequi.

Regarding the defendant's constitutional speedy trial claim, the Court noted that the Commonwealth's *nolle prosequi* and re-indictment only caused a short delay of five months from the new indictments in December 2018 to the trial in May 2019. The Court agreed that the delay was minimal and the reason for the delay was explainable. On the other hand, the defendant's claim of prejudice was speculative, and the Court noted that the trial court had offered to entertain a motion for a continuance if, in fact, the defendant was unable to locate his witness.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0731203.pdf

Local Court Rulings

Commonwealth v. Watson, Doyle, Dooley: May 3, 2022
(Norfolk Circuit Court – Lannetti, Judge)

Norfolk: Defendants seek dismissal of their Murder and related indictments on Speedy Trial grounds.

Facts: The defendants all face indictments for Murder and related charges. Police arrested the defendants on indictments for these offenses in August 2021. The parties continued the cases repeatedly until January 2022 without setting a trial date. During that time, the Virginia Supreme Court approved Norfolk's plan to re-start jury trials, and Norfolk began holding jury trials in September 2020.

Then, in January 2022, the Commonwealth filed a motion for joinder and the defendants moved to dismiss for violation of statutory and Constitutional speedy trial. The trial court denied the motion for joinder but took the motion to dismiss under advisement.

Held: Motions to dismiss denied.

Regarding statutory speedy trial, the Court noted that the Supreme Court of Virginia explicitly stated that any plans to restart jury trials would not affect speedy-trial tolling. The Court wrote "The effects of the COVID-19 pandemic go beyond the trial itself in a given jurisdiction, and some of these effects have been recognized by the supreme court. These effects include issues surrounding

transportation of inmates, including from beyond the local jurisdiction; travel and appearance by witnesses who have COVID-related concerns; possible delays in laboratory and forensic testing; and the possible increased demand on Commonwealth's Attorneys' offices to respond to any backlog of cases coming out of the pandemic."

The Court continued: "This Court therefore holds that, under the Supreme Court of Virginia's declaration-of-judicial-emergency orders, the statutory speedy trial deadline has been, and continues to be, tolled regardless of whether an individual court has resumed conducting criminal jury trials." "Accordingly, the Court does not find a violation of Virginia's Speedy Trial Act because the tolling has been in effect since before Defendants were indicted."

Regarding Constitutional speedy trial, though, the Court explained that "the supreme court has made clear that the COVID-19 pandemic did not, and does not, waive a defendant's *constitutional* right to a speedy trial." The Court also agreed that the delay suffered by the defendants was presumptively prejudicial. The Court also found that, because the Norfolk courts had been able to accommodate any request for a jury trial during the previous months, the delay was not attributable to the pandemic. Instead, the Court found "that it was the Commonwealth's negligence, including apparent inefficiencies related to office staffing issues, that led to the current delay in getting Defendants to trial."

However, the Court noted that the defendants also did not pursue setting trial dates for most of the delay. In addition, the defendants could not articulate any specific prejudice. Thus, the Court explained, "Although the length of the delay is presumptively prejudicial and the reason for the delay weighs against the Commonwealth, Defendants' assertion of their right to a speedy trial weighs only slightly in their favor and Defendants have failed to demonstrate any particularized prejudice."

Full Case At:
https://www.dropbox.com/s/urc6wabyy5edriq/2022%20%20-%20CW%20v.%20Watson%2C%20Doyle%2C%20Dooley.pdf?dl=0

Sentencing

Virginia Supreme Court

Smallwood v. Commonwealth: January 13, 2022
Aff'd Court of Appeals ruling of May 12, 2020
Warren: Defendant appeals the imposition of sentence for Drug Possession after his failure to pay court costs.

Facts: The defendant plead guilty to possession of heroin pursuant to a plea agreement. The trial court found sufficient evidence to support the guilty plea but withheld a finding of guilt pursuant to § 18.2-251. The trial court continued the case for one year and placed the defendant under supervised probation with a special condition that he pay the costs of prosecution on a schedule to be determined by his probation officer.

Upon review of the deferral a year and a half later, the defendant conceded that he had still not paid his court costs as required by the agreement. The Commonwealth supported a continuance for an additional year for the defendant to make the payments. When the trial court again reviewed the case after another year, it noted the court costs had not been paid, entered judgment on the conviction, and imposed sentence.

The Court of Appeals affirmed, finding that the trial court's decision to adjudicate the defendant's guilt was "within the bell-shaped curve of reasonable choices available to the trial court."

Held: Affirmed. The Court agreed that, under *Bearden*, a trial court may only punish a failure to pay if it finds that the failure to pay was willful, rather than due to a lack of funds. However, in this case, the Court found that the trial court had made the requisite inquiry. The Court noted that the defendant had stated that he could pay the costs with more time, and the trial court granted him an additional year in which to make the payment, which the Court found represented an implicit finding that the defendant had the ability to pay if given more time.

Like the Court of Appeals, the Supreme Court noted that the defendant had never presented evidence that he was unable to pay. Instead, the defendant had assured the court he had a full-time job and would pay the costs prior to the review hearing, confirming that he was still employed, which, given his previous affirmative representation, supported a finding that he willfully refused or failed to make sufficient bona fide efforts to pay his court costs.

The Court rejected the defendant's argument that § 18.2-251 does not specifically mention the payment of costs as a term or condition of a deferred disposition. The Court concluded that the use of "a" before "term or condition" and "condition of probation" in § 18.2-251 indicates that the General Assembly did not intend to limit the terms or conditions that could be imposed on a deferred disposition. The Court also ruled that, as the statute expressly addressed the consequence of violating a term or condition, it was unnecessary to include similar language in the deferral order. Lastly, the Court pointed out that the Plea Agreement specifically provided that, in exchange for his guilty plea, the defendant's "finding of guilt and the disposition of the matter shall be deferred for one (1) year," subject to certain terms and conditions, including the payment of "all court costs."

The Court also rejected the defendant's claim that the circuit court form CC-1379 limited the trial court's ability to act on his failure to pay court costs. The Court explained that the language of the CC-1379 form does not limit the circuit court's ability to convict. Rather, the CC-1379 form simply offers the circuit court a separate avenue of penalizing the defendant for his failure to pay court costs: to wit, a finding of contempt under § 19.2-358.

The Court declined to rule on the Commonwealth's argument that, even under *Bearden,* there is a distinction between a deferred disposition imposed by the trial court pursuant to a statute and a deferred disposition imposed pursuant to a plea agreement.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1200803.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0844194.pdf

Virginia Court of Appeals
Published

Cox v. Commonwealth: July 6, 2021
73 Va. App. 339, 859 S.E.2d 690 (2021)
Frederick: Defendant appeals his convictions for Child Sexual Assault on failure to order a Psychosexual Evaluation.

Facts: The defendant sexually assaulted a child. He pled guilty to several offenses and the trial court sentenced him for his crimes. After sentencing, however, the defendant filed a motion to vacate his sentence, contending the trial court was required by § 19.2-301 to order that he undergo psychosexual evaluation prior to sentencing, even though neither he nor the Commonwealth moved for such an evaluation prior to sentencing. The trial court denied his motion.

Held: Affirmed. The Court did not read § 19.2-301 to independently grant a defendant an absolute and unqualified right to a psychosexual evaluation and report prior to sentencing. The Court found that § 19.2-301 does not independently require trial courts to order a mental examination of a defendant prior to sentencing, but instead simply provides that when the process of securing a mental examination of a defendant is initiated pursuant to § 19.2-300, a judge "shall" thereafter order a mental examination in accordance with specific parameters and procedures.

The Court explained that a trial court is required to defer sentencing of a defendant only when one of the parties requests mental examination of the defendant. Alternatively, if neither party makes such a request, the trial court may—but is not required to—defer sentencing and order a mental examination on its own initiative. The Court further explicated that once the process of securing a mental examination of the defendant is initiated—whether by application of one of the parties or on the court's own motion—the remaining process of administering the mental examination must then be "conducted as provided in" Code § 19.2-301.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1360204.pdf

Virginia Court of Appeals
Unpublished

Cellucci v. Commonwealth: May 17, 2022

Loudoun: Defendant appeals his sentence for Aggravated Malicious Wounding on Denial of a Motion to Reconsider.

Facts: The defendant ambushed a man at work and struck him in the back of his neck with a claw hammer. The victim is now paralyzed from the chest down, cannot walk, and struggles to write or open and close objects because his hands are in a "constant claw state." At sentencing, the defendant presented evidence through his sentencing memorandum, the presentencing investigation report, a forensic psychological evaluation, statements from his family, and his allocution. The trial court sentenced the defendant to life in prison.

The defendant filed a motion to reconsider under § 19.2-303. He did not present any additional evidence but pointed to the evidence he previously submitted. In a detailed, 8-page opinion, the trial court denied the defendant's motion. The trial court found that the defendant "has not presented sufficient evidence to establish . . . that he now, or at the time of the offense, suffers from ASD." Alternatively, the circuit court determined that even if the defendant had ASD, the diagnosis did not qualify as a mitigating circumstance and had no logical nexus to the offense. The circuit court characterized the defendant's ASD evidence as a "dying ember," "vacant, wanting of substance, and only now being emphasized as a post-hearing 'hail Mary.'" It concluded that, after considering all the evidence, "as a matter of fact and law that [the defendant] . . . failed to prove any circumstance in mitigation of his offense."

On appeal, the defendant contended the circuit court abused its discretion in determining the defendant failed to prove any circumstances in mitigation, despite evidence demonstrating his Autism Spectrum Disorder (ASD) diagnosis, lack of criminal history, and demonstrated ability to be rehabilitated.

Held: Reversed. The Court wrote that it "cannot turn a blind eye to a trial court's erroneous legal conclusions and failure to consider all relevant factors when deciding whether to modify a sentence under Code § 19.2-303." The Court contended that the circuit court was required to review all the evidence the defendant presented and identify any mitigating circumstances. The Court wrote:

"However, the circuit court overlooked Cellucci's lack of criminal history, both before and after the crime, ability to be rehabilitated, and age as mitigating circumstances. In erroneously concluding that Cellucci proved no mitigating circumstances evidence, the circuit court also failed to consider these relevant factors that should have been given significant weight. Thus, the circuit court abused its discretion in concluding that Cellucci failed to prove any mitigating circumstances."

The Court insisted that it was not questioning the final sentence that the trial court imposed or substituting its own judgment about the appropriate sentence. "Before us is the question of whether the circuit court abused its discretion in reviewing the Code § 19.2-303 factors, a statutory procedural requirement, not the substantive question of whether the circuit court abused its discretion by sentencing Cellucci to life plus a $100,000 fine."

Nevertheless, the Court then proceeded to explain why the defendant had demonstrated mitigating factors, such as his lack of a criminal record, positive changes in his life since he crippled the victim, and his age at the time of the offense. However, the Court affirmed the trial court's findings regarding the evidence at sentencing, holding that it did not abuse its discretion in finding that the defendant failed to prove ASD as a mitigating circumstance.

The Court focused on the analysis that the trial court provided in its detailed, 8-page opinion. Although "there is no general requirement that trial courts must state for the record the reasons underlying their decisions," in this case, because the trial court explained its reasoning, the Court

contended that the trial court's opinion revealed "its error of law and failure to consider the relevant factors."

Finally, in a footnote, the Court recommended that the trial court reassign the case to a different judge for resentencing. The Court wrote: "Because of the circuit court's necessary involvement with this case's facts, it may have difficulty reconsidering its own decision that no mitigating circumstances existed, despite the clear record in this case. Therefore, the circuit court should consider reassigning the case to a different judge."

Judge Decker dissented, explaining in detail how the evidence established that the trial court had, in fact, considered the evidence of mitigating circumstances as required by § 19.2-303.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0195214.pdf

Knighton v. Commonwealth: May 3, 2022

Bath: Defendant appeals his sentences for Reckless Driving and Failure to Appear

Facts: The defendant drove his motorcycle 95 mph in a 55 mph zone. The district court convicted the defendant and imposed a sentence. The defendant appealed, but the failed to appear at his appeal. Later, the defendant pled no contest to reckless driving and failure to appear. The trial court imposed a sentence greater than the sentence imposed in district court.

On appeal, the defendant contended that the trial court abused its discretion by imposing a more severe sentence for reckless driving than the district court had and by basing the sentence on his failure to appear on a subsequent speeding ticket.

Held: Affirmed. Noting that the sentences were within the ranges set by the legislature, the Court explained that, because the sentences fall within the statutory range, "our task is complete."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0852213.pdf

Gant v. Commonwealth: April 19, 2022

Amelia: Defendant appeals his sentence on Denial of a Presentence Report

Facts: The defendant dangerously eluded a law enforcement officer and pled guilty to that felony offense pursuant to a plea agreement. Annoucing the agreement before the trial court, the Commonwealth stated that the parties had an agreed "disposition." In the agreement, the Commonwealth agreed to enter a nolle prosequi regarding two misdemeanor charges. The parties agreed that the Commonwealth would recommend "probation for one year, no active jail time." There

was nothing written to document this oral agreement. The parties represented that the guidelines showed "probation, no incarceration," but did not prepare sentencing guidelines at the time, so the trial court asked the parties to submit guidelines later. The Court conducted a plea colloquy, found the defendant guilty, and sentenced him per the recommendation.

The Court prepared an order that indicated that the presentence report was waived by the parties. However, after the hearing, a probation officer completed the guidelines calculation which recommended a sentence range of seven months to one year of incarceration with a midpoint of ten months. The trial court rescinded its prior order, stating that the prior order was "based on erroneous information that was represented to the Court" and that "this case shall be scheduled for a new sentencing hearing."

At the new sentencing hearing, a different judge heard the matter. At the hearing, the defendant asked for a presentence report, explaining "we had originally waived that because we had thought the guidelines were going to be probation, no incarceration." The sentencing judge found that the defendant made his request too late and deemed that the defendant had waived his request. The Commonwealth requested one year of incarceration instead of the one year of probation under the plea agreement. The trial court imposed an active sentence at the midpoint of the guidelines.

Held: Reversed. The Court concluded that the trial court needed to order a presentence report under § 19.2-299(A)(ii) unless the defendant waived the preparation of a report, or unless he had a plea agreement. Because neither exception applied, the Court reversed and remanded for a new sentencing.

The Court examined the Code and reasoned that the defendant was entitled to a presentence investigation report unless (1) he had a plea agreement; or (2) both he and the Commonwealth waived preparation of the report. Although the Commonwealth described the plea agreement in this case as including a sentencing "recommendation," the Court latched onto the Commonwealth's original description in the record of the agreement: "We assume that the orally-announced plea agreement was precisely what the prosecutor said it was—an agreed 'disposition.'"

Having found that the Commonwealth did not, in fact, only agree to a recommendation but in fact to a binding sentence, the Court then concluded that, when the court then revoked the judgment order which had imposed the agreed disposition, it rejected the plea agreement. There was, thus, no more plea agreement and the Court found that the defendant had the option to continue forward and be sentenced on his open plea of guilty or withdraw his plea of guilty and proceed to trial. The Court noted that the Commonwealth requested a sentence outside its original agreement, as well, which also indicated that the agreement had ended.

Regardless of the original finding that the defendant had waived his right to a presentence report, the Court concluded that right to a presentence report was created when his plea agreement fell apart, so he could only knowingly relinquish or abandon that right after it existed. Finally, the Court noted that the statute contains no time limit under which a defendant must make a request for a presentence report, so if the sentencing court implied a waiver from the defendant's failure to request a presentence report sooner, the Court found that this was also an error of law.

Judge Huff dissented.

Full Case At:

https://www.vacourts.gov/opinions/opncavwp/0480212.pdf

Christie v. Commonwealth: July 20, 2021

Bedford: Defendant appeals his conviction for Drug Possession on Refusal to Enter a Deferred Disposition.

Facts: The defendant possessed Methamphetamine. The defendant pled guilty to the offense. At sentencing, he asked the court to defer disposition pursuant to § 18.2-251. He conceded that he had received a prior deferred disposition for possession of marijuana under § 18.2-250.1 in 2007 and that the offense was criminal at that time. However, the defendant noted that the 2020 statutory amendment decriminalizing marijuana possession and making it a civil offense had also removed it from the deferral statute. The defendant argued that his 2007 deferral for that offense therefore did not bar his request for deferral on the 2020 methamphetamine charge.

The trial court rejected his argument and found that his previous conviction for a charge of marijuana possession barred the court from granting his subsequent request for a deferred disposition on the methamphetamine charge.

Held: Affirmed. The Court held that the legislative intent in the 2020 version of § 18.2-251 was plainly to provide only one opportunity for the deferral of punishment for an offense that was criminal at the time of the deferral for that offense, regardless of the classification of that offense at the time of a second request for a deferral. Consequently, the Court held that the trial court did not err by ruling that it lacked authority to defer disposition again on the defendant's instant conviction for possession of methamphetamine.

The Court noted that, at the time of the defendant's previous dismissal of the 2007 marijuana charge for violating § 18.2-250.1, the charge was in fact one for a "criminal offense." The Court then examined the new statute enacted in July 2020. The Court observed that the 2020 amendments to the deferral provisions in § 18.2-251 effected a substantive change in the law going forward, but nothing in the plain language of the applicable version of that statute indicated an intent to make it retroactive regarding marijuana possession offenses that were in fact criminal at the time they were deferred.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1048203.pdf

Statutory Construction - Retroactivity

Virginia Court of Appeals
Published

McCarty v. Commonwealth: November 9, 2021

Chesapeake: Defendant appeals his conviction for Possession of Heroin on Fourth Amendment and the Retroactivity of the Overdose "Safe Harbor."

Facts: In 2019, the defendant overdosed in a hotel room. An anonymous person called 911 regarding the overdose and police responded to the room. Finding the door slightly ajar, they saw the defendant on the floor, near the bed. The defendant was unconscious, pale in the face, cool to the touch, sweating profusely, and struggling to breathe. The officers believed the defendant was suffering from an overdose.

As medics attempted to revive the defendant without success, officers first conducted a cursory sweep of the motel room to see what they could find in plain view. They then opened the nightstand's drawer and discovered a clear baggie containing heroin. The officers informed the medics of the substance. Medics revived the defendant a few minutes later, and when asked by medics what substance he took, he admitted he had snorted heroin.

The defendant moved to suppress the search, but the trial court denied the motion. The trial court ruled that the officers' search was permissible under the community caretaker exception to the Fourth Amendment's typical warrant requirement. However, later, the United States Supreme Court ruled that the community caretaker exception does not extend to warrantless searches and seizures in the home in *Caniglia v. Strom*, 141 S. Ct. 1596, 1598 (2021).

The defendant also argued that § 18.2-251.03 precluded his prosecution because another individual sought medical assistance for him for his overdose, he remained at the scene and identified himself to law enforcement after their arrival, and the evidence the prosecution sought to use at trial was obtained as a result of the anonymous tip reporting his overdose and requesting medical attention. However, the Court rejected his argument, noting that in 2019, that Code section did not cover the defendant's case.

Held: Affirmed. The Court ruled that the trial court's denial of the motion to suppress was not in error. The Court also agreed that § 18.2-251.03's amendments did not apply retroactively.

The Court first addressed the effect of the *Caniglia* ruling. Because *Caniglia* made clear that the community caretaker exception does not apply to warrantless searches of the home, the Court held that the exception does not apply to motel rooms either. Consequently, the Court determined that the trial court erred in relying on the community caretaker doctrine to deem the officers' search of the defendant's motel room lawful. Nevertheless, the Court held that the "emergency aid" doctrine gives law enforcement some leeway to search areas beyond what is in plain view and that the officers' search here was within the scope of that leeway.

The Court agreed that the officers could have reasonably suspected that because a cursory survey of the room provided no clues as to the cause of the defendant's condition, a search of the nightstand next to the bed would. The Court observed "it very likely would have been irresponsible for the officers not to have searched the nightstand when considering that appellant's life was still in danger and EMS personnel had not identified the cause of appellant's circumstances … It would be an affront to that "commonsense rationale" to hold that the Fourth Amendment required the officers to

throw up their hands and call it quits once the initial cursory survey provided no clues as to appellant's medical condition."

Thus, the Court found that the scope of the officers' search was strictly circumscribed to the emergency with which they were presented. Accordingly, the Court held that even though the trial court wrongly relied on the community caretaker doctrine in deeming the officers' search lawful, its judgment in denying the defendant's motion to suppress was nonetheless correct given the emergency aid exception's applicability to this case.

The Court then turned to the "safe harbor" overdose provision of the Code. The Court noted that under 18.2-251.03 as it existed in 2019, the defendant would not have satisfied the first element of the statute because he did not report his overdose or seek medical treatment on his own initiative. The Court then acknowledge that if the new version of § 18.2-251.03 applied, it presumably would have protected the defendant. The Court then examined whether the change to § 18.2-251.03 applies retroactively.

The Court repeated that a legislative intent to make a statute retroactive is "manifest" in one of two circumstances. The first is when the text of the statute contains "explicit terms" demonstrating its retroactive effect. The second is when the statute's amended terms affect "remedial" or "procedural" rights rather than "substantive" or "vested" rights. However, in circumstances where a statutory amendment effects a change in both substance and remedy (or procedure), the Court explained that it will not give a statute retroactive effect. Thus, even if aspects of § 18.2-251.03's amendments effected procedural or remedial changes, so long as the amendments effected any change in substantive rights, the Court explained that no court would be permitted to apply the statute retroactively.

In this case, the Court agreed that § 18.2-251.03's amendments plainly affected substantive rights because they changed the class of persons and range of conduct that is punishable under law. However, the Court concluded that § 18.2-251.03's amendments also effected a change in remedy. The Court explained that the dual nature of the statutory amendments is a roadblock, not an avenue, to applying the statute retroactively. Accordingly, because the statutory amendments effected substantive changes, and because they did not explicitly provide that they were intended to apply retroactively, the Court agreed that it was proper to refuse to apply them here.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1225201.pdf

Virginia Court of Appeals
Unpublished

Commonwealth v. Murphy: October 26, 2021

Nelson: The Commonwealth appeals the dismissal of a charge on Double Jeopardy grounds.

Facts: The defendant drove while intoxicated in a manner that endangered another person on a license revoked due to a previous DUI and while declared a habitual offender. The Commonwealth

indicted the defendant with operating a vehicle in such a manner as to endanger the life of another while his license was revoked in violation of § 46.2-391, and with driving while under the influence of alcohol while his license was revoked in violation of the same code section. The Commonwealth also separately charged the defendant with driving after being declared a habitual offender whose driving privileges were revoked, and with driving after being declared a habitual offender endangering another person after his license was revoked in violation of § 46.2-357(B)(1), (2).

The defendant moved, pretrial, to dismiss the indictments alleging violations of § 46.2-391 on double jeopardy grounds, arguing that he could not be punished under both § 46.2-391 and § 46.2-357. The trial court granted the defendant's motion and dismissed the two § 46.2-391 indictments.

When it accepted the appeal, the Court of Appeals also asked the parties to brief the following question: "What effect, if any, does the repeal of Code § 46.2-357, effective July 1, 2021, have upon the current proceedings against appellee in the trial court?"

Held: Reversed. The Court held that the trial court erred by dismissing the § 46.2-391 indictments.

The Court first clarified that, in this proceeding, the trial court was required to conduct a hearing and announce a contingent ruling on the defendant's motion. The Court explained that dismissing an indictment pretrial for violating a defendant's right to be free from multiple punishments was premature, and the Court ruled that the trial court erred by doing so.

The Court then applied the *Blockburger* test to determine whether charging both offenses violated the Double Jeopardy clause of the Constitution. Under the *Blockburger* test, the Court found that both § 46.2-357 and § 46.2-391 contain an element that the other does not. Accordingly, the Court concluded that the two offenses are not the "same" for double jeopardy purposes. The Court explained that "this conclusion resolves any constitutional concerns with [the defendant's] punishment if convicted of violations of both Code § 46.2-357 and Code § 46.2-391."

The Court then acknowledged that, while the *Blockburger* test is dispositive in determining if two offenses are the same for constitutional double jeopardy purposes, that test is unhelpful to a statutory construction analysis of whether the General Assembly nevertheless intended to restrict punishment for multiple offenses. However, in this case, the Court concluded that the legislative history does not clearly reflect legislative intent to prohibit multiple punishments. The Court also noted that, in other situations when the General Assembly has sought to prohibit multiple punishments as a matter of policy rather than constitutional prohibition, it has used clear language to express that intent.

Finally, the Court agreed that, despite the recent repeal of § 46.2-357, the Commonwealth may proceed with its prosecution under § 46.2-357 due to the language of Code § 1-239, which provides:

> "No new act of the General Assembly shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new act of the General Assembly takes effect . . . .

Full Case At:

https://www.vacourts.gov/opinions/opncavwp/0596213.pdf

Trial Issues

Virginia Court of Appeals
Published

Meade v. Commonwealth: May 17, 2022

Roanoke: Defendant appeals his conviction for Maliciously Shooting at an Occupied Building on sufficiency of the evidence.

Facts: The defendant and his attacker argued in a parking lot. After the argument, the attacker's associates attacked the defendant, knocked him to the ground, and repeatedly hit and kicked him as he lay on the pavement. Someone fired a gun. The attacker and his associates dispersed and the attacker ran in the direction of a motel. The defendant stood in the parking lot and pointed his gun at the attacker, but suddenly a car sped toward the defendant, struck him, and knocked him to the pavement. The attacker pointed his gun at the defendant and the defendant fired at the attacker.

Just as the attacker reached the motel room door, the defendant stood and fired his gun in the attacker's direction. After the attacker entered the motel room, the defendant fired a second time in the direction of the room. The defendant later testified that his intention in firing the two shots toward the attacker was not to strike, injure, or kill him, but rather, "[t]o get him away from me." The defendant conceded that, at the time he fired the shots, the attacker was "away" from him. At trial, the defendant contended that he was innocent of maliciously shooting at an occupied building because the shots he fired at the motel room were fired in self-defense.

The trial court acquitted the defendant of attempted murder, attempted malicious wounding, and the associated use of a firearm charges. However, the trial court convicted the defendant of Malicious Shooting at an Occupied Building concluded that, prior to the defendant firing the shots, the attacker was retreating into the motel room, and therefore, was not an immediate threat. The defendant contended that these verdicts were unlawfully inconsistent.

Held: Affirmed. The Court repeated that the fact that a person may represent an imminent harm and immediate threat at one point in a confrontation does not require the conclusion that he or she retains that status throughout an encounter. The Court agreed that the defendant did not have a reasonable apprehension of the attacker, who was running away and seeking refuge in the motel room, posing an immediate threat of imminent harm when he fired the shots. Accordingly, the Court concluded that the trial court did err in rejecting the defendant's claim of self-defense.

The Court also ruled that "there is nothing inherently inconsistent about verdicts that acquit a shooter of attempted murder and attempted malicious wounding but convict him or her of maliciously shooting at an occupied building in violation of Code § 18.2-279." The Court noted that the defendant claimed that he did not intend to kill or injure the attacker, but rather, that his intention was "[t]o get

[the attacker] away from me." If accepted as true by the factfinder, the Court agreed that statement was sufficient to negate the specific intent to injure or kill necessary to support convictions for attempted murder and attempted malicious wounding.

Accepting that statement as true, though, the Court found that the defendant's "decision to fire was not the result of rage or passion but represented a considered plan. The statement reflects both thought and calculation, and therefore, is sufficient to provide a reasonable basis for a factfinder to conclude he fired the shots with a "deliberate mind.""

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0651213.pdf

Fields v. Commonwealth: November 16, 2021

Charlottesville: Defendant appeals his convictions for Murder and Related Offenses on Refusal to Change Venue and Evidentiary issues.

Facts: The defendant drove a car into a group of pedestrians, killing one person and injuring others. The defendant had traveled to join the "Unite the Right" rally in 2017 in Charlottesville. The night before the murder, the defendant was captured on video marching and chanting, "Jews will not replace us; you will not replace us." While counter-protesters were marching the next day, the defendant drove his car toward the group of counter-protestors, stopped, and reversed his vehicle away from the crowd.

However, minutes later, the defendant accelerated forward rapidly and drove his vehicle directly into the crowd of counter-protestors, striking several people, causing some to fly up into the air, and running over others. One of them, a young woman, died as a result of her injuries, and eight other people were seriously injured. Immediately after hitting the pedestrians and another vehicle, the defendant reversed his vehicle away from the intersection, hitting another person in the process, before driving away. Police captured him as he attempted to flee.

Prior to trial, the defendant moved for a change of venue. He asserted that the trauma to the Charlottesville community, coupled with the significant pretrial publicity that his case received, impaired his constitutional right to have his case heard by an impartial jury. The trial court took the motion under advisement. After three days of selecting 16 jurors from an initial panel of 75, the trial court denied the motion for change of venue. The circuit court pointed out that "most of the news reports are carried by national news agencies, the Washington Post, New York Times, CNN, and MSNBC . . . and I'm thinking 'where could you go that people wouldn't be privy to that?'"

Prior to trial, the Commonwealth moved *in limine* to admit text messages between the defendant and his mother. In messages before the rally, the defendant's mother told him, "Be careful." In reply, the defendant said, "We're not the one[s] who need to be careful." He attached a photo of Adolf Hitler to that text message. The trial court admitted the messages over the defendant's objection.

At trial, the Commonwealth introduced two "memes" that the defendant circulated months before the murder (a "meme" is typically an image or video that it is spread widely through sites on the

Internet.) The "memes" depicted a motor vehicle violently driving into a group of pedestrians, running some over, and flinging others into the air, because the driver was "late for work." The images included the captions, "When I see protestors blocking" and "You have the right to protest, but I'm late for work." The trial court admitted the images over the defendant's objection.

At trial, the Commonwealth also admitted two taped phone conversations between the defendant and his mother that occurred while the defendant was confined pending trial. On the first call, the defendant stated that he had not done anything wrong. He told his mother that he had been "mobbed by a violent group of terrorists" and that he simply acted in self-defense. He also told his mother that the counter-protestors were waving the ISIS flag on the day of the attack and that the counter-protestors were communists. On the second call, the defendant specifically called the victim's mother an "anti-white communist" and referred to her as "the enemy." The trial court ordered redactions from the calls but admitted them over defendant's objection.

[*Great Job to Joe Platania, Nina Antony, and their team in Charlottesville in this case – EJC*]

Held: Affirmed. The Court first held that the trial court did not err in denying the defendant's motion for a change in venue. The Court agreed that the record supported the trial court's conclusion that selecting jurors willing to honor their oath to keep an open mind and follow the court's instructions was relatively easy, that the publicity was accurate and noninflammatory, and that there was not such widespread prejudice against the defendant that he could not obtain an impartial jury.

Regarding the change of venue, the Court repeated that: "whether to grant a venue change is not merely a mathematical calculation based on the number of prospective jurors considered and length of voir dire, but rather, a careful judicial review and analysis of the 'totality of the surrounding facts.'" The Court then cautioned that the sheer volume of publicity is not sufficient, in and of itself, to justify a change of venue, particularly given the prolific volume of news available in the age of the internet. Instead, whether the publicity surrounding a defendant's alleged crimes is accurate, temperate, and noninflammatory is a pertinent concern in assessing a change in venue.

The Court also cautioned that the shocking nature of a reported crime does not render the news articles themselves inherently inflammatory. Thus, articles that accurately report the facts, despite how shocking the facts are, will not be considered inflammatory. In this case, the Court noted that the trial court had reviewed the news articles and found that most of the news articles were factual in nature and accurate, most of them were not inflammatory, and the photos were inherently accurate because were photographs of what was happening.

Regarding the protest "meme" photographs, the Court first repeated that the fact that evidence is highly prejudicial to a party's claim or defense, in and of itself, "is not a proper consideration in applying the balancing test." Instead, Rule 2:403's requirement that only unfair prejudice may be considered as grounds for non-admission reflects the fact that all probative direct evidence generally has a prejudicial effect to the opposing party. The Court clarified that the nature of the evidence must be such that it generates such a strong emotional response that it is unlikely that the jury could make a rational evaluation of its proper evidentiary weight. For example, the Court noted that particularly graphic crime scene or autopsy photos are inherently unfairly prejudicial because their shock effect prevents a layperson on a jury from being able to properly evaluate or weigh them in the context of the

other evidence. In this case, the Court agreed that the "meme" photographs were probative of the defendant's intent due to the memes' striking similarity to the act.

Regarding the image of Adolf Hitler, the Court agreed that the prejudicial effect of such a picture would not necessarily substantially outweigh any probative value. In this case, the Court noted that the Commonwealth was arguing that the defendant was motivated by hatred for ethnic and political groups when he ran his car into the counter-protestors. Thus, the image of Adolph Hitler had significant probative value and was highly relevant because the defendant's intent, motive, and state of mind were at issue.

Regarding the jail calls, the Court also agreed that, because the defendant's intent was at issue in the case, the phone calls were relevant because they tended to show his state of mind and lack of remorse.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1964192.pdf

Virginia Court of Appeals
Unpublished

Johnson v. Commonwealth: May 17, 200

Loudoun: Defendant appeals his conviction for Attempted Capital Murder of a Law Enforcement Officer and related offenses on Exclusion of Expert Testimony.

Facts: Police responded to 911 calls from the defendant's daughter, reporting that he assaulted her, and from the defendant himself, who wanted police to eject the daughter from the home. The defendant tried but failed to lock the daughter in the basement before police arrived. The defendant concealed multiple, loaded firearms in readily accessible locations before the officers arrived but falsely assured the 911 dispatcher that his firearms were not loaded and that he would not touch them. When officers attempted to arrest the defendant for domestic assault, the defendant repeatedly shot and wounded both officers.

Prior to trial, the defendant's retained expert evaluated the defendant's mental status at the time of the incident and produced a report detailing his findings and conclusions. The report stated that the defendant had previously researched how to successfully commit suicide, purchased a firearm to shoot himself, and planned where he would commit suicide. In addition, the defendant admitted to the expert that he "always has a plan" for suicide and, at the time of the offenses, "ran through his plan" before entering the closet and retrieving the loaded handgun.

The defendant contended that he had established "a prima facie case for an insanity defense based upon irresistible impulse." The Commonwealth moved in limine to exclude the report and testimony and the trial court granted the motion.

At sentencing, which took place during COVID restrictions, the defendant moved to continue the sentencing "until a time that all members of the public who wish to be present can be present." The

defendant also asked to move the sentencing to a larger courtroom. The trial court denied both motions. The defendant contended that the trial court erred by limiting the availability of spectator seating during his sentencing hearing and effectively closing the proceedings to the public.

Held: Affirmed. The Court first agreed that the expert's proffered testimony failed to establish prima facie evidence of the defendant's insanity at the time of the offenses under the irresistible impulse doctrine. The Court found that the defendant's proffered evidence established that he acted in accordance with a premeditated plan—not an irresistible impulse—when he shot the officers. Thus, the Court ruled that the defendant's proffered evidence precluded "as a matter of law" any finding that he acted under an irresistible impulse and consequently, the expert's testimony regarding the defendant's mental state at the time of the offenses was "irrelevant," and therefore inadmissible. [*Note: This case took place before § 19.2-271.6 permitted "diminished capacity" evidence]*.

Regarding the defendant's "public trial" argument, the Court concluded that the defendant failed to make a prima facie showing that the trial court "closed" his sentencing hearing to the public. The Court noted that no evidence in the record reflected how many people were already present in the courtroom or how many seats were available.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1279204.pdf

Gaye v. Commonwealth: November 3, 2021

Arlington: Defendant appeals his conviction for Distribution of Cocaine on Denial of a Continuance and his Trial in Absentia

Facts: The defendant distributed cocaine in 1996. He absconded from his preliminary hearing. Five years later, after his re-arrest and re-release on bond, the defendant was set for trial in 2001. In the "Appearance At Trial" form he executed in 2001, the defendant expressly acknowledged that if he "fail[ed] to appear on the date set for trial, I may be tried in my absence and may be indicted for the felony offense of Failure to Appear which carries a sentence of up to five years in the penitentiary."

However, the day before trial, the defendant requested a continuance. He claimed that he was going to retain a new lawyer from California, that he needed additional time to collect documents to support his alibi defense, and that he had not received in discovery all the materials he was due. The trial court denied the defendant's request for a continuance. The next day, the defendant failed to appear at trial. The defendant left a message for his attorney stating that he had "kidney problems" and was "very dizzy" that morning.

The trial court tried the defendant in his absence. The jury recommended a sentence, but the trial court issued a capias for the defendant rather than imposing a sentence. In 2018, the defendant was re-arrested and extradited to Virginia. He argued that the trial court improperly denied his request for a continuance and improperly tried him in his absence, but the trial court overruled his objections.

Held: Affirmed. Regarding the defendant's claim that he had been deprived of his right to counsel, the Court countered that a deprivation of choice of counsel claim requires that the counsel of choice be authorized to practice before the tribunal. In this case, the defendant stated that he wanted to hire an attorney from California. In addition, when, as here, a defendant's invocation of his right to counsel of his choice necessarily would require delaying a scheduled trial, the Court explained that a trial court may deny the motion to substitute counsel of choice so long as the denial does not represent "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay."

The Court agreed that so long as the trial court considered not only the problems for witnesses caused by the defendant's absence, but also the "economic prejudice caused by the delay along with other factors, such as the absence of any evidence showing a reasonable likelihood that the trial could soon take place with the defendant's presence," it is permissible for it to find sufficient prejudice to justify denying a continuance and proceeding with trial. In this case, considering all of the circumstances, including significant inconvenience to the witnesses (one of whom lived several hours away), disruption of the trial court's docket, the already lengthy passage of time between the offense and the trial, and the lack of any reason to believe the defendant would ever appear voluntarily, the Court agreed that the record more than sufficiently established prejudice to the Commonwealth if the continuance had been granted.

Regarding the defendant's trial in absentia, the Court repeated that, although the Sixth Amendment grants the accused a right to be present during his trial, a "defendant can forfeit his right to be present if he voluntarily absents himself from trial." In this case, the Court found no question that the defendant had notice of the trial date and knew that he would be tried in his absence if he failed to appear. The Court rejected the defendant's claim that his "kidney problem" made his absence involuntary, noting the lack of evidence thereto.

In a footnote, the Court acknowledged that § 19.2-259 provides that a "person tried for felony shall be personally present during the trial," but because the defendant's assignment of error raised only a constitutional claim, the Court declined to address the statute in this appeal.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0713204.pdf

Michael Mollenhauer v. Commonwealth: July 6, 2021

Dinwiddie: Defendant appeals his conviction for Child Cruelty on refusal to hear his Motion to Declare the Statute Unconstitutional.

Facts: The defendants kept their three-year-old granddaughter locked in a cage for several years. The defendants built the cage in a closet, behind a curtain. The cage was too short to permit the child to stand while inside it. It was locked at night so that the child could not get out without assistance. The cage had a "drainage hole" through which her urine and feces could flow, and a linoleum mat covered with baking soda had been placed beneath the cage to catch such substances and neutralize the

odors. The defendants claimed that the cage was necessary to prevent the child from "stealing food," getting "into the garbage" and "everything," and "bothering everybody."

After his trial and conviction for child cruelty, the defendant filed a post-trial motion to set aside the verdict. At that hearing, for the first time, the defendant argued in part that the third clause of §40.1-103 was unconstitutionally vague because it did not define "torture[d]" or "cruelly treated." The defendant made this motion orally and not in writing. The trial court denied the motion.

Held: Affirmed. The Court repeated that § 19.2-266.2 specifically provides that a defendant seeking dismissal of a charge in a circuit court "on the ground that a statute upon which it was based is unconstitutional shall . . . rais[e that claim] by motion or objection" made "in writing" and do so not later than seven days before trial. The Court noted that the statute is important, pointing out that if a trial court grants such a motion after trial has begun, the Commonwealth no longer has a right to challenge that ruling on appeal, allowing potentially significant constitutional rulings to go unchecked by an appellate court. In this case, the Court held that the record did not support a finding of good cause sufficient to excuse the late motion.

The Court agreed that good cause can excuse a failure to abide by the seven-day deadline. In a footnote, the Court noted, though, that the "good cause and . . . interest of justice" provision expressly applies only to the timing of the motion and not to the requirement that it be in writing. The Court provided examples of good cause for a late-filed motion under § 19.2-266.2, such as where a change in the law occurs, or where testimony at trial constitutes a surprise. However, the Court explained that a lack of diligence or mere inadvertence does not establish good cause.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0826202.pdf

Withdrawal of Guilty Plea

Virginia Court of Appeals
Published

DeLuca v. Commonwealth: October 26, 2021

Alexandria: Defendant appeals his convictions for Indecent Liberties and Online Child Exploitation on Refusal to Permit Withdrawal of his Guilty Plea

Facts: The defendant solicited a child he was tutoring on the Internet and convinced him to engage in various sexual activities, including anal intercourse. In his plea colloquy, the defendant represented that he had "discussed with my attorney any registration consequences under the Sex Offender and Crimes Against Minors Registry Act pursuant to Virginia Code § 9.1-900 et seq." and also affirmed that he "understood that as a consequence of this stipulation, my pleas will implicate a

statutory duty to register under the Sex Offender and Crimes Against Minors Registry Act pursuant to Virginia Code . . . § 9.1-900 et seq."

At sentencing, however, the defendant sought to withdraw his guilty plea, claiming that he was "mistaken as to the effect" of the pleas because he believed he would need to register as a sex offender for only ten years and not for the remainder of his life. He claimed that claimed that two prior attorneys and his retained counsel that represented him at the time of his pleas had provided inaccurate information regarding his registration obligation. He also alleged that he had "looked" at books in the law library at the jail and conducted research on the Internet that confirmed his mistaken belief that his registration obligation would last only ten years.

However, during cross-examination, the Commonwealth played a recording of a jailhouse phone call between the defendant and his brother. During the conversation, the defendant discussed his thoughts about seeking to withdraw his guilty pleas, implying that the victim likely would not want to go forward with the case because "he's going to just want it gone and done and over with." The defendant also expressed his preference to have a different judge sentence him.

The defendant's counsel then offered to provide his own "evidence" about the defendant's misunderstanding. The Court construed that as an attempt to testify, but offered to permit defense counsel to testify, over the Commonwealth's objection. Defense counsel conceded that he did not "know whether I gave him that incorrect information" but stated that he did not "think it originated with me." Counsel thought the defendant had developed the misimpression through "faulty research" and bad advice from prior counsel. He confirmed that the defendant had asked him to verify his understanding and that he had failed to "verify it correctly."

The trial court denied the defendant's motion to withdraw his plea, finding it incredible that three attorneys and the defendant's own research would all reach the same incorrect conclusion. The trial court also found that there would be prejudice to the Commonwealth due to the lapse of time and the failure of memory. The trial court also found that the defendant had made no showing of a good faith defense.

On appeal, the defendant complained of the trial court's refusal to permit him to withdraw his plea. The defendant also argued that the trial court erred by requiring defense counsel to testify during his motion to withdraw his guilty plea because doing so deprived him of the right to counsel.

Held: Affirmed. The Court first ruled that the defendant's Sixth Amendment right to counsel was not violated. The Court agreed that, in general, lawyers should not appear as witnesses in cases in which they are counsel. However, the Court also noted that there are exceptions to that rule, including RPC 3.7(a)(3), which allows a lawyer to appear as both counsel and a witness in the same proceedings if "disqualification of the lawyer would work substantial hardship on the client."

In this case, because counsel's testimony was never "prejudicial" to the defendant, the Court found that counsel's appearance as both lawyer and witness at the hearing was not automatically prohibited by the lawyer-witness rule. The Court pointed out that counsel's response to open-ended question asked by the trial court allowed him to provide the information he would have offered via proffer, and the mere fact that he was under oath and subject to cross-examination did not prevent him from attempting to advance the defendant's interests.

The Court then applied § 19.2-296 and held that the trial court did not err in refusing to allow the defendant to withdraw his guilty pleas. In this case, the Court noted that the trial court's finding that the defendant's motive for withdrawing the pleas was a lie was a finding that the motion to withdraw was not filed in good faith. The Court agreed that the defendant's own words in the jail recording supported a conclusion that he was seeking to withdraw his pleas because the victim, now an adult, might decide to let the matter drop and in hopes of manipulating the proceedings so his case would be heard before a different judge.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1151204.pdf

Virginia Court of Appeals
Unpublished

Bartosch v. Commonwealth: January 18, 2022

Stafford: Defendant appeals her conviction for First-Degree Murder on Refusal to Permit Withdrawal of her Guilty Plea.

Facts: The defendant poured gasoline on her husband, stabbed him, and set him on fire. He died after a month in a hospital burn unit. The defendant had been hiding the fact that, for years, she had not been paying bills, including the mortgage. The day of the murder, the defendant knew that the court had scheduled an eviction proceeding.

Prior to trial, Central State Hospital psychologists evaluated the defendant and found that she was not competent to stand trial. However, after a year, psychologists concluded that they had restored her to competency. Facing charges for charged with first-degree murder, aggravated malicious wounding, and arson of an occupied dwelling, the defendant sought a sanity evaluation. The defendant's expert found that she was insane at the time of the offense, but the Commonwealth's expert disagreed.

The defendant entered a plea agreement with the Commonwealth. Pursuant to the plea agreement, the defendant agreed to enter a guilty plea pursuant to *Alford* to the charge of first-degree murder, in exchange for which the Commonwealth would nolle prosequi the remaining charges of aggravated malicious wounding and arson of an occupied dwelling. The plea agreement provided that the trial court would sentence the defendant to a period of active incarceration within the applicable sentencing guidelines. The plea agreement also specifically stated, "I agree to waive my right to withdraw my plea of guilty under Virginia Code § 19.2-296." At the plea hearing, the trial court conducted a thorough colloquy and reviewed the terms of the plea agreement at length, including the waiver of her right to withdraw her plea. The trial court accepted the plea.

The defendant later moved to withdraw her guilty plea. The defendant included a report from a doctor, who later testified that his opinion was that the defendant was incompetent at the time of the

incident and at the time of the plea. The trial court denied the defendant's motion to withdraw her plea and sentenced her in accordance with the plea agreement.

Held: Affirmed. The Court held that the trial court did not err in denying the defendant's motion to withdraw her *Alford* guilty plea. The Court reaffirmed that, while § 19.2-296 usually permits a defendant to move to withdraw a guilty plea before a sentence is imposed, the defendant can contractually relinquish the opportunity to do so by virtue of an express waiver provision in a valid and binding plea agreement. In this case, the Court found that the trial judge engaged in an extensive colloquy during which the trial judge reviewed the terms of the plea agreement and confirmed the defendant's understanding of those terms. The Court concluded that the plain language of the plea agreement between the defendant and the Commonwealth and the transcript of the plea colloquy demonstrate that the defendant expressly agreed that she would not move to withdraw her plea under § 19.2-296.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1249204.pdf

CRIMES & OFFENSES

Abduction

Virginia Court of Appeals
Published

Brown v. Commonwealth: May 10, 2022

Charles City: Defendant appeals his conviction for Abduction on Refusal to Disqualify a Prosecutor and sufficiency of the evidence.

Facts: The defendant, angry that a county employee had just driven onto his property, found her vehicle nearby and blocked it from pulling away by trapping her with his own car. He angrily confronted her and demanded "I'm not going to move the car. You're going to stay here and you're going to tell me what you're doing here." The victim tried to contact the police, but because they were in an isolated, rural area, she could not get a cellphone signal.

Meanwhile, however, the defendant also called the police, asked them to come to the scene to resolve the issue, and told the 911 dispatcher that he "got [the victim] blocked in." During this break, the victim was able to drive through a drainage ditch and escape.

Prior to trial, the defendant moved to disqualify the entire Commonwealth's Attorney's Office from prosecuting the case, alleging a financial conflict of interest between the victim and that office. In his motion, the defendant cited the fact that the County Administrator's office—where the victim worked—created the budget for the Commonwealth's Attorney's office. The Commonwealth's Attorney represented that even though the County Administrator's office prepared the budget for his office, it was the County Board of Supervisors who approved the budget, not the County Administrator's office. The victim also testified that even though she worked in the County Administrator's office, she had no hand in creating or working with the budget for the Commonwealth's Attorney's Office. The trial court denied the motion.

At trial, the defendant argued that he lawfully detained the victim, because she was a government agent who intruded onto his private property and searched for violations without a warrant in violation of § 19.2-59.

Held: Affirmed. The Court noted that by his own language and actions, the trial court could conclude the defendant intended to restrict the victim's freedom of movement. The Court also noted that it was not relevant that the victim was able to escape quickly, as the abduction statute does not contain a temporal requirement, which means a victim can be detained under the statute even if only for the briefest of moments.

In a footnote, the Court acknowledged that it has never decided whether a victim's fear of harm should be viewed through a subjective lens, a purely objective one, or some mix of the two. Because that issue was not relevant in this case, the Court wrote: "this Court leaves definitive resolution of the objective vs. subjective issue for another day."

The Court also rejected the defendant's reliance on §19.2-59, explaining that this statute merely creates a civil cause of action against a government agent who searches a person, place, or thing without a proper search warrant. "§19.2-59 does not permit the aggrieved party to detain the violating official. Nor would it make sense for it to do so, given that a violation of it constitutes a "malfeasance in office," not a crime that would subject the violator to arrest."

Lastly, the Court agreed that the defendant did not establish a financial relationship between the prosecutor and the victim, nor did he explain how the outcome of his trial would affect some financial interest the prosecutor held.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0598212.pdf

Walker v. Commonwealth: April 5, 2022

Prince William: Defendant appeals his convictions for Abduction for Pecuniary Benefit, Robbery, and Use of a Firearm, on Enhancement of his Subsequent Convictions, Admission of Identification, and Fourth Amendment grounds.

Facts: The defendant robbed a bank using a firearm. The defendant threatened tellers and several customers, including one man whom he struck across the face and neck with his right arm. In response to being hit, the victim said he threw himself to the ground "because I saw that person with a weapon and I was fearful, I felt threatened." The victim remained on the floor for the duration of the bank robbery because he was fearful of the defendant and the gun.

The defendant wore a mask, gloves, and a yellow vest. He abandoned the mask near the bank, and law enforcement later found the defendant's DNA on it. The bank's surveillance video captured an image of the defendant. Police captured the defendant during a traffic stop two days later and found the bank's stolen money in the car.

Officers also found a cellphone in the defendant's car. Officers obtained a search warrant for the phone on June 23. On July 5, the forensic unit requested the phone, which they received on July 8. The forensic extraction of the phone's data began on July 25 and ended on July 28. Officers filed a return on the warrant on July 28. The return stated that the warrant was executed on June 23. Examining the phone, officers found that the defendant had read an article about the robbery multiple times and also had googled the phrase "Do sweat have DNA."

Prior to trial, the defendant objected to any in-court identification by any eyewitness. He argued that no witness should be allowed to identify him in court without first successfully identifying him out of court in a double-blind array. The defendant also moved to suppress the search of the cellphone, arguing that the search of the cell phone was not executed "forthwith" as required by Code § 19.2-56. He also challenged the warrant as void because the search had not been conducted within fifteen days of the issuance of the warrant.

At trial, the jury found the defendant guilty of four counts of Use of Firearm. The trial court instructed the jury to impose a three-year sentence for the first charge of use of a firearm and separate

five-year sentences for each of the other three counts of Use of a Firearm charges for which the jury had found him guilty. The defendant argued that the trial court should have instructed the jury to find him guilty of four first offenses.

On appeal, the defendant also argued that he was not guilty of abduction of the customer whom he struck.

Held: Affirmed. Regarding the abduction of the customer, the Court acknowledged that the blow to the customer's head and neck did not knock the customer to the ground and that the defendant did not verbally command the customer to the ground or to remain in place. However, the Court agreed that, by his threatening actions, the defendant induced fear and exercised control over the customer, causing him to go to the floor and remain there for the duration of the robbery. Thus, the Court ruled that the evidence was sufficient to support the conclusion that the defendant seized or detained the victim within the intendment of § 18.2-47(A).

The Court also concluded that all the defendant's actions towards the victim, from striking him to waving the gun around, were designed to control the victim's movements so as to facilitate the robbery of the tellers. The Court rejected the defendant's argument that, because his overarching intention was to facilitate the bank robbery, he could not have possessed the necessary intent to restrict liberty. The Court found that the defendant's admitted intention to commit bank robbery does not negate that he simultaneously harbored the intent to restrict the victim's liberty.

The Court explained that to be guilty of abduction for pecuniary benefit in violation of § 18.2-48, the defendant had to possess both the intent to deprive the victim of his liberty and an intent to achieve pecuniary gain. Given the necessity of both intents existing simultaneously, the establishment of one does not negate the existence of the other. The Court agreed that the evidence presented at trial was sufficient to raise jury questions as to whether the defendant seized or detained the victim and whether he had the intent to deprive the victim of his personal liberty.

Regarding the Use of a Firearm convictions, the Court agreed that, under *Batts,* in the single prosecution context, a defendant cannot be sentenced to the enhanced five-year mandatory minimum for a second conviction without the trial court having convicted of a predicate first such offense. However, unlike the situation in *Batts*, in this case the Court noted that all of the Use of a Firearm charges were tried in a single prosecution, and therefore the Court ruled that the trial court did not err in instructing the jury at sentencing that the second, third, and fourth guilty findings were to be treated as second or subsequent convictions subject to the enhanced sentencing provision of § 18.2-53.1.11.

Regarding admission of the in-court identifications by the witnesses, the Court concluded that the trial court did not err in admitting the witness' in-court identification of the defendant as the perpetrator or in refusing the defendant's request to implement protective procedures. In a footnote, the Court wrote: "Allowing a victim to identify the perpetrator of the crime is not unfair" under Rule 2:403. The Court continued that "identity will be a matter 'in issue' in any case in which a defendant is challenging an identification. It is hard to see how an eyewitness' identification of the perpetrator would not be relevant under this standard. Thus, with the exception of rare cases such as those involving drug-induced testimony or testimony while under hypnosis … witness identifications are likely to be relevant under Rule 2:402(a)."

The Court then rejected the defendant's argument that either the Fourth Amendment or §19.2-56(A) provide for suppression of the evidence when officers do not download evidence from a cellphone within 15 days of the issuance of the warrant. The Court wrote: "Even if we were to agree with Walker that the warrant was not executed within the time frame set forth in Code § 19.2-56(A), he still would not be entitled to the remedy— suppression—that he seeks. A mere violation of state statutory law does not require that the offending evidence be suppressed, unless the statute expressly provides for an evidentiary exclusion remedy… Code § 19.2-56(A) provides for no such remedy." The Court continued, "the United States Supreme Court consistently has rejected arguments like Walker's that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs."

Judge Lorish dissented on two grounds. First, Judge Lorish contended an initial identification during trial is unnecessarily suggestive and that, therefore, the court should have applied the *Biggers* factors to determine whether, under the totality of the circumstances, the teller's identification of the defendant was reliable enough to be presented to the jury. Judge Lorish argued that the evidence in this case was not strong. The majority countered, however, that "on multiple occasions, the dissent relied upon dissenting opinions from non-Virginia courts. These citations are not only not the law in Virginia, but also are not the law in the jurisdictions in which they were rendered."

Judge Lorish then addressed the enhanced punishments for Use of a Firearm. She argued that the Court should overrule *Ansell* because "so-called recidivist penalties serve no purpose where the "subsequent" offense occurs at the same time as the initial offense." She cited several studies and reports to criticize the law as written and contended that the Court should substitute her policy judgment for that of the General Assembly by judicially re-writing the statute to eliminate the enhancement.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1211204.pdf

Adult Abuse & Neglect

Virginia Court of Appeals
Published

Tomlin v. Commonwealth: March 15, 2022

Augusta: Defendant appeals her convictions for Financially Exploiting an Incapacitated Adult and of Abusing or Neglecting an Incapacitated Adult.

Facts: The defendant abused and neglected her mother, the victim. For some time, the defendant had refused offers of assistance from the local social services department to take help care of her mother. After a maintenance worker discovered the victim lying on the floor, covered in bed bugs, and requiring medical attention, he called 911. Firefighters responded and found the victim in horrifying

condition [*the details are truly horrifying and will not be detailed in full here – EJC*]. The defendant told rescue workers that the victim had been on the floor since a fall two days before. The defendant stated that she had not assisted her and instead left her in her own filth for two days without any treatment or cleaning because she "did not have time."

Doctors who examined the victim determined that her bed sores presented a risk of death significant enough to make them a life-threatening condition. Her condition was life-threatening because of the combination of bed sores, leg sores, and the increased risk of infection created by the ubiquitous bed bugs, feces, and urine covering her body. At trial, the defendant argued that the victim had not suffered "serious bodily injuries."

After the victim entered the hospital, the defendant took the victim's money to live in a hotel and pay for various expenses, without the victim's consent. The victim died in hospice care a couple of months later. At trial, the Commonwealth did not offer testimony directly bearing on her mental capacity from the time she was admitted to the hospital to the time of her death approximately two months later. The trial court based its decision about her inability to understand financial matters on evidence of her inability to understand her healthcare needs.

Held: Reversed and Dismissed with respect to the conviction for financial exploitation of a mentally incapacitated adult; Affirmed for abuse or neglect of an incapacitated adult. The Court found that the trial court lacked sufficient evidence to conclude that the victim was mentally incapacitated with respect to financial matters. However, the Court also found that the trial court had sufficient evidence to conclude that the victim had suffered "serious bodily injuries."

Regarding the financial exploitation offense, the Court explained that even though the defendant was mentally incapacitated with respect to healthcare decisions, that fact could not, by itself, justify the trial court in finding beyond a reasonable doubt that she was also mentally incapacitated with respect to financial matters. The Court complained that the record contained no evidence that specifically addresses the victim's mental capacity in financial matters.

Regarding the abuse and neglect offense, though, the Court rejected the defendant's argument that an injury, disease, or condition needs to threaten imminent death in order to be sufficiently serious and that a condition not expected to lead to death if properly treated is not sufficiently serious to fall within the meaning of §18.2-369. The Court noted that the statute lists several categories of injuries that are not necessarily life-threatening but are nevertheless serious. The Court also noted that an injury, disease, or condition can be life-threatening yet not cause certain and impending death.

The Court explained, under §18.2-369, that for an injury, disease, or condition to be life-threatening, it must present a real, appreciable risk of death, but need not create a likelihood of imminent, near-certain death.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0561213.pdf

Virginia Court of Appeals
Unpublished

Swinson v. Commonwealth: March 29, 2022

Augusta: Defendant appeals his conviction for Abuse and Neglect of an Incapacitated Adult on sufficiency of the evidence:

Facts: The defendant was the primary caretaker for the victim, his adult son, who had suffered a traumatic brain injury that left him mentally incapacitated and prone to seizures. The victim's seizures could exacerbate his brain injury, and, in the event of a prolonged seizure, he could suffer cardiac arrest.

One Saturday, a store clerk found the victim alone in the store, eating condiments and asking for food. The clerk noticed that the victim was wearing a Project Lifesaver wristband and called the police, who escorted the victim to the local station and contacted the APS, who took the victim to the hospital. It was not until Monday afternoon that the defendant reached out for the first time to find the victim. Police spoke with the defendant. The defendant acknowledged that he was responsible for ensuring that the victim took his seizure medications and that, without them, the victim was "susceptible" to seizures. The defendant was also prone to seizures. The defendant revealed that he had left the victim with a friend on Friday without any plan for when he was going to return. The defendant admitted that by Saturday, he could no longer contact the friend. He also revealed that he had learned that the victim had "wandered off" by Sunday evening. The defendant claimed that he did not notify authorities until Monday because he first wanted to find "evidence" that he had not been trespassing in violation of previous orders.

The trial court convicted the defendant of misdemeanor abuse and neglect of an incapacitated adult in violation of § 18.2-369. On appeal, the defendant contended that the court erred in finding sufficient evidence of a "knowing and willful failure to provide necessary care."

Held: Affirmed. The Court agreed that the trial court could reasonably conclude that the defendant willfully neglected him when he took no affirmative action for three days to locate his son or to confirm he had received the medications required to prevent life-threatening seizures.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0637213.pdf

Animal Cruelty

Virginia Court of Appeals
Unpublished

Hillmon v. Commonwealth: April 26, 2022

Prince William: Defendant appeals her conviction for Animal Cruelty on sufficiency of the evidence.

Facts: The defendant dragged her incapacitated dog across a six-lane highway, in full view of a police detective in his vehicle. Before the defendant crossed, the dog had been lying on his side at the end of his leash, panting and "visibly distressed." When the traffic signal changed, while the dog remained on his side, the defendant dragged the limp dog across the entire intersection, "walking full force" with her arm behind her.

The detective then parked and approached the defendant. He noted that the dog's stomach was bloated and exhibited abrasions. Additionally, the dog was "hyper-breathing," his tongue was protruding, his eyes were bulging, and he was hot to the touch. Although the dog had white fur, the detective saw darker areas on the dog's side, which he believed were caused by dragging. The detective thought that the dog was clearly "about to die" and said so. The defendant denied that anything was wrong with her dog.

At trial, the defendant admitted that she heard people honking and yelling about her dog. She claimed, though, that she thought the dog was "running behind" her and she did not realize that he was lying down until she reached the fifth of the six lanes.

Held: Affirmed. The Court declined to consider whether animal cruelty was a "strict liability offense," as the trial court had surmised. Instead, assuming that the offense required proof of knowledge, the Court concluded that the evidence was satisfied that the defendant was aware of her actions that constituted ill-treatment of her dog. The Court specifically noted that the trial court's rejection of the defendant's testimony provided affirmative evidence that she was fully aware that she dragged the dog across the six-lane intersection on its side.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1027214.pdf

Arson & Threats to Burn

Virginia Court of Appeals
Published

Howard v. Commonwealth: May 10, 2022

Stafford: Defendant appeals his conviction for Bomb Threats on Admission of Intent Evidence and sufficiency.

Facts: The defendant threatened the victim, his wife, that "I'll blow your car up with you in it or not if you try to leave." She later testified that she felt scared because the defendant, who was on active military duty, "has blown up things . . . on base" and "knows how to work on vehicles and he builds guns for a living."

Four hours later, the defendant returned home, crashing his vehicle into trash cans and holding down his car horn. He attempted to enter the house but became enraged when he encountered the

front door barricaded and began pounding and beating on the door. The defendant entered the home and spat on the victim. The victim barricaded herself in a room with the defendant's firearms and ammunition until the police arrived.

Prior to trial, the defendant pled no contest to the assault and battery charge for spitting on his wife. He then sought to exclude evidence of the 911 telephone call, the defendant's gun ownership, and testimony of about the evening argument and the victim's reactions to his behavior. The trial court excluded the evidence of the spitting but refused to exclude the other evidence.

The trial court also rejected the defendant's argument that, under § 18.2-83, he was not guilty because he owned the vehicle that he threatened to bomb.

Held: Affirmed. The Court concluded that the evidence that the trial court admitted related to the events following the threat, the defendant's ability to carry out the threat, the victim's belief in the threat, and the relationship between the defendant and the victim. The Court explained that the defendant was not entitled to a "sanitized" version of the facts and that the day's events were interconnected. The Court also explained that the caselaw does not support the defendant's argument that a four-hour period renders evidence irrelevant.

The Court rejected the defendant's argument that his other actions that day were evidence of another "bad act." Because the entire day was part of a continuing domestic dispute and a reasonable jurist could find that the evidence was not substantially more prejudicial than probative, the Court concluded that the trial court did not abuse its discretion in admitting evidence about the events following the threat.

The Court also rejected the defendant's argument that the *Perkins* ruling limited the application of § 18.2-83(A). Instead, the Court explained that "Nothing in the statute's plain language carves out threats to burn or bomb one's own property from the scope of the offense."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0495214.pdf

Virginia Court of Appeals
Unpublished

Goodman v. Commonwealth: April 26, 2022

Hanover: Defendant appeals her conviction for Arson of an Occupied Dwelling on sufficiency of the evidence.

Facts: The defendant set her own home on fire. A Fire Marshall investigated the incident and determined that there were four separate origins of fire inside the house. He also concluded that all four fires were caused by an ignition source that "made direct contact with ordinary combustible materials," and were not caused by an electrical source. The defendant denied setting the fire. She stated that she had been the only person in the home.

At trial, the defendant's expert opined that an accidental fire which started in the attic could not be eliminated as a causal factor of the three points of origin found in other areas of the house. On cross-examination, he acknowledged that he had not interviewed the firefighters who had been at the scene and conceded that if the bedroom doors were closed during the fire, his hypothesis that burning embers from the attic could have started the fires in the bedrooms would be faulty.

A Commonwealth's expert responded, though, that the defendant's theory was not feasible because there was no fire damage in the attic above the kitchen. The Commonwealth's expert agreed that the investigation did not properly eliminate all potential sources of accidental ignition. However, the expert testified extensively to the sources he considered and ruled out as potential sources of accidental ignition, specifically dealing with every potential source that the defense expert mentioned.

Held: Affirmed. The Court agreed that the trial court had sufficient evidence to conclude that the fires were incendiary rather than accidental. The Court wrote: "Because they were incendiary, they must have been set intentionally and the evidence was sufficient to conclude" that the defendant set them. Because the defendant denied she set the fires, the Court observed that she offered no justification for setting her house on fire. The Court noted that the defendant did not argue that she was not mentally capable of forming the intent to deliberately set a fire or that she could have set the fire in her sleep. Therefore, the Court concluded that the only reasonable explanation was that the defendant, knowing what she was doing, deliberately set four separate fires.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0509212.pdf

Assaults

Virginia Court of Appeals
Unpublished

Harvey v. Commonwealth: May 17, 2022

Norfolk: Defendant appeals her conviction for Assault on sufficiency of the evidence

Facts: During an argument about whether the defendant could park her car in front of the victim's house, blocking her trash cans on trash collection day, the defendant said: "You live here. You'll die here. I'll burn this bitch down." The victim did not know the defendant and believed she would follow through with that statement. The defendant remained in her car the entire time and drove away after making the threat. The victim later tracked down the defendant and re-approached her. The two argued again and the police responded.

Held: Reversed. The Court held that, without proof of any overt act, the assault conviction rested on the defendant's words alone. The Court wrote that the victim's decision "to walk up to [the

defendant], thirty minutes after the original exchange, cannot constitute an overt act reflecting [the defendant's] intent to place Marshall in fear of anything." The Court distinguished the 2010 *Clark* case and the 2020 *Blankenship* case.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1116211.pdf

Assault on Law Enforcement

Virginia Supreme Court

Carter v. Commonwealth: December 22, 2021
Aff'd Court of Appeals Ruling of August 18, 2020
Lynchburg: Defendant appeals her conviction for Assault on Law Enforcement on sufficiency of the evidence.

Facts: An officer responded to the defendant's home based on a 911 call. When the officer arrived at her home, he encountered a disorderly situation involving the defendant, who was just inside her open door, and other people on her front porch. The officer attempted to determine whether a crime had occurred. Instead of cooperating with the officer, the defendant attempted to shut the door on him and retreat into her home. The officer stopped her by putting his foot in the door.

The defendant slammed the officer's foot in the door multiple times before he seized her and placed her in handcuffs. The defendant attempted to handcuff the defendant, but she resisted and began fighting against him. While the officer tried to get the defendant under control so that he could continue to investigate the incident, the defendant elbowed him three times and hit him in the chest and arm.

At trial, the defendant made three arguments. First, she argued that her physical acts of violence toward the officer were defensible because she was using reasonable force to expel a trespasser. Second, she contended that because the officer was not acting within the scope of his law enforcement duties at the time, she could not be guilty of assault and battery of a law enforcement officer. Third, she argued that she was justified in striking the officer because she was resisting an illegal arrest.

The Court of Appeals affirmed the conviction, holding that the defendant's acts of assault and battery against the officer, meant to facilitate her attempted retreat from him, were efforts to resist an investigative detention, not an arrest.

Held: Affirmed. The Court first analyzed the law regarding expelling a trespasser. The Court explained that the law requires two preconditions that must be satisfied before a person in lawful possession of the premises can employ reasonable force to expel a trespasser: a command to leave must be issued and the trespasser then must be given a reasonable amount of time, considering the circumstances, to comply with this command and leave. Thus, in this case, once the defendant

manifested her desire by her conduct that the officer should leave, she was required to give him a reasonable time under the circumstances to leave. The Court noted that the defendant did not do so. Therefore, the Court agreed that the defendant's use of force was not justified by the law of trespass.

In this case, the Court noted an officer who reasonably believes that a person has violated the law has the duty to investigate and, if appropriate, arrest the responsible individuals. In addition, the officer was permitted to knock on the defendant's door to investigate a possible domestic disturbance. In a footnote, the Court distinguished this case from *Payton,* where officers developed probable cause to arrest a suspect for a completed crime and then, days after the commission of the crime, entered his home without a warrant to arrest him. The Court also distinguished the recent *Lange* case, where the officers suspected a misdemeanor had been committed outside of the home, followed as the suspect retreated into his home, and then entered the home without a warrant.

In this case, the Court pointed out that, rather than giving the officer a warning to leave and allowing him some time to comply with this warning, the defendant tried to close the door on him, and when he extended his foot to stop the door from closing, she then repeatedly slammed the door on his foot. The Court quoted the U.S. Supreme Court from *Santana* that "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place." In a footnote, the Court explained that here, police had probable cause to believe the defendant had committed a felony at the threshold of her home, against the officer who was standing at the threshold and proceeded to make an arrest in the immediate aftermath of the battery.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1201145.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1559193.pdf

Virginia Court of Appeals
Unpublished

Malicious Wounding

Virginia Court of Appeals
Unpublished

Vaughn v. Commonwealth: February 1, 2022

Pittsylvania: Defendant appeals his convictions for Attempted Murder, Aggravated Malicious Wounding, and related charges on refusal to admit of Impeachment Evidence and sufficiency of the evidence.

Facts: The defendant shot the victim in the head at point-blank range while the victim was driving the defendant to go fishing. The defendant and the victim had been drinking together, and the defendant was complaining that the victim was driving too fast.

At trial, on cross-examination, the victim admitted that he was probably weaving while driving. Defense counsel then asked the witness "you've had problems driving drinking and weaving all over the road in the past, have you not?" The defendant explained that he seeking to inquire about an incident from 2014 where the victim was weaving while driving under the influence. He argued that such evidence was permissible and probative as it contradicted the victim's "claim that he was not weaving on the highway." He also argued that any past acts of weaving are "probative on the issue of credibility." This weaving was relevant, he claimed, because it supported his claim of self-defense, as he purportedly shot the victim out of fear for his life based upon the victim's alleged reckless driving. However, the trial court sustained the Commonwealth's objection to the question.

Held: Affirmed. The Court first held that the trial court did not err in excluding the defendant's proffered impeachment evidence. The Court pointed out that the witness did not deny weaving while driving, or that alcohol could affect his driving; therefore, there was no contradiction, as required by Rule 2:607(a)(vii). The Court also concluded that an isolated incident of weaving while driving, that occurred half-a-decade before the events at issue, has no relevance to whether the witness' "perception, memory, or narration was defective or impaired," or that there was reason to question his "sincerity or veracity" under Va. R. Evid. 2:607(a)(viii).

Regarding sufficiency, the Court agreed that a reasonable fact finder could infer malice from the defendant's deliberate act using a deadly weapon when he fired a weapon directly at the victim's head, at point-blank range.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1440203.pdf

Coleman v. Commonwealth: October 5, 2021

Petersburg: Defendant appeals his convictions for Aggravated Malicious Wounding and Use of a Firearm on refusal to Grant a New Trial and sufficiency.

Facts: The defendant and two other men shot the victim repeatedly. The victim made statements identifying the defendant as a shooter that police recorded in an officer's body camera footage. Before the officers arrived, the victim had also left a voicemail message for his girlfriend identifying the same men as the shooters.

The defendant initially told the police that he was not present when the shooting occurred and knew nothing about the incident. He gave the police the names of two would-be alibi witnesses who would testify that he was not there. However, he admitted at trial that these witnesses provided false information. The defendant also sent a text message before trial to a witness "to make sure she said the right things."

After the jury convicted the defendant, the defendant filed motions to set aside the verdict and for a new trial. He called the victim as a witness, who stated that although the defendant "was out there, he was with them, but I didn't honestly see him shoot me." The victim explained that he mistakenly identified the defendant as a shooter because "[a] lot was going on at the time" because he was "getting shot" approximately twenty times.

However, on cross-examination, the victim admitted he had been offered payment not to come to court and testify at the trial. Although the victim denied being threatened, he acknowledged that after the trial, someone shot at his vehicle while he was inside it. The trial court denied the motions.

Held: Affirmed. The Court first ruled that the victim's testimony and recorded evidence identifying the defendant as one of the shooters, coupled with the presence of bullet holes and shell casings at the scene, constituted sufficient evidence from which the jury could conclude that the defendant used a firearm and therefore acted with malice.

Regarding the motion for a new trial, the Court repeated that if a court finds that new recantation evidence does not establish by clear and convincing proof that the trial testimony was false, the court's original credibility determination controls, and the court must deny the motion for a new trial. In this case, the Court held that the court acted within its discretion in weighing all the evidence and concluding that the victim's new testimony – that he could not recall who shot him and that he mistakenly identified defendant – would not produce a different result in a new trial.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0993202.pdf

Strangulation

Virginia Court of Appeals
Unpublished

Dodge v. Commonwealth: February 22, 2022

Hanover: Defendant appeals his conviction for Strangulation on sufficiency of the evidence.

Facts: The defendant attacked and strangled his wife. A friend videotaped the attack. Police responded and documented the victim's injuries. After the attack, the victim had red marks on her neck where the defendant grabbed her. The marks on her neck, however, did not remain or "bruise like the rest of [her] body did." At trial, the victim testified that she had difficulty breathing and speaking when the defendant applied pressure to her neck. The victim had testified in a bond hearing that the marks on her neck resulted from a consensual sexual encounter, but she explained at trial that she had lied at the defendant's request so that he would be released from jail.

At trial, the defendant contended that the Commonwealth had failed to present forensic evidence regarding the strangulation. The defendant also contended that the evidence was insufficient because "there is a difference between impeding and making it more difficult" to breathe under § 18.2-51.6

Held: Affirmed. The Court held that the court did not err in finding sufficient evidence that the defendant impeded the victim's respiration by knowingly, intentionally, and unlawfully applying pressure to her neck and that his actions resulted in bodily injury, in violation of § 18.2-51.6.

The Court explained that, contrary to the defendant's assertion, the statute does not require the Commonwealth to prove that the victim's ability to breathe or speak was completely restricted. Rather, pursuant to the ordinary meaning of "impede," the evidence must show that the defendant's actions merely interfered with her ability to breathe or obstructed her breathing. In this case, the Court agreed that the trial court could reasonably infer that the red marks on the victim's neck resulted directly from the defendant applying enough pressure to her neck to impede her breathing.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0577212.pdf

Burglary

Virginia Court of Appeals
Unpublished

Child Abuse & Neglect

Virginia Court of Appeals
Published

Woodson v. Commonwealth: May 3, 2022

Hanover: Defendant appeals her conviction for Assault and Battery on sufficiency of the evidence.

Facts: The defendant repeatedly struck her twelve-year-old twins with a belt because of a dispute over texting. The son sustained a single bruise to his thigh and was sore on his back. The defendant's daughter sustained a single bruise on her back and some bruises on her thigh. Both children reported that they did not feel safe going home after school. Police observed the bruises on the children, although later a DSS investigator did not notice the bruising, only "discoloration."

Held: Reversed. The Court focused on the fact that, in the Court's words, "While each child had some transient bruise or mark afterward, neither was seriously injured."

The Court endeavored to define "significant physical harm," explaining that significant physical harm is "best understood as involving injuries that are evidenced by something more than mere transient pain or minor temporary marks. A lack of significant physical harm does not end the analysis. This is where a factfinder must consider the totality of the circumstances and whether a parent's actions nevertheless place a child at risk of serious harm." Thus, "Absent significant harm, a factfinder may conclude that a combination of factors show the child was at risk of serious harm—which still makes the discipline unreasonable. But the nature of the child's misconduct, and the trial court's view that the misbehavior did not warrant corporal punishment, cannot be the primary factor."

The Court distinguished other cases, writing that "in each case decided by the Supreme Court and our Court upholding a lower court's conclusion that discipline was excessive, the parent or caregiver inflicted significant physical harm on the child. The harm was readily evident from the presence of more than transient physical pain or temporary marks." The Court specifically distinguished this case from *Carpenter, Harbaugh, Campbell,* and *Eberhardt*.

The Court rejected the victims' fear, contending that there was insufficient evidence here that this fear was linked to the defendant in particular, or that the fear reflected the reasonableness of the specific instance of corporal punishment. Citing a draft of the Restatement of Children and the Law, the court wrote: "deference to parents provides a particularly important shield for low-income families and families of color who disproportionately experience state intervention."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0610212.pdf

Eberhardt v. Commonwealth: December 14, 2021

Dinwiddie: Defendant appeals his conviction for Child Cruelty on sufficiency of the evidence.

Facts: The defendant used a webbed-belt portion of a dog leash to repeatedly strike his nine-year-old child because she had been talking in school. The defendant inflicted at least ten lashes with that dog leash and left numerous linear marks and welts and significant bruising on various parts of the child's body as she cried out in pain. The defendant claimed that he intended to hit only the child's buttocks but struck her arms and legs, as well, because she was moving to avoid the blows. The child had "tons of bruising on the front and back[] of both of her legs, her bottom, and her right hip," as well as "bruising to . . . her face," all of which remained visible the next day

School personnel noticed the child's injuries and notified the police. Police interviewed the defendant, who admitted to his actions and stated that he intended "to continue to discipline his child the same way."

At trial, the defendant argued that the Commonwealth failed to prove that his behavior violated the statute or that he acted with the requisite intent because his only purpose was to discipline his child. The trial court convicted the defendant of violating § 40.1-103(A).

Held: Affirmed. The Court first confirmed that the common law generally permits a parent to use corporal punishment in disciplining his or her child. However, a parent's conduct may be unlawful if the discipline used is "excessive" or "immoderate." In particular, the Court noted that a violation of § 40.1-103(A) may be proved with evidence that the defendant committed one of the proscribed acts against a child either "willfully or negligently." The Court did not reach the issue of whether the defendant acted in a criminally willful manner.

Regarding the "negligence" prong, the Court explained that the type of negligence required is criminal negligence. A lesser standard than criminal willfulness, the Court further explained that criminal negligence "involves a reckless or indifferent disregard of the rights of others, under circumstances that make it not improbable that injury will be occasioned and under which the offender knows, or is charged with the knowledge of, the probable result of his acts."

In this case, the Court agreed that the evidence supported a finding that the defendant acted with at least criminal negligence when he beat the child. The Court found that the record established that he either knew or should have known "it was not improbable that injury would be occasioned," the standard required to prove criminal negligence. The Court noted that the defendant heard the child "crying out . . . during each of these lashes" and thus he "could understand and appreciate at the time that he continued to beat the child" that he was inflicting "hurt and pain."

The Court concluded: "The purpose of Code § 40.1-103 is to protect children. The statute does not prohibit a parent from using corporal punishment to discipline a child, but it requires a parent to employ moderation in doing so."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0028212.pdf

Mollenhauer v. Commonwealth: July 6, 2021
73 Va. App. 318, 859 S.E.2d 680 (2021)
Dinwiddie: Defendant appeals her conviction for Child Cruelty on sufficiency of the evidence.

Facts: The defendants kept their three-year-old granddaughter locked in a cage for several years. The defendants built the cage in a closet, behind a curtain. The cage was too short to permit the child to stand while inside it. It was locked at night so that the child could not get out without assistance. The cage had a "drainage hole" through which her urine and feces could flow, and a linoleum mat covered with baking soda had been placed beneath the cage to catch such substances and neutralize the odors. The defendants claimed that the cage was necessary to prevent the child from "stealing food," getting "into the garbage" and "everything," and "bothering everybody."

The child's daycare providers became concerned about her. They noted that she arrived at daycare or school with a black eye on at least two different occasions. The defendants told daycare employees that the child was "allergic to everything" and could not have any snacks or other food from the facility. The amount of food she brought from home was "not even close to" what her peers were

bringing and consuming, and the child often said she was hungry and asked for more food. They reported the facts to DSS, who visited the home and took the child from the defendants that very day.

At trial, the Commonwealth called Dr. Robin Foster. Dr. Foster had examined the child and found soft tissue injuries of a type inconsistent with those typically incurred by young children during play, was physically restrained and isolated by being kept in the sleeping enclosure, was deprived of food, and was socially isolated in that she was not registered for kindergarten in a timely fashion.

Dr. Foster emphasized that the child's weight immediately began to improve upon her removal from the home, increasing by an amount equal to 25% of her body weight in just ten days. She concluded that nothing medical had caused the child's failure to thrive and that it resulted from food deprivation amounting to nutritional neglect. Dr. Foster further opined that the child's history and medical records were "consistent with" a medical diagnosis of child torture. Two of the factors for that diagnosis were that she slept in a locked cage and was deprived of food.

Held: Affirmed. The Court agreed that the evidence was sufficient to prove that the defendants caused or permitted the child to be cruelly treated by being locked in a cage at night, which not only required the child to soil herself but also facilitated the family's restrictions on her food consumption and led to her precipitous weight loss and diagnosis of failure to thrive. The Court also found that Dr. Foster's testimony also supported the conclusion that the defendants' actions constituted the lesser behavior of cruel treatment under § 40.1-103.

The Court examined § 40.1-103 and concluded that the term "cruelly treated" describes engaging in behavior toward another that causes physical or emotional pain or suffering in that other person. The Court concluded that a conviction for violating the statute does not require proof that the defendants personally tortured or cruelly treated the child, only that they "caused or permitted" the actions constituting torture or cruel treatment to occur. In this case, the Court noted that the grandmother defendant acknowledged that she agreed to the building of the cage, and it was constructed to enhance the ability of all of the child's caretakers, including her, to control her.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0803202.pdf

Virginia Court of Appeals
Unpublished

Berry v. Commonwealth: May 31, 2022

Hampton: Defendant appeals his conviction for Felony Murder on sufficiency of the evidence.

Facts: The defendant violently shook his five-month-old son, causing hemorrhage bleeds in his brain and ultimately killing the child. Police interviewed the defendant, who first denied having done anything to his child, but later admitted to having shaken the child in a moment of frustration and stated that he believed that his actions resulted in the child's injuries.

At trial, a child abuse pediatrician and the medical examiner testified for the Commonwealth. The medical examiner explained that the child's death resulted from "blunt force injuries" to the brain and observed further that "acute hemorrhaging" was "related to why he died." The defendant called his own expert, who testified that he disagreed with the "widely accepted notion in the child abuse world" that an adult could shake an infant with sufficient force to cause fatal brain injuries, claiming that "the science" did not support it. He argued that the child's other injuries were not necessarily caused by abuse, indicating that they could have been caused by a fall or another child or dog "jumping" on him. However, he agreed that the fractures raised suspicion of abuse.

While the experts disagreed regarding whether abusive trauma or "a minor trigger" caused the child's lethal brain hemorrhaging, both experts agreed that the event precipitating the child's catastrophic brain injury occurred on the offense date, when the defendant was his sole caretaker.

Held: Affirmed. The Court concluded that a rational factfinder could adopt the opinions of the Commonwealth's experts that the child's lethal brain hemorrhages and seizure resulted from injuries on the morning of the offense, while he was in the defendant's care. Based on the totality of the evidence, the jury could also reasonably find that the defendant's abusive conduct caused the injuries, resulting in his son's death.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0358211.pdf

Child Pornography

Virginia Court of Appeals
Unpublished

Lee v. Commonwealth: July 13, 2021

Fairfax: Defendant appeals his convictions for Possession of Child Pornography on sufficiency of the evidence.

Facts: The defendant possessed child pornography on portable hard drives in his apartment. Police executed a search warrant at the defendant's apartment. They informed the defendant that he could stay or leave at his leisure. The defendant elected to stay outside in the hallway during the execution of the warrant. In a closet, police located several documents related to the defendant as well as the hard drives.

An officer forensically examined the hard drives. The officer found child pornography files within certain designated folders. The officer later testified that anyone who plugged the hard drives into a computer would see the file structure, which was "not hidden." Additionally, anyone who plugged in one of the hard drives to a computer would have seen "preteen sluts child pornstar movies" and

"candydoll" in the main folders. Other folders contained the defendant's letters to doctors; another folder named "Career" included the defendant's resume, and the "Personal" folder contained other items connected to him.

The officer discovered numerous items of child pornography that were in the hard drives. He found that on two occasions in June 2016, child pornography was placed on one hard drive under "New Folder" in subfolder "vcb" and further subfolder "Vietnamese Child Brothel." About one month later, and from the same source as the pornography placed on that hard drive, numerous videos of child pornography were added to "New Folder" of the other hard drive under the title "preteen sluts child pornstar movies," the same subfolder title found on a third hard drive. The officer also found personal photographs of the defendant were placed on the first hard drive on October 26, 2016, from the same source of the child pornography previously saved on both the first and second hard drive. As with the third hard drive, the officer testified that a person accessing the first two hard drives for an innocent purpose, such as saving his personal photos or documents, would necessarily see the titles of folders that already resided there and indicated that they contained child pornography.

Held: Affirmed. The Court first noted that the trial court found that the apartment belonged to the defendant. The Court quoted the trial court, "I have what appears to be personal documents identifying it [the apartment] as a place where the [defendant] feels comfortable enough to leave such important documents." The Court noted that there was no indication that anyone other than the defendant lived at the apartment. The Court also pointed out that the defendant remained in the hallway outside the apartment during the hours that the search was underway. The Court reasoned that the defendant would have had no reason to linger outside during the search if the apartment was not his.

The Court then held that the direct and circumstantial evidence supported the conclusion that the defendant knew of the child pornography on the hard drive devices, that it was subject to his dominion and control, and that he constructively possessed it. The Court noted that the file structure of the device, which included file names indicative of child pornography, was not hidden and would be visible to anyone accessing the hard drives. The Court also observed that the folders of child pornography were "organized," and there was no indication that files were randomly copied into the hard drive without placing them into folders. The Court agreed with the trial court's assessment that "the number of images and the lengths of the movies suggest that the person who assembled and stored the material into the hard drives knew what was kept."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0869204.pdf

Conspiracy

Virginia Supreme Court

Commonwealth v. Richard: December 29, 2021

Rev'd Court of Appeals Ruling of December 8, 2020

Floyd: Defendant appeals her conviction for Conspiracy to Distribute a Controlled Substance on sufficiency of the evidence.

Facts: The defendant's confederate offered to purchase a car from an undercover officer in return for methamphetamine. The undercover officer arranged the deal to lure the confederate, who was wanted, out of hiding. The confederate and the officer made the agreement without the defendant's involvement. The confederate then recruited the defendant to help deliver the drugs in exchange for the car. The two developed a detailed plan where the defendant would drive them to the pre-determined location, hold the methamphetamine on her person, and, if the confederate got robbed, the defendant would drive away but return later to pick him up. The defendant was also prepared to contribute cash for the car.

Police arrested both the defendant and the confederate at the scene just before the deal took place. At trial, the defendant argued that a single buyer-seller transaction may not constitute a conspiracy. The defendant also offered a jury instruction based on the *Zuniga* case, which stated:

"A single buyer-seller relationship may constitute a conspiracy only if:

"(1) the seller knows the buyer's intended use; and

"(2) that by the sale, the seller, intends to further, promote and cooperate in the venture."

The trial court refused the instruction. The Court of Appeals reversed, holding that there was more than a scintilla of evidence to support the proffered instruction and the jury should have been given the opportunity to determine if the evidence supported its application.

Held: Reversed, Conviction Reinstated. Unlike the Court of Appeals, the Supreme Court held that there was not more than a scintilla of evidence to support the trial court giving the instructions.

Like the Court of Appeals, the Virginia Supreme Court focused on "Wharton's Rule," which supports a presumption that, absent legislative intent to the contrary, conspiracy and the substantive offense merge when the substantive offense is proved. The Court noted, though, that there is a "third-party exception" to Wharton's Rule, which provides that a conspiracy charge may be brought where the agreement which is the basis for the conspiracy involved more participants than were necessary for the commission of the substantive offense. The rationale supporting this exception is that the addition of a third party enhances the dangers presented by the crime and thus invokes the policy concerns addressed by the law of conspiracy.

The Court explained that, when applied to a case involving the distribution of drugs, Wharton's Rule requires that when a single buyer and a single seller agree to a drug exchange, that agreement does not constitute a conspiracy, only an illegal sale of drugs. "That is the single-buyer/seller relationship exception to conspiracy liability." The Court elucidated that: "Wharton's Rule is not applicable in cases where, like this one, no congruence exists between the conspiratorial agreement and the agreement that makes up the substantive offense."

In this case, the Court found ample evidence that showed preconcert and connivance between the two purported sellers. The Court concluded that the question of whether the "nature" and "degree" of the defendant's involvement warranted a finding that she was guilty of conspiracy went to the weight

and sufficiency of the evidence that an agreement existed, and the jury was instructed on that issue by the trial court's instructions explaining the elements of a conspiracy.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1210027.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1722193.pdf

Virginia Court of Appeals
Published

Pulley v. Commonwealth: December 28, 2021

Augusta: Defendant appeals his convictions for Conspiracy to Distribute, Soliciting Another to Deliver Drugs to a Prisoner, and related offenses on Sixth Amendment confrontation, Hearsay, and sufficiency grounds.

Facts: The defendant, a prison inmate, conspired with two other individuals outside the prison to smuggle Suboxone into the prison. The prison recorded several phone calls between the defendant and one of the co-conspirators arranging the delivery and distribution of the drugs. During those calls, the defendant instructed the second conspirator to text her address to the third conspirator so that person could deliver a package to her. Police traced the number and executed a search warrant, seizing the delivery.

During the calls, the defendant instructed that the package's contents could not get "wet," and he asked what the "count" was. In total, the defendant arranged for eighty strips of Suboxone to be smuggled into the prison. At trial, an officer testified that each strip of Suboxone could be broken down into sixteen individual doses, for a total amount of 1,280 doses. Further, the officer testified that the value of Suboxone was at its highest level within the prison, $200 per strip, meaning the eighty Suboxone strips were worth $16,000. After police seized the drugs, the defendant admitted he arranged delivery of the drugs to the conspirator's house.

At trial, the defendant objected that the testimony about statements made on the recorded phone calls violated the rule against hearsay and the defendant's right to confrontation under the Confrontation Clause.

Held: Affirmed. The Court held that the trial court did not err in admitting the statements of witnesses that did not testify at trial and in finding that the evidence was sufficient.

Regarding the co-conspirator hearsay exception, the Court ruled that the trial court did not err in finding the co-conspirator statements admissible under the co-conspirator exception to the rule against hearsay. The Court first reaffirmed that there must be evidence establishing a prima facie case of conspiracy before the declarations of a co-conspirator may be admitted into evidence. Thus, the prima facie case of conspiracy must be established by evidence that is independent of the challenged co-

conspirator's statements. In this case, the Court also found that the Commonwealth presented sufficient independent evidence that the defendant and the two co-conspirators conspired to commit the same criminal object. Reviewing the facts, the Court agreed that the evidence demonstrated a prima facie case of both conspiracy to smuggle drugs into a prison and conspiracy to distribute a controlled substance.

In a footnote, the Court rejected the Commonwealth's argument that the rule set out in *Floyd* does not apply in this case because it refers only to co-conspirator statements "made out of the defendant's presence." Instead, the Court required the Commonwealth prove a prima facie case of conspiracy even when the defendant was present for the statements. However, the Court noted in another footnote that the defendant's own out-of-court statements were admissible under a separate exception and could be considered as evidence of the conspiracy.

Regarding the defendant's Sixth Amendment confrontation challenge, the Court ruled that the statements were not testimonial, the Confrontation Clause was not implicated, and the trial court did not err in admitting them. The Court agreed that challenged statements were made in furtherance of a criminal conspiracy and, as such, the challenged statements, by their nature, were not testimonial. The Court rejected the defendant's argument that the jail had recorded the statements for trial, explaining: "We look not to the prison's purpose for recording the call, but to [the speakers'] primary purpose in making the statements." In this case, the Court found out that the conspirators' statements were not made with the purpose of creating an "out-of-court substitute for trial testimony."

Lastly, regarding sufficiency, although the officer did not testify what amount was consistent with personal use, the Court ruled that a reasonable fact finder could conclude that possession of 1,280 individual doses was not consistent with personal use. The Court noted that the offense occurred within the context of a state prison. The Court contended that a reasonable fact finder could conclude that it would be unlikely that a prisoner, with no evidence of income in the record, would have the necessary funds to purchase $16,000 worth of Suboxone for his personal use or that he would be able to indefinitely conceal 1,280 doses of Suboxone when his person and living quarters are subject to inspection. The Court also found that the defendant's language and instructions indicated that he was part of a drug supply network.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1203203.pdf

Virginia Court of Appeals –
Unpublished

Lewis v. Commonwealth: March 15, 2022

Newport News: Defendant appeals his conviction for Conspiracy to Commit Burglary on sufficiency of the evidence.

Facts: The defendant and a co-conspirator broke into a home and stole items from the victim. The victim's own video surveillance depicted the two men in close proximity to each other, entering the living room together, and following one another up and down the stairs. During the burglary, the men conferred with stolen items in their hands. Police found the two men together an hour after the burglary. When apprehended, he possessed purple gloves matching those seen on the video. Police found the defendant's DNA at the apartment.

The defendant argued that "the Commonwealth's evidence failed to exclude the reasonable hypothesis that there had been no agreement or conspiracy to commit burglary, the burglary being an impulsive and spontaneous action of just one person."

Held: Affirmed. The Court agreed that the evidence was sufficient to support a finding that the defendant and his co-conspirator agreed, in advance, to break and enter into the victim's residence.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0803211.pdf

Credit Card Offenses

Virginia Court of Appeals
Unpublished

Floyd v. Commonwealth: August 17, 2021

Lynchburg: Defendant appeals her convictions for Credit Card Fraud and Embezzlement on sufficiency of the evidence.

Facts: The defendant charged credit cards and stole money, costing the victim almost $100,000, while working as her caretaker. The victim suffers from hydrocephalous, is confined to a wheelchair, and has permanent memory deficits. The defendant was her sole caretaker.

The victim occasionally permitted the defendant to use her credit card to purchase groceries, but otherwise kept her credit cards in her purse. She rarely used the cards and rarely kept a balance. The defendant, however, used the cards to make purchases of roughly $50,000 in two years. The defendant also changed the address on one of the cards to the defendant's personal address. At trial, the victim consistently denied ever giving the defendant permission to use the credit cards for her own personal purchases. The defendant claimed that the victim permitted her to use the cards and change the address and that the victim simply forgot having done so, due to her memory issues.

The victim paid the defendant for her services by check. However, police discovered that the defendant had drafted checks from two different bank accounts for an overlapping period worked and presented them to the victim to sign. Additionally, the defendant drafted payroll checks and presented them to the victim for signature for dates that she did not work. When confronted, the defendant claimed that the payments were loans. She produced on a purported handwritten note from the victim

stating that any "extra" payments she received were loans, and such loans had been repaid in full. However, the victim had no recollection of making such loans, or writing a note stating that the defendant had repaid any loans.

[*Great Job to Mike Pflieger, Chief Deputy CA, Lynchburg, who tried this case – EJC*]

Held: Affirmed. Regarding the credit card offenses, the Court likened this case to the *White* case and distinguished this case from the *Soponaro* case. Based on the extensive use and variety of the purchases placed on the credit cards, the Court concluded that the trial court could rationally infer that the defendant did not have consent or permission to use the cards for personal items. While the defendant did occasionally have permission to make purchases on the credit cards for the victim, the Court agreed that the defendant violated the statute when she made purchases while the credit cards were in her wrongful possession, exceeding the scope of her authority.

Regarding the victim's memory issues, the Court agreed that the trial court could reject the defendant's hypothesis, as the purchases were inconsistent with the victim's purchase history. The Court noted that, before the defendant stole the card, the victim had made no purchases at a sporting goods store, had no tattoos, had not visited Disney resorts, and did not possess a vehicle, which was inconsistent with the purchases on the card.

Regarding the defendant's embezzlement, the Court noted that the defendant was paid twice for the same time periods or time periods that she did not work at all. Although the defendant claimed that any extra payments were for work that she was not paid for or loans, the Court pointed out that the note appeared fraudulent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1075203.pdf

Dangerous Dogs

Virginia Court of Appeals
Unpublished

Stacey v. Commonwealth: April 19, 2022

Albemarle: Defendant appeals her sentence for Owning a Dangerous Dog that Killed a Companion Animal on Expiration of the Suspended Sentence.

Facts: In 2015, the trial court convicted the defendant of owning a dangerous dog that killed another person's companion animal in violation of § 3.2-6540 and sentenced the defendant to ninety days in jail, all suspended. The Court specifically ordered euthanasia for the dog as a specific condition of the suspended sentence. The defendant appealed, but the Court of Appeals denied the appeal. The trial court then issued a second order, ordering that the dog be euthanized in 2016. However, the trial court stayed its order pending a civil suit.

When the civil suit ended in 2019, the defendant asked the trial court to order the dog's "disposal" pursuant to § 3.2-6562.1 and the trial court agreed. The Commonwealth asked the trial court to clarify the order, and the trial court entered another order clarifying that the dog is to be "euthanized." The Commonwealth asked the trial court to clarify the order, and the trial court entered another order clarifying that the dog is to be "euthanized." The defendant objected again, now contending that the trial court lacked jurisdiction to revoke the suspended sentence or enforce conditions of the suspension because the maximum sentence she could have received for her crime has passed. The defendant contended that the dog could be disposed of, but that the trial court could not specifically order euthanasia as the method of disposal.

The trial court overruled the objection and the defendant appealed. On appeal, the Court of Appeals denied the appeal. On remand, the trial court ordered for the dog to be "disposed of by Albemarle County pursuant to Code § 3.2-6562." The defendant objected again, now contending that the trial court lacked jurisdiction to revoke the suspended sentence or enforce conditions of the suspension because the maximum sentence she could have received for her crime has passed.

Held: Affirmed. The Court first noted that, in general, trial courts have the authority to order the euthanasia for a vicious dog pursuant to § 3.2-6540.1. In this case, though, because the defendant specifically requested "disposal" rather than "euthanasia," the Court found that the defendant was bound by her prior position of assent to the trial court's ordered disposal of the dog and found that the present appeal is without merit. In a footnote, the Court criticized the defendant for improperly attempting to argue inconsistent positions throughout her appeals.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0607212.pdf

Destruction of Property

Virginia Court of Appeals
Published

Glass v. Commonwealth: January 18, 2022.

Danville: Defendant appeals his conviction for Felony Destruction of Property on sufficiency of the evidence.

Facts: The defendant smashed several windows and doors belonging to various victims. One of the victims, an experienced contractor, informed police that it would cost approximately $1,165 to repair the damage, which included labor, materials, and a fifteen to twenty percent profit margin. The victim explained he was a contractor with more than thirty years of experience and that he used his employees to repair the property damage. He noted that his employees had to quit another job to

repair the property. At trial, the victim also testified that if he "had to do the same thing for somebody else's house that is what he would price it at."

At trial, the defendant argued that the victim's profits were improperly included in the fair market cost of repair amount, causing the damage amount to exceed the statutory threshold, resulting in his felony conviction. Without including a twenty percent profit, the total cost of repair would have been below the $1,000 statutory threshold (approximately $986), barring the felony charge.

Held: Affirmed. The Court examined whether fair market cost of repair includes profits. Because the phrase "fair market cost of repair" includes a contractor's profit, the Court ruled that the Commonwealth presented sufficient evidence to find that the defendant committed felony destruction of property.

The Court examined the statute, § 18.2-137(B), which states only that the "amount of loss . . . may be established by proof of the fair market cost of repair." The Court noted that the section contains no language intimating that the word "may" is mandatory. Further, the Court reasoned that the exclusive use of fair market cost of repair or fair market replacement value is not necessary to fulfill the General Assembly's purpose. Thus, the Commonwealth could put on other evidence demonstrating value, such as the victim's actual repair costs, without contravening the statute.

The Court also noted that the actual cost of repair may equal or at least indicate the fair market cost of repair. In a footnote, the Court pointed out that other states' courts have raised concerns that a victim's actual repair costs do not reflect fair market or reasonable cost of repair.

The Court pointed out that, in larceny cases, the Commonwealth may use price tags, purchase price, or retail value, each of which includes profits for the victim. The Court concluded that fair market cost of repair inherently includes what the market deems reasonable profit. However, the Court also found that neither the value of nor damage to the property includes the victim's opportunity costs from missed contracting jobs nor speculative rental income.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0294213.pdf

Virginia Court of Appeals
Unpublished

Stark v. Commonwealth: February 8, 2022

Franklin: Defendant appeals his conviction for Felony Destruction of Property on sufficiency of the evidence.

Facts: The defendant damaged a private roadway in a gated community. The defendant had been in a dispute with the HOA's director and told a witness that him he planned to "drive [the director] crazy" until the director bought the defendant's lot back. Later, video surveillance caught the defendant driving his truck while spinning its wheels, smoking, weaving, and leaving skid marks near the front gate.

The sound of tires skidding could be heard in the video's audio. After around four seconds of spinning and smoking on the asphalt, the truck stabilized and drove off without further damaging the asphalt. HOA staff also found similar marks nearby that had not been there prior to the defendant's actions.

At trial, the Commonwealth presented two experts who observed the damage in three areas and stated they could not repair the total damage for less than $1,000. The defendant testified at trial. At first, he testified that he did not particularly remember if he was driving on that date. Eventually, he stated the evidence made him realize "that had to have been me driving that truck." He testified he knew how to make skid marks but suggested he may have skidded due to wet weather conditions or because he was in a hurry.

At trial, the defendant also objected that the trial court failing to consider dismissing the charge under § 19.2-151 based on a civil settlement agreement stemming from the same events.

Held: Affirmed. The Court agreed that the evidence demonstrated that the defendant intended to do damage when he drove his truck in this manner. The Court also pointed out that § 19.2-151 only applies to misdemeanors.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0458213.pdf

Driving Suspended

Virginia Court of Appeals
Unpublished

Nicholson v. Albemarle: September 28, 2021

Albemarle: Defendant appeals her conviction for Driving on Suspended on sufficiency of the evidence.

Facts: The defendant drove on a suspended license after having four previous convictions for the same offense. At trial, the Commonwealth presented evidence that the defendant's license was suspended at the time of the instant offense for failure to pay fines, court costs, and fees. The Commonwealth presented various court orders and related notices, copies of the notices sent by the DMV, and the DMV transcript. The trial court convicted the defendant of a violation of a local ordinance for Driving Suspended, one that was identical to the Virginia statute. The defendant appealed.

The Court of Appeals held that the appeal was jurisdictionally defective and dismissed it. The Supreme Court of Virginia reversed, holding that the defect in the defendant's notice of appeal was waived. The Court remanded the case to the Court of Appeals for further proceedings. On remand, the Commonwealth conceded that it did not prove that the defendant received actual notice that her license had been suspended for an indefinite term and remained suspended at the time of the offense.

Held: Reversed. The Court accepted the Commonwealth's concession that it did not prove that the defendant received actual notice that her license had been suspended for an indefinite term and remained suspended at the time of the instant offense.

The Court repeated that, to obtain a conviction for driving on a suspended license, the prosecution must prove that the defendant had actual notice that she no longer had the privilege to drive in the Commonwealth when the offense occurred. Further, for notice to be effective, the Commonwealth must present evidence that the defendant actually received the notice. In addition, the Court repeated that the notice must adequately inform the driver of the fact of suspension and its length, and it cannot simply indicate that a suspension might occur on some date in the future.

In this case, the Court concluded that the evidence did not establish the required notice. For the Court, the evidence was not sufficient to prove actual notice because it did not establish that the notices:

(i) were issued after the actual suspension,
(ii) listed a term of suspension that encompassed the instant traffic stop, or
(iii) adequately informed the defendant of the length of the suspension term.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0371182.pdf

DUI and Refusal

Virginia Court of Appeals
Published

Park v. Commonwealth: May 3, 2022

Fairfax: Defendant appeals his conviction for Refusal, 2nd Offense, on sufficiency of the evidence and the content of the refusal form.

Facts: The defendant crashed his vehicle. Police responded and found the defendant hiding nearby. His speech was slurred, his eyes were bloodshot and glassy, and his breath smelled like alcohol. The defendant did not know the street he was on and could not find his driver's license. He admitted that he had been driving and explained that he drove off the road when he turned too early for his exit. He refused to participate in field sobriety tests. The officer did not offer the defendant a PBT.

When the defendant refused a breath test, the officer read to the defendant the standard "Information About Consequences of Refusal." The defendant continued to refuse. The officer then obtained a search warrant for the defendant's blood, which revealed a BAC of .14. The defendant later claimed that he had consumed alcohol after driving. At trial, he contended that drinking alcohol after driving would render any breath test worthless and that therefore his refusal to submit to the test was reasonable.

At trial, the defendant argued that the officer lacked probable cause to arrest him for DUI. He also argued that the arrest was invalid because the officer failed to offer him a PBT. Regarding the refusal form, the defendant argued that the form misled him by not notifying him that if he refused to submit to a breath test the police officer could compel a blood test. He claimed that by telling him that a separate charge would result from his refusal, the clear implication was that such a charge would be the only consequence.

The trial court acquitted the defendant of DUI, but convicted him of refusal, 2nd offense.

Held: Affirmed. The Court first ruled that the evidence established probable cause to arrest the defendant for driving under the influence of alcohol.

The Court then agreed that § 18.2-267 obliged the officer to specifically tell the defendant that he was entitled to a preliminary breath test and offer him one, even though the defendant declined "field sobriety tests." However, the Court rejected the argument that the proper remedy is suppression of the evidence. The Court repeated that, under *Wohlford*, § 18.2-267(F), which requires that an investigating officer inform a suspect of the right to take a preliminary breath test, does not provide that a violation is remedied by excluding the resulting evidence.

Regarding the defendant's "due process" argument about the refusal form, the Court ruled that the officer did not violate the defendant's due process rights by reading the form and then obtaining a search warrant for his blood.

Lastly, the Court rejected the defendant's argument that this refusal was reasonable, based on his claim to have consumed alcohol after driving. The Court explained that "If a suspect is intoxicated because he drank alcohol after driving, that is a defense to a DUI. It is not, however, sufficient reason to lawfully refuse to submit to a test under the implied consent statute."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0592214.pdf

Virginia Court of Appeals
Unpublished

Ibanez v. Commonwealth: January 11, 2022

Campbell: Defendant appeals his conviction for DUI on Admission of the Certificate of Analysis and sufficiency of the evidence.

Facts: The defendant drove while intoxicated and crashed his vehicle after midnight in a rural area. An officer responded and found the defendant's truck had suffered damage to all sides and the roof, consistent with a serious roll-over accident. Other than the emergency responders, only two other people were present at the scene: a witness in a separate vehicle, and the defendant, smelling strongly of alcohol, eyes bloodshot, speech slurred, and whose face was covered in blood. When questioned, the defendant first said that "he was on his way home from a friend's house," but then said that he had just

left a bar. The defendant admitted that he had consumed two to three beers. The truck was registered to a female who lived at the same address as the defendant, but there was no evidence that she was driving the truck when it rolled over.

A certificate of analysis demonstrated that the defendant's BAC was .214% At trial, the defendant argued that the certificate was inadmissible because the Commonwealth failed to prove that he was operating the truck when it rolled over. The defendant claimed that, without such proof, the trial court erred both in admitting the certificate of analysis showing his excessive blood-alcohol level and in convicting him of driving while intoxicated.

Held: Affirmed. The Court repeated that, for the certificate of analysis to be admissible, the Commonwealth had to present evidence that the defendant was

(1) operating a motor vehicle,

(2) on a public highway and

(3) validly arrested for an offense under Code § 18.2-266,

(4) within three hours of the alleged offense.

In this case, the Court agreed that the trial court reasonably concluded that the defendant was driving the truck. The defendant was the only one injured and the only one present who could have been driving it.

The Court analogized this case to *Ramos* and noted that it would be unusual for a passenger or pedestrian—rather than the driver—to say that he was on his way home, and he had just left a bar. The Court also rejected the defendant's contention that *Powers* applied here. Instead, the Court noted that the only question was whether the defendant was driving the truck when it rolled over, not why the accident occurred nor whether the defendant's conduct was reckless, so *Powers* was inapposite.

In a footnote, the Court observed that the parties did not brief whether using the accused's silence in response to pre-custodial questioning by police would violate the privilege against self-incrimination after *Salinas v. Texas*, 570 U.S. 178 (2013). The Court pointed out that neither the Virginia Court of Appeals nor the Virginia Supreme Court has addressed this constitutional question since the *Salinas* ruling.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0135213.pdf

Billups v. Commonwealth: October 5, 2021

Newport News: Defendant appeals her convictions for DUI and DUI Maiming on sufficiency of the evidence.

Facts: The defendant drove while intoxicated, crashed, and severely injured her passenger, who was thrown from the vehicle while the vehicle spun through the air. The victim suffered a partially broken neck and injury to her leg, which caused her pain, cognitive issues, and difficulties with walking

and lack of mobility. She also suffered memory problems since the crash and had no memory of the night of the crash.

A witness to the crash responded and immediately helped the defendant exit from the driver's side of the car. An officer responded and spoke to the defendant, who acknowledged having consumed alcohol and having been the driver. Her Intoxylizer test resulted in a .15. The crashed vehicle's plates, as well as the defendant's driver's license, were both issued in Alabama. When the magistrate informed her of the victim's condition and the charges for DUI Maiming, the defendant whispered to herself that "it's still not as bad as having a broken neck."

At trial, the defendant contended that the evidence failed to establish that she was operating the vehicle at the time of the crash, because no witness directly observed her driving.

Held: Affirmed. The Court found that the evidence at trial was sufficient to prove that the defendant was driving the vehicle the night of the crash.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1264201.pdf

Drugs

Possession with Intent to Distribute

Virginia Supreme Court

Bower v. Commonwealth: June 24, 2021
Unpublished
Aff'd Court of Appeals Unpublished Ruling of June 9, 2020
Augusta: Defendant appeals her conviction for Possession with Intent to Distribute on sufficiency of the evidence.

Facts: An officer saw the defendant, who was wanted on a warrant, leave her house and drive away. The officer stopped the defendant and searched her car. The officer found a bag containing empty plastic baggies, needles, a spoon with residue and another bag that had a crystal substance in it. The Department of Forensic Science determined the substance to be .693 grams of Methamphetamine. The defendant confessed to selling roughly a two to four ounces of Methamphetamine every week.

Police obtained a search warrant for the defendant's residence. The defendant's home contained empty plastic bags and a quantity of a "fake meth" substance. At trial, an officer testified that such "cutting agents" would be used to "make [drugs] go further." The defendant, who possessed over $1,600 in cash despite having been unemployed for several months, also told police that she had been buying about an ounce of methamphetamine every two to four days and that she would keep some, sell the remainder, and thus provide for her own drug use while "making a profit."

Held: Affirmed. Like the Court of Appeals, the Court specifically pointed to the presence of clean, empty baggies in the same location as the defendant's methamphetamine, which the officer testified were consistent with drug repackaging and resale, and the defendant's own admission to selling quantities of less than one ounce of methamphetamine. The Court also noted that evidence of her personal use of the drug was not dispositive with respect to her intent. The Court found that the amount of Methamphetamine, 0.693 grams, was not inconsistent with an intent to distribute. Lastly, the Court also agreed that the evidence of drug distribution found in the defendant's residence was circumstantial evidence of her intent to distribute

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/200843.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0707193.pdf

Virginia Court of Appeals –
Unpublished

Bailey v. Commonwealth: March 1, 2022

Newport News: Defendant appeals his convictions for Possession with Intent to Distribute, Second Offense, on sufficiency of the evidence.

Facts: The defendant possessed heroin and fentanyl with the intent to distribute them. The defendant had a prior conviction of possession with the intent to distribute imitation cocaine in violation of § 18.2-248(G). At trial, the defendant unsuccessfully argued that the trial court erred in finding that his prior conviction for possession with the intent to distribute imitation cocaine qualified as a predicate offense triggering the statutory enhanced penalties.

Held: Affirmed. The Court found that, under *Jones*, the prior conviction for possession with the intent to distribute imitation substance qualified as a predicate offense sufficient to trigger the sentencing enhancement provisions of § 18.2-248(C).

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0741211.pdf

Possession

Virginia Court of Appeals
Published

Thompson v. Commonwealth: November 22, 2021

Halifax: Defendant appeals his conviction for Possession of Marijuana, 2nd Offense, on sufficiency of the evidence.

Facts: The defendant possessed marijuana, after having been previously convicted of that offense. Police seized the marijuana and sent it to DFS, whose certificate of analysis established that it was just under twelve ounces of "Marijuana, . . . plant material." The certificate of analysis also provided that the "Concentration of cannabinoid(s)" in the material was "not determined." At trial, the defendant argued that the Commonwealth failed to prove either that he intended to distribute the substance or that the substance was marijuana and not "hemp" because it was not tested for THC content.

Held: Affirmed. The Court held that § 18.2-263 governed the outcome in this case. That code section provides in pertinent part that "in any . . . proceeding . . . [to] enforce[] . . . any provision of this article," which proscribes various drug crimes, "it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this article." Thus, the express language of § 18.2-263 allocates the burden of proving the statutory exception for "hemp" to the defendant."

The Court looked to the definition of marijuana in § 18.2-247(D) and found that the definition does not require proof of the concentration level of THC to establish that the substance was marijuana. The Court observed that only the exceptions to the definitions for certain categories of hemp require proof of the concentration level of THC content no greater than 0.3 percent (or as otherwise specified by state or federal law).

In a footnote, the Court further observed that the exceptions require proof not only that the substance has a THC concentration no greater than specified by state or federal law but also that it is either "industrial hemp . . . possessed by a person registered pursuant to [state law]" or a "hemp product . . . derived from industrial hemp . . . that [was] grown, dealt, or processed in compliance with state or federal law." In the absence of any evidence on either of these points, the Court concluded that the record did not establish the defendant's entitlement to an exemption.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1262202.pdf

Allison v. Commonwealth: August 3, 2021
73 Va.App. 414, 861 S.E.2d 64 (2021)
Fauquier: Defendant appeals his conviction for Possession of Paraphernalia on sufficiency of the evidence.

Facts: An officer arrested the defendant on an open warrant and searched him incident to arrest. During the search, the officer discovered a hypodermic syringe in an upper pocket of the defendant's jacket. The syringe had an orange cap, was completely clean, and appeared to be "brand new." The officer testified that when he found the syringe, the defendant appeared surprised.

The defendant did not have any drugs in his possession when he was arrested, and a K-9 search of the area surrounding the arrest did not locate any drugs. There was no drug residue in or on the syringe. At trial, the Commonwealth presented no evidence of circumstances indicating that the defendant intended to use the syringe in his possession to illegally administer a controlled drug.

Held: Reversed. The Court held that the trial court erred in its application of § 54.1-3466 when it convicted the defendant for possession of controlled paraphernalia based upon his mere knowing possession of a hypodermic syringe.

The Court extended the Virginia Supreme Court's ruling in *Murray* to the recodified version of the drug paraphernalia statute. The Court found that, to convict for possession of controlled paraphernalia in violation of § 54.1-3466, the Commonwealth must prove not only that an individual possessed a hypodermic syringe, a needle, or some other "instrument or implement or combination thereof" adapted for administering injections of controlled dangerous drugs, but also that the item in question was possessed "under circumstances that reasonably indicate an intention to use such [item] for purposes of illegally administering any controlled drug," per § 54.1-3466(A)(i).

In a footnote, the Court noted that its ruling was consistent with its unpublished ruling in an unpublished case called *Tomasinski* from 1992.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0857204.pdf

Virginia Court of Appeals
Unpublished

Carter v. Commonwealth: March 15, 2022

Roanoke: Defendant appeals his conviction of Possession with Intent to Distribute Marijuana and Possession of Ammunition by Felon on sufficiency of the evidence.

Facts: Police responded to a call for a domestic offense and found drug evidence. The defendant was not home when police arrived. The victim was present, but she was not cooperative with police. Police obtained a search warrant. The victim asked to re-enter the home, but police did not allow her to re-enter. Instead, they allowed a third party to enter the home and collect the children from the home. Police then entered and located drugs and ammunition. The marijuana was in a closed kitchen cabinet, along with distribution paraphernalia. Police also found a box of ammunition on the bedside table along with a gun case and firearm cleaning items, near a set of men's shoes.

At trial, evidence established that the defendant had lived at that house and had been there at various points prior to the day of the search.

Held: Reversed. The Court ruled that there was insufficient evidence that the defendant constructively possessed either the ammunition or the marijuana. The Court complained that the

prosecution introduced no evidence of the defendant's presence at the house during the week in question. Despite the evidence that demonstrated that the defendant lived at the home, the Court wrote: "there was no evidence at trial tying appellant to that house on the day in question."

The Court compared this case to several other cases, including *Staton*, and noted that in this case, the evidence was not in plain view. The Court also pointed to the fact that other people were inside the residence and had access to the home shortly before the search was conducted. In a footnote, the Court also compared this case to the *Brown* case to contend that, here, there was no evidence to show that the defendant had been at the home in the two days leading up to the search. The Court also thought it was significant that two other adults (one of whom was also charged with possession with intent to distribute marijuana as a result of this search) were inside the house just prior to the search.

The Court criticized the evidence tying the defendant to the residence. For example, regarding the shoes found, the Court argued that there was no evidence presented that the shoes were the same size as that worn by the defendant.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0315213.pdf

Green v. Commonwealth: November 9, 2021

Prince William: Defendant appeals her conviction for Drug Possession on sufficiency of the evidence.

Facts: Officers responded to a domestic dispute at the defendant's residence. The defendant appeared to be intoxicated. The defendant's mother expressed a concern that the defendant was using illegal drugs. The defendant consented to a search of her purse and in it, the officer found a vape pen, which he testified was "an object that somebody uses to smoke either vape or some type of drugs, whatever that would be." Upon analysis by the Virginia Department of Forensic Science, the vape pen was found to contain cocaine.

At trial, the defendant testified that she was using the vape pen to help her quit smoking cigarettes. However, she could not identify when she had last used the vape pen prior to its seizure by police and refused to acknowledge that the pen in evidence was, in fact, her pen.

Held: Affirmed. The Court found that the combined force of the circumstances could have led a rational trier of fact to find that the defendant knew the nature and character of the vape pen's contents. The Court explained that the defendant's testimony that the vape pen "resemble[d]" the one that she owned, but that she doubted it was the specific vape pen found in her purse, supported a reasonable inference that the defendant had known that her vape pen contained cocaine and sought through her testimony to distance herself from the object and thus conceal her guilt.

The Court distinguished the *Young* and *Yerling* cases.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1355204.pdf

Embezzlement

Virginia Court of Appeals
Unpublished

Floyd v. Commonwealth: August 17, 2021

Lynchburg: Defendant appeals her convictions for Credit Card Fraud and Embezzlement on sufficiency of the evidence.

Facts: The defendant charged credit cards and stole money, costing the victim almost $100,000, while working as her caretaker. The victim suffers from hydrocephalous, is confined to a wheelchair, and has permanent memory deficits. The defendant was her sole caretaker.

The victim occasionally permitted the defendant to use her credit card to purchase groceries, but otherwise kept her credit cards in her purse. She rarely used the cards and rarely kept a balance. The defendant, however, used the cards to make purchases of roughly $50,000 in two years. The defendant also changed the address on one of the cards to the defendant's personal address. At trial, the victim consistently denied ever giving the defendant permission to use the credit cards for her own personal purchases. The defendant claimed that the victim permitted her to use the cards and change the address and that the victim simply forgot having done so, due to her memory issues.

The victim paid the defendant for her services by check. However, police discovered that the defendant had drafted checks from two different bank accounts for an overlapping period worked and presented them to the victim to sign. Additionally, the defendant drafted payroll checks and presented them to the victim for signature for dates that she did not work. When confronted, the defendant claimed that the payments were loans. She produced on a purported handwritten note from the victim stating that any "extra" payments she received were loans, and such loans had been repaid in full. However, the victim had no recollection of making such loans, or writing a note stating that the defendant had repaid any loans.

[*Great Job to Mike Pflieger, Chief Deputy CA, Lynchburg, who tried this case – EJC*]

Held: Affirmed. Regarding the credit card offenses, the Court likened this case to the *White* case and distinguished this case from the *Soponaro* case. Based on the extensive use and variety of the purchases placed on the credit cards, the Court concluded that the trial court could rationally infer that the defendant did not have consent or permission to use the cards for personal items. While the defendant did occasionally have permission to make purchases on the credit cards for the victim, the Court agreed that the defendant violated the statute when she made purchases while the credit cards were in her wrongful possession, exceeding the scope of her authority.

Regarding the victim's memory issues, the Court agreed that the trial court could reject the defendant's hypothesis, as the purchases were inconsistent with the victim's purchase history. The Court noted that, before the defendant stole the card, the victim had made no purchases at a sporting goods store, had no tattoos, had not visited Disney resorts, and did not possess a vehicle, which was inconsistent with the purchases on the card.

Regarding the defendant's embezzlement, the Court noted that the defendant was paid twice for the same time periods or time periods that she did not work at all. Although the defendant claimed that any extra payments were for work that she was not paid for or loans, the Court pointed out that the note appeared fraudulent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1075203.pdf

Escape

Virginia Court of Appeals
Published

King v. Commonwealth: July 13, 2021
73 Va. App. 349, 859 S.E.2d 695 (2021)
Chesterfield: Defendant appeals his conviction for Escape on sufficiency of the evidence.

Facts: The defendant escaped from custody while serving a sentence at his local jail's "home incarceration program." Under home electronic incarceration, the defendant was prohibited from leaving his house for any reason except to travel to and from work and was subject to 24/7 GPS monitoring via an ankle monitor to ensure his compliance. While in that program, the defendant cut off his ankle monitor and escaped.

At trial, the defendant argued that his violation of home electronic incarceration cannot amount to felony escape under § 18.2-479(B) as a matter of law because he was not in the custody of a court, jail, or law enforcement agent.

Held: Affirmed. The Court affirmed the conviction on the grounds that the defendant remained in custody during his participation in the home electronic monitoring program.

The Court agreed that the term "custody," as used in § 18.2-479, requires more than purely constructive control over a person. The Court concluded that the proper inquiry is whether the individual's freedom of movement was curtailed to a degree associated with incarceration at a jail or prison. In this case, the Court found that the defendant's custody was not "purely constructive." Instead, the Court agreed that the restrictions on the defendant's freedom of movement were severe and of a degree associated with incarceration in a jail or prison.

The Court rejected the defendant's argument that § 53.1-131.2, which makes it a misdemeanor to leave one's home or place of employment without authorization or just cause while in a home

incarceration program, establishes that it is the exclusive charge for such action. The Court observed that it is not uncommon that singular actions may violate multiple criminal laws. In those cases, the Court repeated that it is left to prosecutorial discretion which charge the Commonwealth pursues.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1216202.pdf

Failure to Appear

Virginia Court of Appeals
Unpublished

Lassiter v. Commonwealth: April 26, 2022

Virginia Beach: Defendant appeals his convictions for Felony Hit and Run and Failure to Appear on sufficiency of the evidence.

Facts: While the victim was stopped and making a left turn, the defendant rear-ended the victim at a high-speed. The impact pushed the victim's car into the cross street; she was unable to control her steering because foot was on the brake. Seeing that she was heading towards a street sign, the victim had to accelerate to steer away from hitting the street sign. She was "in shock" when her car came to a stop, and she called 911 for assistance.

The defendant's car had gone underneath part of the victim's car. The front end was crumpled, and the hood of the car folded upward blocking much of the windshield. The defendant exited his car to inquire if the victim "was okay," to which she equivocally responded, "I think so." The defendant did not provide the victim with his name, address, driver's license number, registration number, or insurance information. He then left the scene of the accident on foot, leaving his car behind.

Later, police located the defendant. He stated that "that he freaked out, and that's why he ran." He also admitted that he did not have a driver's license or insurance and that the vehicle was not registered. The defendant first denied having been injured but acknowledged that he "had a couple [of] lumps" on his head because of the accident.

After his arrest, the defendant asked to continue his case. He then failed to appear in court. After his re-arrest, the court granted him bond again, and the defendant signed release conditions acknowledging his next court date. Through his attorney, the defendant again asked to continue the case. At the new June date, the defendant again failed to appear. At trial for the second felony failure to appear, the trial court took judicial notice of the defendant's own attorney's request to continue the matter to the June date and heard testimony from the victim that the defendant did not appear.

Held: Affirmed. Regarding the felony Hit and Run offense, the Court agreed that the evidence was sufficient to allow a rational fact finder to conclude that the defendant knew or should have known that he injured the victim. The Court pointed to the force of the impact of the crash and the extent of

the damage to both parties' cars. The Court noted that the defendant knew of the extent of the damage to his car, evidenced by the fact he abandoned it at the scene of the collision. Based on the force, the damage, and the defendant's own injury, the Court found that the evidence supported a conclusion that a reasonable person should have known that the victim likely also sustained injuries.

Regarding the Failure to Appear, the Court first repeated that "Any failure to appear after notice of an appearance date is prima facie evidence that the failure to appear was willful." The Court then repeated that "when a defendant receives notice of an original appearance date, that defendant 'is charged with notice of those dates to which his or her case is expressly continued when such action is duly recorded in the order of the court.'"

The Court then concluded that, given the attorney-client relationship, the trial court was permitted to infer from that fact that the defendant also had actual notice of the June hearing date. The Court also noted that the trial court was free to take judicial notice of its own records under Virginia Rule of Evidence 2:201(b), which permits a court to take judicial notice of a factual matter "at any stage of the proceeding."

Judge Chaney dissented regarding the hit and run offense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0661211.pdf

Burgess v. Commonwealth: October 12, 2021
Rev'd and Remanded by Virginia Supreme Court, August 13, 2021 (Unpublished)
Rev'd by Va. Court of App. October 12, 2021 (Unpublished)
Virginia Beach: Defendant appeals his conviction for Failure to Appear on sufficiency of the evidence.

Facts: The defendant failed to appear at preliminary hearing for various felony theft and false pretense offenses. At trial for failure to appear, a police officer testified that the defendant's hearing was set for August 6, 2018, and that he was present that day, but the defendant was not. The Commonwealth did not present any testimony or other evidence establishing that the defendant was aware that the date was August 6. [*Note: the trial court convicted the defendant of failure to appear on another date as well, but that offense was not at issue in this appeal – EJC*].

The defendant argued that the Commonwealth failed to prove that the defendant was provided notice to be in court that day. The prosecutor noted that the trial court's record reflected certain relevant facts about notice. The prosecutor asked the trial court to take judicial notice of the facts in the file, but the judge simply replied, "move along," and made no reference to judicial notice.

The Court of Appeals affirmed the conviction in 2020 in an unpublished opinion, ruling that the defendant failed to establish that the evidence was insufficient to prove "willfulness," noting that that the defendant only challenged the "notice" on appeal. However, the Virginia Supreme Court reversed and remanded, noting that the prosecution attempted to prove willfulness only by establishing that the defendant had notice of the trial date.

Held: Conviction reversed. The Court concluded that the record did not prove notice of the trial date and consequently did not support an inference of willfulness. Absent proof of actual or constructive notice, the Court ruled that the defendant's failure to appear was not "prima facie evidence" that the failure to appear was willful.

In this case, the Court noted that, just as in the *Edmonds* case, the prosecutor asked the trial court to take judicial notice of its own order. However, also like in *Edmonds*, nothing in the record showed that the trial court did so. The Court therefore found that the record did not "demonstrate clearly" that the trial judge took judicial notice that the defendant had been advised of the trial date, and nothing admitted into evidence at trial proved that the defendant had notice of that date.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1270191.pdf
Va. Supreme Court Ruling At:
https://www.vacourts.gov/courts/scv/orders_unpublished/200825.pdf

False Pretense, Fraud, and Financial Exploitation

Virginia Court of Appeals
Published

Tomlin v. Commonwealth: March 15, 2022

Augusta: Defendant appeals her convictions for Financially Exploiting an Incapacitated Adult and of Abusing or Neglecting an Incapacitated Adult.

Facts: The defendant abused and neglected her mother, the victim. For some time, the defendant had refused offers of assistance from the local social services department to take help care of her mother. After a maintenance worker discovered the victim lying on the floor, covered in bed bugs, and requiring medical attention, he called 911. Firefighters responded and found the victim in horrifying condition [*the details are truly horrifying and will not be detailed in full here – EJC*]. The defendant told rescue workers that the victim had been on the floor since a fall two days before. The defendant stated that she had not assisted her and instead left her in her own filth for two days without any treatment or cleaning because she "did not have time."

Doctors who examined the victim determined that her bed sores presented a risk of death significant enough to make them a life-threatening condition. Her condition was life-threatening because of the combination of bed sores, leg sores, and the increased risk of infection created by the ubiquitous bed bugs, feces, and urine covering her body. At trial, the defendant argued that the victim had not suffered "serious bodily injuries."

After the victim entered the hospital, the defendant took the victim's money to live in a hotel and pay for various expenses, without the victim's consent. The victim died in hospice care a couple of

months later. At trial, the Commonwealth did not offer testimony directly bearing on her mental capacity from the time she was admitted to the hospital to the time of her death approximately two months later. The trial court based its decision about her inability to understand financial matters on evidence of her inability to understand her healthcare needs.

Held: Reversed and Dismissed with respect to the conviction for financial exploitation of a mentally incapacitated adult; Affirmed for abuse or neglect of an incapacitated adult. The Court found that the trial court lacked sufficient evidence to conclude that the victim was mentally incapacitated with respect to financial matters. However, the Court also found that the trial court had sufficient evidence to conclude that the victim had suffered "serious bodily injuries."

Regarding the financial exploitation offense, the Court explained that even though the defendant was mentally incapacitated with respect to healthcare decisions, that fact could not, by itself, justify the trial court in finding beyond a reasonable doubt that she was also mentally incapacitated with respect to financial matters. The Court complained that the record contained no evidence that specifically addresses the victim's mental capacity in financial matters.

Regarding the abuse and neglect offense, though, the Court rejected the defendant's argument that an injury, disease, or condition needs to threaten imminent death in order to be sufficiently serious and that a condition not expected to lead to death if properly treated is not sufficiently serious to fall within the meaning of §18.2-369. The Court noted that the statute lists several categories of injuries that are not necessarily life-threatening but are nevertheless serious. The Court also noted that an injury, disease, or condition can be life-threatening yet not cause certain and impending death.

The Court explained, under §18.2-369, that for an injury, disease, or condition to be life-threatening, it must present a real, appreciable risk of death, but need not create a likelihood of imminent, near-certain death.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0561213.pdf

Virginia Court of Appeals
Unpublished

Phillips v. Commonwealth: January 11, 2022

Amelia: Defendant appeals his conviction for False Pretenses on sufficiency of the evidence.

Facts: The defendant contracted with the victims for work on their home. While working on the project, the victims entered a second contract paying the defendant an additional $1,700, which was to be used for specific building materials which the defendant said were needed to finish the job. Under the initial contract, materials were delivered to the victim's home; under the November contract, the defendant reported that the "additional materials" were delivered to his own home, not the victim's home. The defendant, however, never brought the materials to the victim's home or used them in the

construction work, nor did he reimburse the victims for their cost. The victims ultimately testified that she did not think some of these materials were needed for the job.

After entering the second contract, the defendant ventured to the victim's home once or twice to work on the project and then stopped coming altogether. The defendant failed to communicate with the victims as to why the work stopped, but he kept their money. Ultimately, the defendant failed to begin several aspects of the job. He never finished other aspects and performed some aspects so clumsily that another contractor was required to repair them.

Held: Affirmed. The Court found that it was a reasonable inference that the defendant told the victims they needed the additional materials to get payment from them, even though he never intended to deliver the materials. The Court noted that the bulk of the "additional materials" purchased with the victims' money were never used by the defendant on their project. The Court ruled that the evidence was sufficient to support the trial court's finding that the defendant obtained money by false pretenses.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0224212.pdf

Firearms and Weapons Offenses

Virginia Court of Appeals
Published

Barney v. Commonwealth: November 3, 2021
Previously Reversed and Remanded by Court of Appeals, January 8, 2018
Hampton: The defendant appeals his convictions for Use of a Firearm on jury instruction and sufficiency issues.

Facts: The defendant committed two robberies. During the robberies, the defendant made statements and gestures to imply that she had a firearm. Her co-conspirator kept his hand in his pocket and told the clerk not to move "and won't nobody get hurt." The defendant gave the clerk at the first robbery a note that said the clerk should give them the money "and not make a sound if she wanted to live." At the second robbery, the defendant told the clerk she had "two guns" facing her, and "if the clerk went any slower that she was going to shoot her."

At her first trial, the instructions given to the jury did not require the Commonwealth to prove that the defendant possessed either an actual firearm or an object that gave the appearance of an actual firearm.

On initial appeal, the Court of Appeals reversed the conviction. Although the Court found the evidence sufficient, the Court ruled that the trial court improperly instructed the jury. The Court repeated that, to convict of 18.2-53.1, the Commonwealth must prove that the accused actually had a firearm or replica firearm in his possession. Thus, in the case, the Court ruled that the trial court erred in

instructing the jury that it was not necessary that the object was in fact an actual or replica firearm so long as the victim perceived a threat or intimidation by a firearm.

In the initial appeal, however, the Court agreed that the evidence was sufficient. The Court agreed that a jury was therefore free to infer that, because the defendant said she had a gun in the second robbery, she used one at the first robbery, even though, like in *Powell*, no firearm or facsimile of a firearm was ever seen or recovered. On remand, however, at trial, the trial court struck the evidence from the second robbery at the motion to strike. Thus, the only evidence before the jury was the evidence from the first robbery.

The defendant requested an additional jury instruction as to the definition of a "firearm" under the statute, seeking to clarify the requirement that the Commonwealth must prove that the defendant had a firearm or an object with the appearance of a working firearm. The defendant offered ten possible supplemental jury instructions. For example, the defendant offered one alternate instruction: "The defendant's fingers or hands are not considered a firearm," and another: "It is not sufficient to convict if you believe that the defendant used an object to make the victim believe that she had a firearm." The trial court denied the additional instructions, only using the Model Jury Instruction, No. 18.702.

Held: Reversed. The Court reaffirmed that it is not enough for a jury to find that the accused used her finger, or that the object concealed in the pocket looked like it could be a gun. Instead, for a jury to convict the accused, it must find that the accused, in fact, used or attempted to use an actual firearm or an object so physically similar to a working firearm that it appeared to have the same functionality as one.

Regarding the jury instructions, the Court found that the Model Instruction's ambiguity may have caused the jury to construe its instructions to mean that it must convict even if it did not find that the defendant had a firearm or other object physically resembling a firearm in her pocket. The Court repeated that such a conclusion conflicts with both the statute and settled precedent. To clarify the ambiguity and dispel this improper rationale from the minds of the jury, the Court ruled that the trial court should have granted a clarifying instruction. Thus, it was error to deny an additional instruction on the "firearm" element.

While the Court acknowledged that the trial court need not examine all the proffered instructions, nor did it hold that they are all perfect for this case; but some of the supplemental instructions would have clarified the "firearm" requirement for the jury given the facts of the case. The Court did agree, though, that the defendant's alternate instructions would have emphasized the importance of an objective inquiry, rather than the victim's subjective perception and both correctly stated the law. In a footnote, the Court cautioned that, while these instructions would have provided some clarity in this case, trial courts in future cases must exercise their usual discretion in granting, or refusing, any supplemental instruction as necessary to ensure clarity of the final jury instructions on a case-by-case basis.

Regarding sufficiency, the Court pointed out that, while the defendant's note contained a threat against the victim's life, it mentioned nothing of a weapon, let alone a firearm. The Court also observed that there was no additional circumstantial evidence—or any direct evidence— establishing the bulge was a firearm or an object physically resembling one. The Court also pointed out that, in the initial appeal, it had given great weight to the fact that the two firearm offenses were tried together, but

because of the defendant's subsequent acquittal on the second charge, none of this evidence was introduced at the trial below for the first charge. Therefore, the Court concluded that no rational, properly instructed jury could conclude beyond a reasonable doubt that the defendant used a firearm or an object physically resembling a working firearm.

Judge Ortiz concurred, finding that the lack of sufficient evidence should have resolved the appeal, without addressing the jury instructions.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1057201.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1694171.pdf

Morgan v. Commonwealth: October 5, 2021

Virginia Beach: Defendant appeals his conviction for Falsely Pretending to be a Police Officer and Carrying a Concealed Weapon While Intoxicated on sufficiency of the evidence.

Facts: The defendant drove a "police interceptor" model Crown Victoria equipped with red, white, and blue emergency lights, flashed the vehicle's red and white emergency lights and tailgated other motorists. The defendant exceeded the speed limit, straddled the center line, and activated strobing lights as he approached close behind other motorists. Immediately following those actions, one of the motorists the defendant tailgated responded as though they were submitting to lawful police authority when they drastically slowed down their vehicle. Detectives who were driving nearby noticed the defendant's behavior and after determining he was not a police officer, stopped him.

After arresting the defendant, the police discovered that the defendant's vehicle contained various police paraphernalia and equipment. Further investigation showed that the defendant was intoxicated and had a firearm in a zipped backpack on the front passenger seat while operating the vehicle.

At trial, the defendant argued that, even though his vehicle was equipped with red, white, and blue strobe lights, he operated the red and white emergency lights only. Thus, he contended, an observer would more readily assume that he was a firefighting or EMT official, given that the vehicles used by those officials are equipped with red and white emergency lights. Second, the defendant argued that, to support his conviction, the trial court must find some "false announcement of police authority" on his part. Third, the defendant contended that the post-seizure evidence was not relevant to his guilt because he never used any item of that evidence while driving his vehicle.

Regarding the offense of carrying a concealed handgun while intoxicated, the defendant argued that when the General Assembly used the word "permitted," it did not intend to encompass concealed weapons permit holders. Second, he contended that because the firearm was kept in a zipped backpack while he was driving a motor vehicle, § 18.2-308(C)(8)'s affirmative defense to unlawful possession of a concealed weapon applied and meant his firearm was not "concealed." Third, he argued that even though the backpack containing the firearm was in the front passenger seat of the vehicle, the firearm

was not "about his person" because he could not access it without first opening the backpack and taking it out of its holster.

The trial court convicted the defendant of falsely pretending to be a police officer in violation of § 18.2-174 and of carrying a concealed firearm while intoxicated in violation of § 18.2-308.012.

Held: Affirmed. The Court first addressed the offense of impersonating a police officer. The Court reviewed the Code section for impersonating a police officer. The Court explained that a person may be convicted if (1) he falsely exercises the privileges "incident to" one's position as a law enforcement officer (the "privileges clause") or (2) he falsely "assumes or pretends" to be a law enforcement officer (the "pretending clause"). In this case, the Court noted that the trial court convicted the defendant under the pretending clause, the elements for which are:

(1) falsely assuming or pretending

(2) to be a law enforcement officer

The Court acknowledged that the statute does not explain whether the defendant's intent must be specific or general. In a footnote, the Court expressed concern that, if the pretending clause does not impose a specific intent requirement but instead simply requires that a person generally intend to portray himself as a police officer, then constitutional questions would arise as to the statute's overreach into impermissible areas such as actors, Halloween partygoers dressed as police officers, and children who play "cops and robbers"

The Court then dodged the question of whether the defendant's intent must be specific or general. Instead, the Court simply noted that the evidence in this case was sufficient to show that he not only generally intended to give himself the appearance of being a police officer, but that it was his specific intent to deceive others into believing he possessed that status. The Court noted that the post-seizure police-paraphernalia evidence in the defendant's car was probative of that intent, since the possession of police gear be illuminative of a person's intent to make others believe he is a police officer.

The Court also rejected the defendant's argument that he could have been impersonating a fire or rescue vehicle. The Court contended that, even if the use of red and white emergency lights could be associated with non-police personnel, the same could not be said for the defendant's vehicle: a police-interceptor model Crown Victoria that plainly had the appearance of being an unmarked police vehicle. The Court pointed out that the police detectives who first saw the Crown Victoria were initially under the impression that the defendant's vehicle was, in fact, an unmarked police vehicle. The Court also noted that, although the defendant did not operate the vehicle's blue lights prior to his arrest, his vehicle was equipped with flashing blue emergency lights.

The Court then addressed the offense of carrying a concealed firearm while intoxicated. The Court noted that the Code provides "[a]ny person permitted to carry a concealed handgun who is under the influence of alcohol . . . while carrying such handgun in a public place is guilty of a Class 1 misdemeanor." First, the Court concluded that, because there was no dispute that the defendant had a concealed weapons permit, it followed that he was "permitted" to carry a concealed firearm under the language of the Code.

The Court then concluded that, even if he were covered by the exception for a handgun that is secured in a container or compartment in the vehicle or vessel", that exception had no bearing on

whether the firearm he carried was "concealed." The Court explained that the statute's affirmative defenses do not apply if the accused engaged "in the prohibited conduct delineated in § 18.2-308.012(A)"—i.e., possessing a concealed firearm while intoxicated. Lastly, the Court agreed that, unlike § 18.2-308(A), § 18.2-308.012 does not contain an "about the person" element.

In another footnote, the Court pointed out that § 18.2-308.012 contains an "in a public place" element. In the footnote, the Court acknowledged that there is a potential tension between the fact that the firearm was in a zipped backpack in a private motor vehicle and the statute's requirement that a firearm be carried "in a public place" to support a conviction. However, the Court declined to address the issue, as the defendant had not brought up the issue on appeal.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1139201.pdf

Virginia Court of Appeals
Unpublished

Vines v. Commonwealth: February 15, 2022

Williamsburg: Defendant appeals his conviction for Possession of a Firearm by a Felon on sufficiency of the evidence.

Facts: The defendant, a convicted felon, possessed a firearm. Police responded to a report of an assault and brandishing of firearm at the defendant's residence. When police arrived, the defendant first told police that he had been sleeping in his daughter's bedroom. Later, however, he and his girlfriend both indicated that they slept in the master bedroom, and officers entered that bedroom. Inside, an officer noticed a box of ammunition sitting on top of the dresser and a handgun sitting on the bedroom floor, in plain view, two to three feet from the bed. The ammunition matched the handgun.

Prior to trial, while incarcerated, the defendant and a friend participated in a video call with the defendant's girlfriend. The jail recorded the call. In the call, the parties discussed what the girlfriend would say at trial and addressed potential changes to her testimony. In another recorded call, the defendant described finding and handling the firearm.

At trial, the defendant's girlfriend claimed that she had invited another man to her home while the defendant was not present. She claimed that she had intercourse with the other man, whose name she did not know, as "revenge" on the defendant. She then alleged that the unknown man accidentally left his firearm behind. She told the trial court that she noticed the firearm and was "uncomfortable" having the firearm in the home with her children, but then claimed that she forgot about it.

Held: Affirmed. Pointing out the defendant's initial false statement about where he had been sleeping, the Court explained that when the "defendant's denial of circumstances relating to an illegal act is inconsistent with the facts, it is fair to infer that such denial was for the purposes of concealing guilt."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0576211.pdf

Seamster v. Commonwealth: July 13, 2021

Halifax: Defendant appeals his convictions for Receiving Stolen Goods, Possession of a Firearm, Possession of Ammunition, and related cases on sufficiency of the evidence.

Facts: The defendant, a convicted felon, kept stolen goods, cocaine, firearms, and ammunition at his residence. Law enforcement obtained a search warrant for the residence and executed the warrant. Officers told the defendant that they were looking for stolen items, including weapons, and asked the defendant if he could direct them to any stolen or possibly stolen items in the house. The defendant identified a room as his bedroom and told officers that a weapon was inside his dresser that "possibly could have been stolen." Officers found a firearm inside the dresser. The defendant claimed that the firearm belonged to someone else. Officers also found a box of ammunition on an end table in the bedroom.

The defendant also pointed to a bag on the living room floor, stating that it could possibly be stolen. Officers discovered a stolen handgun inside the bag. The defendant then led the officers to the guest bedroom closet and pointed to the blanket wrapped in tape. The defendant stated that there were "weapons" inside the blanket and that he had helped wrap them in the blanket. Officers also located a safe contained the defendant's social security card, birth certificate, and a bag with stolen jewelry.

The Court convicted the defendant of several offenses, including both convictions and sentences under § 18.2-308.2 for simultaneous possession of a firearm and possession of ammunition.

Held: Affirmed. The Court held that the evidence was sufficient to prove that the defendant possessed a firearm and possessed ammunition in violation of § 18.2-308.2. However, the Court, as in *Groffel,* also held that the trial court erred in imposing two sentences under § 18.2-308.2 for simultaneous possession of a firearm and ammunition because doing so is a violation of the double jeopardy clause. Accordingly, the Court remanded this case to the trial court to allow the Commonwealth to elect one conviction and sentence for the defendant's violation of § 18.2-308.2.

The Court agreed that the trial court could conclude that the defendant was aware of the nature and character of the firearms in the dresser drawer and the box of ammunition in his bedroom. The Court repeated that possession may be joint and several and it mattered not whether someone else was the gun's owner. The Court noted that the defendant claimed that the gun belonged to someone else, indicating that the defendant was aware of the nature and character of the gun.

Regarding the cocaine in the residence, the Court contended that the fact that the cocaine was recovered in the kitchen and the firearms were found elsewhere in the house is of no moment because the Commonwealth was required to prove only simultaneous possession of both the cocaine and firearms.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1193192.pdf

Hit & Run

Virginia Court of Appeals
Unpublished

Owen v. Commonwealth: April 26, 2022

Halifax: Defendant appeals his conviction for Hit and Run on sufficiency of the evidence.

Facts: The defendant crashed into the victim's car, unsuccessfully attempted to dislodge his truck from the victim by shifting into reverse and stepping on the gas, then shifted his truck back into drive, struck the victim again, and reversed before successfully dislodging his truck and driving away. The defendant drove 200-300 feet from the scene of the accident and parked his vehicle in his own driveway. The defendant did not check on the driver of the other vehicle nor exchange information with him.

The defendant did not call 911 dispatch until thirty minutes after he arrived home. By that time, police were already in route because the victim had pulled off the road and reported the accident.

Held: Affirmed. The Court agreed that evidence in the record was sufficient to support the trial court's finding that the defendant failed to immediately stop at the scene of the accident. The Court applied *Edwards v. Commonwealth*, 41 Va. App. 752, 770 (2003). The Court pointed out that nothing in the record suggested that stopping in his own driveway was an immediate stop or that his driveway was the first safe place to park the truck.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0419212.pdf

Lassiter v. Commonwealth: April 26, 2022

Virginia Beach: Defendant appeals his convictions for Felony Hit and Run and Failure to Appear on sufficiency of the evidence.

Facts: While the victim was stopped and making a left turn, the defendant rear-ended the victim at a high-speed. The impact pushed the victim's car into the cross street; she was unable to control her steering because foot was on the brake. Seeing that she was heading towards a street sign, the victim had to accelerate to steer away from hitting the street sign. She was "in shock" when her car came to a stop, and she called 911 for assistance.

The defendant's car had gone underneath part of the victim's car. The front end was crumpled, and the hood of the car folded upward blocking much of the windshield. The defendant exited his car to inquire if the victim "was okay," to which she equivocally responded, "I think so." The defendant did not provide the victim with his name, address, driver's license number, registration number, or insurance information. He then left the scene of the accident on foot, leaving his car behind.

Later, police located the defendant. He stated that "that he freaked out, and that's why he ran." He also admitted that he did not have a driver's license or insurance and that the vehicle was not registered. The defendant first denied having been injured but acknowledged that he "had a couple [of] lumps" on his head because of the accident.

After his arrest, the defendant asked to continue his case. He then failed to appear in court. After his re-arrest, the court granted him bond again, and the defendant signed release conditions acknowledging his next court date. Through his attorney, the defendant again asked to continue the case. At the new June date, the defendant again failed to appear. At trial for the second felony failure to appear, the trial court took judicial notice of the defendant's own attorney's request to continue the matter to the June date and heard testimony from the victim that the defendant did not appear.

Held: Affirmed. Regarding the felony Hit and Run offense, the Court agreed that the evidence was sufficient to allow a rational fact finder to conclude that the defendant knew or should have known that he injured the victim. The Court pointed to the force of the impact of the crash and the extent of the damage to both parties' cars. The Court noted that the defendant knew of the extent of the damage to his car, evidenced by the fact he abandoned it at the scene of the collision. Based on the force, the damage, and the defendant's own injury, the Court found that the evidence supported a conclusion that a reasonable person should have known that the victim likely also sustained injuries.

Regarding the Failure to Appear, the Court first repeated that "Any failure to appear after notice of an appearance date is prima facie evidence that the failure to appear was willful." The Court then repeated that "when a defendant receives notice of an original appearance date, that defendant 'is charged with notice of those dates to which his or her case is expressly continued when such action is duly recorded in the order of the court.'"

The Court then concluded that, given the attorney-client relationship, the trial court was permitted to infer from that fact that the defendant also had actual notice of the June hearing date. The Court also noted that the trial court was free to take judicial notice of its own records under Virginia Rule of Evidence 2:201(b), which permits a court to take judicial notice of a factual matter "at any stage of the proceeding."

Judge Chaney dissented regarding the hit and run offense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0661211.pdf

Homicide

Virginia Court of Appeals

Unpublished

Daily v. Commonwealth: April 26, 2022

Chesterfield: Defendant appeals his conviction for First-Degree Murder as an Accessory Before the Fact on sufficiency of the evidence.

Facts: The defendant instigated the perpetrator to murder the victim. The defendant called the perpetrator and claimed that the victim had raped her, causing him to become "frantic" with anger, drive to her apartment to speak privately with her, and exit her bedroom shortly thereafter, exclaiming, "I'm gonna kill that [person]." The perpetrator then shot and killed the victim. Evidence from a cooperating witness, 911 calls, canine tracking, and cell phone historical location data analysis corroborated that the perpetrator committed the murder.

The defendant admitted to police that admitted to police that she and the perpetrator had been "texting and calling back and forth" the weekend of his murder. However, she told police that she had deleted her cell phone texts and Instagram messages "as soon as she . . . saw" the detectives waiting for her at her school, as confirmed by business records introduced at trial. The defendant also confessed that she performed a "factory reset" to remove the data from her cell phone before speaking to detectives.

Police learned that, one month before the murder, the defendant had sent the perpetrator an Instagram message about another man, again stating that this other man had raped her. In the message, the victim stated, "I should say [a man] raped me," to which the perpetrator replied, "Please lemme kill him, lol let me shoot him . . . Let's shoot him," and "Imma kill him." At trial, the Commonwealth admitted the messages. The trial court overruled the defendant's objection that the messages were irrelevant because they were too remote to the crime at hand since they did not occur within the timeframe that the defendant knew the victim.

Held: Affirmed. The Court first reaffirmed that in the trial of an accessory before the fact, the Commonwealth must prove the following elements beyond a reasonable doubt: "the commission of the crime by the principal, the accessory's absence at the commission of the offense, and that before the commission of the crime, the accessory was 'in some way concerned therein . . . as (a) contriver, instigator or advisor."

The Court agreed that based on the evidence submitted, a jury could reasonably determine that the defendant "instigated the commission of" the murder, that "she had reason to know" of the perpetrator's criminal intention and "intended to encourage his commission of the crime," and that her encouragement in fact "induced" the defendant to murder the victim. From the victim's attempts to destroy evidence, the Court also agreed that the jury properly inferred the defendant's "guilty knowledge of, and participation in" the murder.

The Court agreed that, based on the Instagram messages, the jury could infer that the defendant knew that a claim of sexual assault could induce the perpetrator to volunteer to perform criminal acts of violence at her behest. The Court concluded that the messages were therefore relevant and admissible to demonstrate the perpetrator's protective relationship with the defendant and to

establish that the defendant "knew or had reason to know" of the defendant's criminal intent when she later communicated a similar rape allegation to him specifically regarding the victim.

The Court rejected the defendant's argument that the exchange was too temporally remote from the incident, as "every fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0490212.pdf

Copeland v. Commonwealth: October 5, 2021

Chesapeake: Defendant appeals his convictions for Murder and Use of a Firearm on sufficiency of the evidence.

Facts: The defendant shot and killed the father of the defendant's sister's child, after the victim and the sister had a verbal dispute. During the dispute, the sister told the victim that she would have someone kill the victim. A short time later, the defendant located the victim and shot him. A security video captured the defendant just before and just after the murder, walking towards and then away from the crime scene.

Police located the defendant's brother's car abandoned, broken down, near the crime scene. A witness had seen two men abandon the car. Police found the defendant's DNA in the car and found the defendant's wallet and driver's license abandoned nearby.

Held: Affirmed. The Court held that the circumstantial evidence of the defendant's presence at and then flight from the crime scene, together with his motive, was sufficient to prove beyond a reasonable doubt that he was the criminal agent of the offenses and committed a premeditated murder.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0825201.pdf

Impersonating an Officer

Virginia Court of Appeals
Published

Morgan v. Commonwealth: October 5, 2021

Virginia Beach: Defendant appeals his conviction for Falsely Pretending to be a Police Officer and Carrying a Concealed Weapon While Intoxicated on sufficiency of the evidence.

Facts: The defendant drove a "police interceptor" model Crown Victoria equipped with red, white, and blue emergency lights, flashed the vehicle's red and white emergency lights and tailgated other motorists. The defendant exceeded the speed limit, straddled the center line, and activated strobing lights as he approached close behind other motorists. Immediately following those actions, one of the motorists the defendant tailgated responded as though they were submitting to lawful police authority when they drastically slowed down their vehicle. Detectives who were driving nearby noticed the defendant's behavior and after determining he was not a police officer, stopped him.

After arresting the defendant, the police discovered that the defendant's vehicle contained various police paraphernalia and equipment. Further investigation showed that the defendant was intoxicated and had a firearm in a zipped backpack on the front passenger seat while operating the vehicle.

At trial, the defendant argued that, even though his vehicle was equipped with red, white, and blue strobe lights, he operated the red and white emergency lights only. Thus, he contended, an observer would more readily assume that he was a firefighting or EMT official, given that the vehicles used by those officials are equipped with red and white emergency lights. Second, the defendant argued that, to support his conviction, the trial court must find some "false announcement of police authority" on his part. Third, the defendant contended that the post-seizure evidence was not relevant to his guilt because he never used any item of that evidence while driving his vehicle.

Regarding the offense of carrying a concealed handgun while intoxicated, the defendant argued that when the General Assembly used the word "permitted," it did not intend to encompass concealed weapons permit holders. Second, he contended that because the firearm was kept in a zipped backpack while he was driving a motor vehicle, § 18.2-308(C)(8)'s affirmative defense to unlawful possession of a concealed weapon applied and meant his firearm was not "concealed." Third, he argued that even though the backpack containing the firearm was in the front passenger seat of the vehicle, the firearm was not "about his person" because he could not access it without first opening the backpack and taking it out of its holster.

The trial court convicted the defendant of falsely pretending to be a police officer in violation of § 18.2-174 and of carrying a concealed firearm while intoxicated in violation of § 18.2-308.012.

Held: Affirmed. The Court first addressed the offense of impersonating a police officer. The Court reviewed the Code section for impersonating a police officer. The Court explained that a person may be convicted if (1) he falsely exercises the privileges "incident to" one's position as a law enforcement officer (the "privileges clause") or (2) he falsely "assumes or pretends" to be a law enforcement officer (the "pretending clause"). In this case, the Court noted that the trial court convicted the defendant under the pretending clause, the elements for which are:

(1) falsely assuming or pretending

(2) to be a law enforcement officer

The Court acknowledged that the statute does not explain whether the defendant's intent must be specific or general. In a footnote, the Court expressed concern that, if the pretending clause does not impose a specific intent requirement but instead simply requires that a person generally intend to portray himself as a police officer, then constitutional questions would arise as to the statute's

overreach into impermissible areas such as actors, Halloween partygoers dressed as police officers, and children who play "cops and robbers"

The Court then dodged the question of whether the defendant's intent must be specific or general. Instead, the Court simply noted that the evidence in this case was sufficient to show that he not only generally intended to give himself the appearance of being a police officer, but that it was his specific intent to deceive others into believing he possessed that status. The Court noted that the post-seizure police-paraphernalia evidence in the defendant's car was probative of that intent, since the possession of police gear be illuminative of a person's intent to make others believe he is a police officer.

The Court also rejected the defendant's argument that he could have been impersonating a fire or rescue vehicle. The Court contended that, even if the use of red and white emergency lights could be associated with non-police personnel, the same could not be said for the defendant's vehicle: a police-interceptor model Crown Victoria that plainly had the appearance of being an unmarked police vehicle. The Court pointed out that the police detectives who first saw the Crown Victoria were initially under the impression that the defendant's vehicle was, in fact, an unmarked police vehicle. The Court also noted that, although the defendant did not operate the vehicle's blue lights prior to his arrest, his vehicle was equipped with flashing blue emergency lights.

The Court then addressed the offense of carrying a concealed firearm while intoxicated. The Court noted that the Code provides "[a]ny person permitted to carry a concealed handgun who is under the influence of alcohol . . . while carrying such handgun in a public place is guilty of a Class 1 misdemeanor." First, the Court concluded that, because there was no dispute that the defendant had a concealed weapons permit, it followed that he was "permitted" to carry a concealed firearm under the language of the Code.

The Court then concluded that, even if he were covered by the exception for a handgun that is secured in a container or compartment in the vehicle or vessel", that exception had no bearing on whether the firearm he carried was "concealed." The Court explained that the statute's affirmative defenses do not apply if the accused engaged "in the prohibited conduct delineated in § 18.2-308.012(A)"—i.e., possessing a concealed firearm while intoxicated. Lastly, the Court agreed that, unlike § 18.2-308(A), § 18.2-308.012 does not contain an "about the person" element.

In another footnote, the Court pointed out that § 18.2-308.012 contains an "in a public place" element. In the footnote, the Court acknowledged that there is a potential tension between the fact that the firearm was in a zipped backpack in a private motor vehicle and the statute's requirement that a firearm be carried "in a public place" to support a conviction. However, the Court declined to address the issue, as the defendant had not brought up the issue on appeal.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1139201.pdf

Internet Solicitation

Virginia Court of Appeals

Published

Mackey v. Commonwealth: March 1, 2022

Rockbridge: Defendant appeals his conviction for Internet Solicitation of a Child on Amendment of the Indictment.

Facts: The defendant traded messages on Facebook Messenger with a child. The Commonwealth indicted the defendant under § 18.2-374.3(C), which concerns soliciting a child younger than 15 years of age. At trial, however, the Court found the evidence regarding the child's age to be equivocal and, *sua sponte*, decided to convict the defendant of § 18.2-374.3(D), which concerns soliciting a child 15 years of age or older. The defendant objected that subsection (D) was not a lesser-included offense of subsection (C), but the trial court contended that it was. In post-trial motions, the trial court ruled that it had simply "amended" the indictment on its own.

Held: Reversed. The Court repeated that an accused cannot be convicted of a crime that has not been charged, unless the crime is a lesser-included offense of the crime charged. In this case, the Court concluded that subsection (D) contains an element that the charged offense does not contain and is not a lesser-included offense of subsection (C).

The Court agreed that the trial court has the power, subject to certain procedural requirements, to amend the indictment before a verdict under § 19.2-231 and charge the accused with another crime. However, the Court further noted that, under § 19.2-231, "[a]fter any such amendment the accused shall be arraigned on the indictment . . . as amended, and shall be allowed to plead anew thereto . . . ." Since, in this case, trial court never actually ruled it was amending the indictment during trial, the trial court's acquittal on the original charge left no remaining charges in this case.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0355213.pdf

Larceny

Virginia Court of Appeals
Published

Goldman v. Commonwealth: April 19, 2022

Norfolk: Defendant appeals his conviction for Larceny on sufficiency of the evidence.

Facts: The defendant stole tools from the victim. A surveillance video captured the theft. At trial, the victim testified that he had purchased the tools in September 2019 and that the defendant stole them in October 2019. At trial, however, the person who pulled the video testified that the video was

dated from January 2019. The video filename included "20191031" in the name, but no one testified that this name reflected the true date of the video.

Held: Reversed. The Court agreed that the video would have been sufficient if it had been dated in October. However, due to the error in date, the Court found the video could not have proven the theft of the tools, as the victim had only purchased the tools in October. The Court pointed to a lack of explanation in the record regarding the discrepancy in the date. The Court complained that without the date, there was no other evidence that the defendant lacked authority to be where he was or that he lacked permission to access the tools.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0208211.pdf

Virginia Court of Appeals
Unpublished

Walker v. Commonwealth: May 3, 2022

Fairfax: Defendant appeals his conviction for Petit Larceny, 3rd offense, on Admission of Electronic Evidence and sufficiency of the evidence.

Facts: The defendant concealed several items while inside a Target store in shopping bags that had the Target logo on them. He then attempted to leave, paying for only a few items. Staff captured the defendant and brought him back into the store. After identifying the items in the defendant's possession that had not been paid for, staff used a scanner in "training mode" to print a "training receipt" that listed those items along with their value after any discounts. The defendant then tried to escape, but staff restrained him. He continued to struggle until police arrived.

At trial, the defendant objected to a "training receipt" that listed items he stole. He argued that the "training receipt" was inadmissible hearsay because it contained information that came from Target's system rather than the witness' personal knowledge and did not meet the criteria for the business record exception to the rule against hearsay. The witness explained that he generated the receipt by scanning the bar codes of the items. He further explained that the training receipts accessed the same information in the "Target system" as a normal receipt, with the only distinction being that they do not affect the records of the store's sales. The trial court admitted the receipt.

Held: Affirmed. The Court wrote: "We need not decide whether the training receipt was a business record because the record demonstrates that it was admissible under this Court's opinion in *Twine v. Commonwealth*, 48 Va. App. 224 (2006)." In *Twine*, the Court had held that the price tag exception to the hearsay rule in shoplifting cases permits the admission into evidence of a cash register receipt generated by scanning the bar codes on the stolen items of merchandise. The Court reasoned that the inherent unreliability of hearsay was not present because "the bar code imprinted on or

attached to the item is scanned at a cash register," which reads the bar code and "access[es] the electronic data associated with that bar code" and "displays its name and purchase price."

Regarding sufficiency, the Court repeated that a defendant "may be said to have taken another's property by trespass though he has not removed it from the other's premises or from his presence." In this case, the Court agreed that the defendant committed a trespassory taking when he hid items.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0676214.pdf

Arrington v. Commonwealth: April 12, 2022

Alleghany: Defendant appeals his conviction for Unauthorized Use of a Fire Truck on sufficiency of the evidence.

Facts: The defendant, a volunteer firefighter, drove a fire truck without authority. The defendant had been an EMT, but the department terminated him when they learned that the defendant lacked a driver's license. The defendant then obtained his license and joined the volunteer fire department. However, he knew he was not allowed to drive emergency vehicles unless expressly authorized, which he was not.

One day, an emergency call went out and the defendant jumped into the driver's seat of a fire truck and started it up; two other volunteers hopped in. But after backing up only a few feet, the defendant sheared off a compartment door that had been inadvertently left open, causing $21,000 in damage to the truck. Almost immediately thereafter, the emergency call was canceled. At trial, the defendant admitted that he knew he did not have the authority to drive fire trucks.

Held: Affirmed. The Court agreed that the evidence was clear that the defendant knew that he could not drive the fire truck. The Court contrasted this case with *Blanks v. Gordon*, a 1960 case regarding a police officer who moved a car that had been blocking a construction site.

Full Case At:
https://www.courts.state.va.us/opinions/opncavwp/0124213.pdf

Locke v. Commonwealth: April 5, 2022

Campbell: Defendant appeals his convictions for Altering a Price Tag on sufficiency of the evidence.

Facts: The defendant altered price tags at a store and purchased items for a discounted price using the false price tags. A loss prevention officer reviewed previous video from two weeks earlier and

noticed that the defendant also had purchased several items with falsely labeled price tags on the previous occasion as well. No one saw who placed the improper price tags on those items in the earlier incident.

Held: Affirmed in Part, Reversed in Part. While the Court affirmed the conviction for the incident where the loss prevention officer witnessed the defendant alter the price tags, the Court reversed the conviction regarding the offense two weeks earlier. The Court found that the evidence from that offense established only that some items had somehow been improperly tagged with a clearance sticker. The Court complained that no evidence was introduced regarding how the items came to be improperly priced. The Court held that no reasonable fact finder could have found beyond a reasonable doubt that the defendant altered the price tags.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0540213.pdf

Scott v. Commonwealth: March 29, 2022

Smyth: Defendant appeals her conviction for Grand Larceny on sufficiency of the evidence.

Facts: The defendant opened a thrift store using loans from the victim and agreed to sell numerous items belonging to the victim on consignment at the store. Later, while the victim was on vacation, the defendant emptied the store and disappeared, taking with her the key to a storage unit with the victim's property. The defendant's friends reported her as missing and suggested that she had drowned in a lake, leading to a search in Virginia and West Virginia. However, after the Commonwealth obtained an indictment against the defendant, police found the defendant and arrested her in West Virginia.

The defendant later offered various excuses for not delivering the property back to the victim when requested, saying, "Oh, I forgot," or that his property was "at my house" or "locked in my safe." However, she admitted to retaining the items even after closing the thrift store.

On appeal, the defendant claimed that she did not intend to permanently deprive the victim of his property because she gave it back, more than a year later, while awaiting trial.

Held: Affirmed. The Court agreed that the evidence demonstrated that the defendant intended to permanently deprive the victim of the items and that she gave them back only as a last-second gambit to avoid conviction.

The Court agreed that this case involved a bailment. The Court repeated that the lack of an oral or written contract does not vitiate the bailment because "it is not necessary to have a formal contract or even an actual meeting of the minds." The Court repeated that, as in *Overstreet*, once a bailment ends, "the use of the property by the former bailee constitutes a trespassory taking because possession of the property has constructively revested in the owner." The Court distinguished the *Molash* case.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0534213.pdf

Chittum v. Commonwealth: January 25, 2022

Roanoke: Defendant appeals her conviction for Grand Larceny on sufficiency of the evidence.

Facts: Without authority, the defendant transferred to herself $163,600 belonging to her mother, the victim, that the victim held in a joint checking account. The defendant's mother had previously given her a general durable power of attorney. The defendant had deposited about $100 maybe of her own money into the account; the rest of the account's funds came from social security and insurance proceeds for the victim's deceased husband. The victim denied authorizing the transfer and testified at trial that those assets were essential to her financial security, because they were "all she had to live on for the rest of her life."

At trial, the defendant argued that she lacked the necessary intent to commit grand larceny because (1) she had joint ownership in the account and her mother had granted her power of attorney, and (2) she made the transfer with her mother's consent and at her behest.

[*Great job to Bill Braxton, City of Roanoke, in this case – EJC*]

Held: Affirmed. The Court emphasized that "being named as an owner in a joint account does not provide license to drain funds belonging to or contributed by another account holder." The Court quoted § 6.2-606(A): "A joint account belongs, during the lifetimes of all parties, to the parties in proportion to the net contributions by each to the sums on deposit . . . unless . . . there is clear and convincing evidence of a different intent." In this case, the Court concluded that the money in the joint account was the victim's property, and that the defendant had no right to transfer to herself solely by virtue of being a joint account holder.

Regarding the power of attorney, the Court rejected the defendant's argument that the victim's execution of the general power of attorney evinces "clear and convincing evidence" of an intent to give her the money. The Court explained that the defendant's role as the victim's agent with power of attorney did not authorize her to transfer the victim's money against her wishes and contrary to her best interest. The Court quoted § 64.2-1612, to explain that a power of attorney has a duty to "act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;" "act in good faith;" "act only within the scope of authority granted in the power of attorney;" and "act loyally for the principal's benefit."

In this case, the Court concluded that the defendant had an obligation to preserve the victim's assets. By transferring the funds to herself, the Court found that the defendant acted contrary to, and outside the scope of, her duties owed to the victim acting as her agent pursuant to the power of attorney.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0783203.pdf

Obstruction of Justice & Resisting Arrest

Virginia Court of Appeals
Published

Virginia Court of Appeals
Unpublished

Perjury

Virginia Court of Appeals
Published

Sorrell v. Commonwealth: January 18, 2022

Madison: Defendant appeals his conviction for Perjury on sufficiency of the evidence.

Facts: In 2017, the defendant was convicted of two misdemeanors: violation of a protective order and destruction of property. In 2019, the defendant applied for a concealed handgun permit. In answer to the question on the form that asks whether he had been convicted of a misdemeanor in the past five years, the defendant answered "No." The bottom of the application reads, in pertinent part, as follows:

> "I, the undersigned, affirm that the information contained in this application . . . is both correct and complete to the best of my knowledge. The willful making of a false statement in this application constitutes perjury and is punishable in accordance with § 18.2-434 of the Code of Virginia."

At trial, the trial court rejected the defendant's argument that the language on the application for a concealed handgun permit did not meet the statutory requirements of the related statute, § 8.01-4.3. [*Note: The Commonwealth indicted the defendant for perjury under § 18.2-434, rather than false statement on a concealed weapons application under § 18.2-308.02(C)].*

Held: Affirmed. The Court examined whether the attestation clause on the application was a "declaration, certificate, verification, or statement under penalty of perjury pursuant to § 8.01-4.3." The Court noted that no court has ruled on what constitutes a sufficient attestation. The Court held that §8.01-4.3 focuses on the substance of the language used in an unsworn declaration rather than the specific wording. Thus, the statute simply requires two elements in an attestation clause: that the

written declaration acknowledges that it is made under threat of penalty of perjury and attests to the information's accuracy.

In this case, the Court agreed the defendant's affirmation that the information he provided on the form was "correct and complete" constitutes an assertion that the facts, at a minimum, were "true and correct," as required by § 8.01-4.3. Further, his signed acknowledgement that any falsity was punishable as perjury achieves the requirement of § 8.01-4.3 that the statement be made "under penalty of perjury." Therefore, the Court concluded that the signed attestation clause in the defendant's application for a concealed handgun permit substantially followed the form of the relevant language in § 8.01-4.3.

In a footnote, the Court rejected the defendant's argument that the permit application form did not meet the requirements of the statute because it does not use the words "under penalty of perjury" and its "mention of perjury is not part of the affirmation." The Court pointed out that, immediately following the defendant's affirmation, the form provides, "The willful making of a false statement in this application constitutes perjury and is punishable in accordance with § 18.2-434 of the Code of Virginia." The Court agreed that this language communicates that providing false information on the form constitutes perjury and is punishable as such.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0198212.pdf

Virginia Court of Appeals
Unpublished

Probation Violation

Virginia Court of Appeals
Unpublished

McCauley v. Commonwealth: May 3, 2022

Henrico: Defendant appeals her Probation Revocation on sufficiency of the evidence.

Facts: The defendant violated probation. The trial court revoked and resuspended her suspended sentence and ordered her into drug court. The defendant, while in drug court, appeared six different times on a show cause and only once received active jail time. The defendant then incurred a new drug charge, failed to participate in substance abused treatment, and continued to use illegal drugs to the point of overdose.

After the defendant's final violation, the trial court found that McCauley "talk[ed] a good game" but had "never done a thing toward getting the treatment and the help" she required and that "to

repeat what [the court has] done the last six times would . . . make no sense whatsoever." The court dismissed her from drug court and revoked the balance of her sentences.

On appeal, the defendant contended that the revocation was improper and that the revocation and resuspension of her sentence in the original drug court order "was not valid as the court lacked the jurisdiction to extend her suspended sentence."

Held: Affirmed. The Court noted that completion of the drug court program was a special condition of the defendant's suspended sentences on each underlying conviction. The Court wrote: "Regardless of the basis for her discharge from drug court, be it the accrual of a new felony charge, her life-threatening overdose, or the positive drug screen, the fact remains that McCauley did not successfully complete the program. That fact furnished the trial court with "reasonable cause" to find McCauley in violation of an express term of her suspended sentences."

The Court then ruled that the defendant cannot now collaterally attack the original drug court referral order. The Court explained that the defendant "accepted the benefit of the court's suspension of sentence," as well as the opportunity to participate in drug court.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0451212.pdf

Rape & Sexual Assault

Virginia Court of Appeals
Published

Conley v. Commonwealth: May 3, 2022

Albemarle: Defendant appeals his convictions for Marital Sexual Assault on Prior Bad Acts and Jury Instruction Issues.

Facts: The defendant repeatedly sexually assaulted the victim while she was unconscious. The victim discovered that the defendant had recorded the assaults on video. Several assaults took place in Albemarle, and several took place in Fairfax. As in the Albemarle videos, the Fairfax videos show defendant engaging in identical sexual assaults upon victim while she was sleeping or unconscious. Prior to trial, the Commonwealth filed a motion in limine seeking to introduce the Fairfax videos as evidence of "prior bad acts" under Rule 2:303(b). The trial court agreed to admit the Fairfax videos over the defendant's objection.

On one occasion, the victim observed sediment on one occasion in a beer that the defendant handed to her. She recalled that the beer that was foaming out of its can and when she poured it into a glass, she observed a "sediment that filtered down and settle[d] on the bottom." In overruling the defendant's motion in limine to exclude this testimony, the trial court reasoned that the evidence was relevant to the issue of consent and whether the victim was physically helpless or merely "feigning"

sleep. The trial court ordered the Commonwealth to refer only to "sediment" in the beer, rather than a "pill."

Although there is no model jury instruction for object sexual penetration, the trial court gave the following instruction:

"1) That the defendant penetrated the outer lips of the female sexual organ of [the victim] with any animate object; 2) That at the time [the victim] was physically helpless; 3) That at the time of the offense the defendant knew or should have known [the victim] was physically helpless; and 4) That the object sexual penetration was accomplished through the use of [the victim's] physical helplessness."

The trial court also gave an instruction to the jury on sodomy that instructed the jury that the Commonwealth must prove "That the penis of the defendant penetrated into the female sex organ of [the victim]," instead of the anus. Despite the error, the defendant did not object.

The defendant also requested that the trial court instruct the jury that lack of consent is an element of or that consent is an absolute defense to rape by physical helplessness. The trial court denied the defendant's request and instead gave a version of Instruction No. 44.300, which instructs the jury regarding the crime of rape where the complaining witness was mentally incapacitated or physically helpless.

Held: Affirmed.

Regarding the Fairfax videos, the Court first rejected the defendant's contention that the trial court was required to cite the specific exception in Rule 2:303(b) upon which it relied. The Court wrote: "We have not, and do not now, require a trial court to make specific citation to a particular evidentiary rule each time it decides to admit or exclude a piece of evidence." The Court then agreed that the videos were probative. The Court explained that the videos were evidence of the relationship between the parties and show the defendant's conduct and attitude towards the victim. The Court also found that they tended to negate the defendant's assertion that the victim was role playing or feigning sleep and show instead that she was deeply asleep and possibly heavily medicated or intoxicated, as well as his knowledge of her physical helplessness.

The Court equally agreed that the videos countered the defendant's claim that he was acting consistently with the victim's consent to waken her. The Court also found that the videos were relevant evidence of the defendant's modus operandi as they demonstrated an idiosyncratic pattern of behavior toward the victim. The Court concluded that the videos were highly probative and therefore their value was not outweighed by their prejudicial effect.

The Court also agreed with the trial court's analysis regarding the "sediment" that the victim observed in her beer.

Regarding the defendant's argument regarding a "consent" instruction, the Court wrote: "To hold that a person can give prior consent to sexual activity taking place when they are asleep would deny that person the ability to withdraw that consent… consensual sexual activity requires "continued consent" during the duration of the activity, whenever a sleeping person is unable to express consent, that person consequently cannot consent to sexual activity."

The Court rejected the argument that, based on his theory that the victim may have been feigning sleep in the videos, the defendant was entitled to a consent instruction. The Court explained: "If the jury was persuaded by Conley's defense that J.M. was feigning sleep, then it necessarily could not

find that the Commonwealth had satisfied this physical helplessness element and it would have to acquit."

The Court also analyzed the defendant's argument regarding object sexual penetration, § 18.2-67.2. The Court held that the means of accomplishing object sexual penetration and sodomy parallel those for accomplishing rape. Moreover, although the Virginia Model Jury Instructions do not contain separate instructions for object sexual penetration and sodomy accomplished through use of the victim's physical helplessness, the Court ruled that the object sexual penetration instruction given to the jury in this case was an accurate statement of the law.

The Court pointed out that, under *Nelson*, force includes both actual and constructive force. The Court repeated that "sleep rendered the victim unable to consent and proved constructive force," and explained that, because the defendant was prosecuted on the theory that he committed object sexual penetration and sodomy on the victim while she was asleep, and thus physically helpless, consent was not a proper issue on which the jury should have been instructed.

Lastly, the Court addressed the sodomy instruction. The Court acknowledged that anal intercourse was the only form of sodomy alleged in this case and supported by the evidence. Nevertheless, the Court found that the trial court's failure to properly instruct the jury on the element of penetration of the anus was harmless error beyond a reasonable doubt, and accordingly failed to meet the "ends of justice" exception to Rule 5A:18.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0682212.pdf

Massie v. Commonwealth: February 8, 2022

Culpeper: Defendant appeals his convictions for Rape, Abduction, and related charges on sufficiency of the evidence.

Facts: The defendant forced a homeless drug addict into prostitution. The defendant invited the victim, while she was homeless, to share drugs with him and offered her a place to stay. After providing her with drugs and a place to stay, though, the defendant told her that she "needed to go take care of" a man for the defendant. The man had paid the defendant for sexual acts. When the victim objected, the defendant brandished a firearm and told her to do it "or else." The defendant also had a pit bull with him, whom the victim knew to be aggressive and dangerous. The victim, who testified that she was "scared to death," then engaged in sodomy and intercourse with a third party due to her fear of harm.

Among other charges in this case, the Commonwealth charged the defendant with abduction under § 18.2-48. The indictment was charged in the disjunctive; specifically, that the defendant abducted the victim "with the intent to defile or for the purpose of prostitution."

At trial, the Commonwealth proved that, on multiple occasions, the defendant referred to the victim and others as his "bitches," which, as a slang term, the Commonwealth showed can be used to refer to the prostitutes who work under a pimp. The defendant, for example, made repeated

statements to the victim to the effect of "[m]y bitches don't have money" when he took money away from the victim to exercise control over a her.

[*Good job to Travis Owens, Deputy CA, who tried this case – EJC*]

Held: Affirmed. The Court noted that the law prohibits a person from unlawfully causing a "complaining witness . . . to engage in" sexual conduct "with any other person." Thus, so long as the evidence was sufficient to establish that the defendant caused the victim to engage in the sexual acts with the third party against her will through threat, force, or intimidation, the Court noted that it did not matter that the defendant did not engage in the sexual acts or that he was not in the room when the acts occurred. In a footnote, the Court also pointed out that it was immaterial whether the third party was aware that the victim was being coerced into the sexual acts by the defendant.

In this case, regarding the charges of Rape and Sodomy, the Court agreed that the circumstances were more than sufficient to conclude beyond a reasonable doubt that the defendant had directed the victim under threat of bodily harm. Regarding the abduction charge, the Court also agreed that the evidence established that the defendant controlled the victim's movements and restricted her liberty by means of intimidation. The Court agreed that that the statute, the indictment, and the jury instructions all allowed for conviction in the absence of an intent to defile, if the evidence proved that the defendant abducted the victim "with the purpose of prostitution."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0282214.pdf

Nelson v. Commonwealth: November 3, 2021

Essex: Defendant appeals his conviction for Aggravated Sexual Battery on sufficiency of the evidence.

Facts: The defendant sexually assaulted a fourteen-year-old child. At trial, the victim testified that while sleeping, she "felt something" and "woke up to find the defendant's hands" were "down her pants." At trial, the defendant argued that his act was not accomplished against the victim's will " by force, threat or intimidation," as proscribed by § 18.2-67.3.

Held: Affirmed. The Court held that the commission of the proscribed act against a sleeping victim established a lack of consent that proved constructive force, thereby satisfying the challenged element of the offense.

The Court reaffirmed that that 'force' is defined to include both actual and constructive force. The Court then explained that the definition of force in the *Martin* case, which includes constructive force, applies across all species of sexual offenses that require proof of force, including aggravated sexual battery. Turning to common law cases from as early as 1887, the Court found that common law principles also recognize that a victim is unable to give consent for sexual contact while sleeping. Thus, the Court concluded that the defendant committed the offense of aggravated sexual battery using constructive force.

In a footnote, the Court also acknowledged that sleep could constitute "physical helplessness," but noted that in this case, the indictment charged that the offense was committed by force, threat, or intimidation, not by physical helplessness. In another footnote, the Court declined to consider the Commonwealth's alternative argument that the evidence proved constructive force due to an absence of legal consent solely because the victim was under the age of fifteen. The Court also did not address the Commonwealth's assertion that the evidence proved actual force.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0925202.pdf

Poole v. Commonwealth: July 20, 2021
73 Va. App. 357, 860 S.E.2d 391 (2021)
Norfolk: Defendant appeals his conviction for Rape on sufficiency of the evidence.

Facts: Defendant raped his wife. The next day, the victim called the police. A SANE examiner found bruising on the victim's leg, though she did not note any other injuries. DNA later showed the defendant's semen in the victim's vagina. During a police interview, the defendant initially claimed that he and the victim had not had sexual intercourse in over a month. However, when confronted with the fact that his DNA had been collected from the victim during her SANE examination, the defendant admitted to having intercourse the evening of the offense.

The defendant argued that, under the 1984 cases of *Weishaupt* and *Kizer*, to be convicted of rape of a spouse, the Commonwealth must prove that the victim's conduct demonstrated a *de facto* termination of the marriage. The trial court rejected his argument.

Held: Affirmed. The Court held that the evidence was sufficient to support the conviction for rape. The Court repeated that "a conviction for rape and other sexual offenses may be sustained solely upon the uncorroborated testimony of the victim."

The Court agreed that the 1984 cases, *Weishaupt* and *Kizer,* had rejected the English common law rule involving marital rape that prohibited a wife from unilaterally revoking her implied consent to marital intercourse, but retained the common law requirement that a spouse manifest an intent to terminate the marital relationship. However, the Court found that subsequent amendments to § 18.2-61 plainly showed that the General Assembly's intent was to remove any additional elements needed for a conviction of rape when the defendant and victim are spouses. Thus, the Court concluded that the common law rule regarding marital rape and the holdings applying this rule in *Weishaupt* and *Kizer* have been entirely abrogated by the General Assembly's 2005 amendment to § 18.2-61.

In a footnote, the Court acknowledged that § 18.2-61(B)(2) contains potential alternative sentencing options in cases where the defendant and victim are married. However, the Court reasoned that these provisions demonstrate only that the General Assembly distinguishes rape against a spouse after the court has either convicted the defendant and is in the sentencing phase, under § 18.2-61(B)(2), or has made "a finding of guilt," under § 18.2-61(C). Therefore, the Court concluded, based on the statutory scheme, that the General Assembly's clear intent was to make the marital status of the

defendant and the victim immaterial during the guilt phase, but to allow a court to treat rape of a spouse differently in the punishment phase.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1177201.pdf

Virginia Court of Appeals
Unpublished

Villareal v. Commonwealth: May 24, 2022

Newport News: Defendant appeals his convictions for Child Sexual Assault regarding Refusal to Strike a Juror for Cause and sufficiency of the evidence.

Facts: The defendant sexually assaulted the victim for many years, beginning when she was six years old and ending when she was about eleven years old. The victim explained her reasons for not telling anyone as a child when she testified at trial that she was "afraid of people knowing what happened" to her, that she "felt ashamed" and "felt embarrassed," and that the defendant had threatened to kill her when the family lived in Hawaii if she ever told anyone.

During jury selection, the prosecutor asked the prospective jurors if any of them would "need[] more than just one witness" in order to convict. One of the prospective jurors indicated that she would have trouble believing only one witness. She stated that "just to hear from one person without seeing if other persons can state something completely different about this person, it is hard. . . . [H]ow can I make a decision based on what one person thinks has happened?" Defense counsel asked the potential juror, "[I]f you heard the alleged victim say this happened and there's no additional evidence to refute it, you wouldn't be able to convict…?" The potential juror replied, "It would be hard. How can – how can you believe just one person?" The Commonwealth moved to strike that potential juror from the venire for cause. The trial court granted the Commonwealth's motion and excused the potential juror for cause, over the defendant's objection.

At trial, the victim in this case testified that the assaults "happened frequently" and "happened often," but could not provide specific dates. She stated: "it was just a, you know, a routine" that "just every morning . . . just before PT, he would – he would have me do something for him." The defendant argued that the victim's testimony did not establish a clear timeline of when the offenses occurred.

Held: Affirmed. Regarding the victim's testimony about when the offenses took place, the Court wrote: "Simply put, the fact that she struggled to recall the precise timeline of repeated instances of sexual abuse that happened when she was six years old certainly does not mean that her testimony was "so manifestly false that reasonable men ought not to believe it.""

Regarding the juror struck for cause, the Court agreed that the potential juror's statements during voir dire amounted to a clear indication that she would have struggled to apply firmly established Virginia law if she had been selected as a member of the jury.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0736211.pdf

Chavez Macias v. Commonwealth: October 5, 2021

Fairfax: The defendant appeals his convictions for Rape and Sexual Assault on limiting Closing Argument and sufficiency.

Facts: The defendant raped and sexually assaulted the victim in the bathroom of a house during a party. The victim lost consciousness while drinking at the party. When she awoke, the defendant was sexually assaulting her. She could not stop him because she felt paralyzed and could not move. She quickly lost consciousness again and awoke the next day in a friend's apartment.

The victim sought a SANE exam over a day after the incident. The forensic nurse explained that due to the metabolic rate and the time it takes for alcohol and/or drugs to metabolize out of someone's system, most of the drugs and alcohol would have already metabolized out of the victim's system in about a twenty-four-hour period.

DFS examiner Dr. Jessica Harris found two spermatozoa cells on the victim's anorectal swab. The defendant could not be eliminated as a contributor to the foreign DNA found on the swab, and the probability of randomly selecting an unrelated individual who would be included as a contributor of that DNA was 1 in greater than 7.2 billion. At trial, on cross-examination, Dr. Harris acknowledged that it would be "possible" for a person to transfer spermatozoa from a towel to their hands or clothing by using the towel.

Prior to closing argument, the Commonwealth asked the trial court to bar the defendant from arguing that the victim must have put his DNA on her person when she used a towel in the bathroom. The trial court ruled that the defendant could "restate precisely what the expert said" and "suggest to the jury that [the testimony] raise[d] [a] reasonable doubt." But the court ruled that the defendant could not "go further" and "suggest what has not been in evidence" because "there's no other evidence of transference."

At trial, the defendant contended that, considering the minimal amount of alcohol the victim had allegedly consumed, and her "graphic testimony" regarding the details of the assault, the victim was not so intoxicated that she did not understand the "nature or consequences of the sexual acts" and therefore was not "mentally incapacitated."

[*Great job to ACA Whitney Gregory and DCA Jessica Greis Edwardson in this case – EJC*]

Held: Affirmed. Regarding sufficiency, the Court first pointed out that the Commonwealth need not prove that the victim was both mentally incapacitated and physically helpless to sustain convictions for those offenses; either is sufficient by itself. Nevertheless, the Court found that the evidence in this case contained overwhelming evidence to support the defendant's convictions under either theory.

Regarding the victim's intoxication, the Court found that the evidence demonstrated that the victim was mentally incapacitated due to her heavy intoxication. The Court pointed out that partygoers

who testified universally described the victim as "incoherent," unable to speak, unresponsive, and disheveled. The Court reaffirmed that a "transitory circumstance such as intoxication" may result in mental incapacity "if the nature and degree of the intoxication has gone beyond the state of merely reduced inhibition and has reached a point where the victim does not understand 'the nature and consequences of the sexual act.'" The Court emphasized that nothing in the law requires that a victim's "mental incapacity" be proven with scientific evidence or expert testimony.

Regarding the victim's physical helplessness, the Court noted that the victim was unconscious and unresponsive before, during, and after the assault due to significant intoxication. The Court also acknowledged that she had no recollection of the events that happened during those periods of unconsciousness and was, therefore, "unable to communicate an unwillingness to act."

Regarding the defendant's intent, the Court explained that the Commonwealth was not required to prove specific intent under those statutes to demonstrate the defendant's knowledge. Instead, the statutory requirement, that the defendant "knew or should have known" that the victim was mentally incapacitated or physically helpless, requires proof of criminal negligence. Thus, the Court continued, the Commonwealth had to prove that "the conduct of the accused constitutes a great departure from that of a reasonable person which creates a great risk of harm to others and whereby the application of an objective standard the accused should have realized the risk created by his conduct."

Regarding the defendant's intent, the Court also pointed out that the defendant's alleged intoxication did not deprive him of the awareness and physical control necessary to lift the victim's motionless body from the floor, return her to the toilet, and continue sodomizing her. The Court concluded that the facts provided overwhelming evidence that the defendant either knew or should have known that the victim was suffering from a condition that rendered her mentally incapacitated or physically helpless at the time of the offenses.

Lastly, the Court briefly addressed the limitation that the trial court placed on his closing argument. The Court did not directly address the issue, though, simply finding that, given the overwhelming evidence that the defendant's spermatozoa were transferred onto the victim's person during the sexual assault, and the fact that the defendant was substantially able to make the argument in closing that he contends he could not, any error in the trial court's ruling limiting his closing argument was harmless.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0876204.pdf

Reckless Driving and Vehicular Manslaughter

Virginia Supreme Court

Commonwealth v. Cady.: October 28, 2021
Reversed Court of Appeals Ruling of August 11, 2020
Fauquier: Defendant appeals his conviction for Reckless Driving on sufficiency of the evidence.

Facts: The defendant struck and killed a motorcyclist while driving at noon on a clear day on a straight roadway. The large motorcycle was stopped directly in front of the defendant in his lane and within his full, unobstructed view, and the motorcyclist had his left turn signal on while waiting to make a left turn.

The defendant claimed that he did not see the motorcycle, did not remember striking the motorcycle, and made no statements tending to show inattentiveness, intoxication, or fatigue. The defendant had been driving at a constant speed, two miles over the posted speed limit, and was not swerving. Investigators found no evidence of any distractions in the defendant's car, although he had been listening to music, and there was evidence that the defendant's cell phone was not in use in the moments before the crash.

At trial, the defendant offered an expert to testify about the concept of "situational blindness," which is "the phenomenon of looking somewhere but failing . . . to recognize or notice or process exactly what's there." A jury convicted the defendant of reckless driving.

The Court of Appeals reversed the conviction, concluding that "the dearth of evidence establishing recklessness in this case required the fact-finder to improperly speculate as to what caused appellant to strike the motorcycle."

Held: Conviction Affirmed. The Court agreed that the Court of Appeals erroneously held as a matter of law that no rational jury could have found the defendant guilty of reckless driving. The Court analyzed two issues: the mens rea requirement applicable to misdemeanor reckless driving and the standard of appellate review governing jury verdicts.

The Court first examined criminal recklessness, the requisite mens rea specified in § 46.2-852 for a misdemeanor reckless-driving conviction. The Court explained that criminal recklessness requires a reckless "disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb, or property" of others. The Court clarified that this requirement is more than simple negligence, as that concept is used in civil tort cases, but it is less than "gross, wanton, and culpable" negligence, the mens rea requirement for felony involuntary manslaughter (although it acknowledged, in a footnote, that the statute criminalizing involuntary manslaughter caused by driving under the influence has its own lesser mens rea requirement).

The Court emphasized that an "objective standard" applies to all three levels of mens rea, and the requisite mens rea "may be found to exist when the defendant either knew or should have known the probable results of his acts." Thus, the mens rea standards of criminal negligence primarily involve differences in degree, and even when courts apply the highest degree of mens rea in involuntary manslaughter cases, the Court explained that the "measuring stick" is the same in a criminal case as in the law of torts: the exercise of due care and caution as represented by the conduct of a reasonable person under like circumstances. For the Court, a very substantial deviation is essential to criminal guilt. The Court also repeated that "what distinguishes a speeding violation from the misdemeanor of reckless driving, and the misdemeanor from the felony of involuntary manslaughter, is the likelihood of injury to other users of the highways."

In this case, the Court agreed that a rational trier of fact could reasonably infer that the crash in this case was not the result of a "split-second, momentary failure to keep a lookout," constituting only

simple negligence, but rather a "lengthy, total, and complete" failure to keep a lookout, satisfying the mens rea requirement for reckless driving in violation of § 46.2-852.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1201204.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1595194.pdf

Virginia Court of Appeals
Unpublished

LaBarge v. Commonwealth: February 24, 2022

Hanover: Defendant appeals his convictions for Involuntary Manslaughter and Reckless Driving on sufficiency of the evidence.

Facts: The defendant recklessly drove his tractor-trailer at high speeds during a violent storm, crashing and killing a firefighter. That night, a flash flood warning had been in effect, several inches of rain had fallen, and a high wind warning was also in effect with winds of twenty-five to thirty-five miles per hour and gusts over forty miles per hour blowing from the left side of the highway. There was substantial water on the roadway, high winds, and poor visibility as the remnants of a tropical storm moved through the area.

During the storm, the defendant, an experienced truck driver, passed two emergency vehicles that had their lights and sirens activated. Rather than moving over in compliance with § 46.2-829, the defendant rushed past the responder vehicles and then changed lanes closer to a fire engine which was visibly parked on the side of the roadway, as its crew worked at an accident scene. Throughout these maneuvers, the defendant maintained a speed between sixty and sixty-five miles per hour in terrible weather conditions. As he approached the rescue workers, the defendant's truck hydroplaned and collided with a fire engine. The crash trapped a firefighter underneath the fire engine, killing him.

After the crash, the defendant told his son that his truck was being blown around before the crash and that there was a large amount of water on the road. In his own testimony, the defendant acknowledged that while he was driving, the wind was moving his trailer as if it were being "punch[ed]." At trial, a forensic engineer testified that the defendant was likely traveling at about 64 miles per hour just before the crash.

[*Great job to Steve Royalty, Hanover, in this case* - EJC]

Held: Affirmed. The Court held that the evidence demonstrated the defendant operated his tractor-trailer with a reckless or indifferent disregard of the rights of others under circumstances which made it not improbable that others would be injured. The Court further held that the trial court did not err in finding the evidence sufficient to convict the defendant of involuntary manslaughter and reckless driving.

Regarding Involuntary Manslaughter, the Court focused on three factors to find criminal negligence: the defendant's decisions to (1) rush past two emergency vehicles with their lights and sirens engaged, (2) move closer to the fire engine and into the lane adjacent to it while its lights were activated at an accident scene, in violation of the "move over" law, and (3) drive at excessive speeds while knowing conditions were treacherous and that his empty trailer was being "blown around." The Court agreed that the defendant's series of risky maneuvers demonstrated a reckless, indifferent disregard for the fire engine crew under circumstances which made it not unlikely that injury would occur and that the defendant knew or should have known the probable consequences of his acts and omissions.

In a footnote, the Court rejected the Commonwealth's argument that the evidence was sufficient because, as an experienced truck driver, the defendant "should have known" he had an increased likelihood of hydroplaning in these weather conditions and his lack of care caused this accident. The Court, though, repeated that a series of independent or connected negligent acts causing a death, when evaluated cumulatively, may be considered in determining whether the defendant exhibited a reckless disregard for human life. The Court pointed out that, for example, even if the defendant was driving below the posted speed limit at the time of his collision, he was nonetheless driving too fast for the existing conditions.

Regarding Reckless Driving, the Court agreed that the defendant's speed alone constituted reckless driving under the circumstances. Alternatively, the Court also found the defendant's conduct in passing the medic and rescue units constituted Reckless Driving under § 46.2-829. Lastly, the Court also pointed to the defendant's lane change near a fire engine under adverse driving conditions and his knowledge of the risks of hydroplaning, as evidence that the defendant knew or should have known that his acts and omissions created a substantial risk of harm to others and that he displayed a reckless disregard for the consequences of his conduct and an indifference to the safety of others.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0081212.pdf

Robbery

Virginia Supreme Court

White v. U.S.: October 14, 2021

Certified to the 4th Circuit: Defendant appeals his sentence for Possession of a Firearm by Felon, on the definition of Robbery in Virginia.

Facts: In federal district court, the defendant pleaded guilty to being a felon in possession of a firearm in violation of federal law. The government requested that he receive an enhanced sentence under the Armed Career Criminal Act, based on his prior convictions for three predicate violent felonies, which included a robbery conviction in Virginia. The defendant objected to the proposed sentencing

enhancement, arguing that under the ACCA, a felony is defined as a violent felony only if it categorically requires a showing of some "use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i). The defendant argued that the physical force element is not always required to prove robbery in Virginia.

On appeal, the Fourth Circuit entered a certification order asking the Virginia Supreme Court to answer a determinative question of Virginia law: "Under Virginia common law, can an individual be convicted of robbery by means of threatening to accuse the victim of having committed sodomy?"

Held: Yes, under Virginia common law, an individual may be convicted of robbery by means of threatening to accuse the victim of having committed sodomy, if the accusation of "sodomy" involves a crime against nature under extant criminal law. The Court cited four Virginia cases, ranging from 1890 to 1936, which stated that: "To constitute [a robbery] offense, there must be (1) violence, but it need only be slight, for anything which calls out resistance is sufficient; or, what will answer in place of actual violence, there must be such demonstrations as put the person robbed in fear. The demonstrations or fear must be of a physical nature, with the single exception that, if one parts with his goods through fear of a threatened charge of sodomy, the taking is robbery."

The Court first clarified that this doctrine does not reach sexual acts that do not implicate criminal liability. The Court examined English common law cases going back to 1719 where courts ruled that threatened accusations of sodomy constituted robbery. While historically, "sodomitical practices" included pederasty, bestiality, and other sexual offenses subject to criminal punishment, the Court noted that none of these offenses were common-law crimes under English common law. However, the Court concluded that one who successfully obtains money or any valuable property from the presence of a victim by threatening to publicly accuse the victim of an extant crime against nature (such as bestiality or paternal anal sodomy with a minor daughter) has committed robbery.

Justice Mims concurred, along with Justice Powell. He contended that the Commonwealth adopted the English common law in 1776 and the "sodomy exception" was not first applied in England until after that date. However, he also concurred that the Court's ruling reflected the existing case law.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1210168.pdf

Virginia Court of Appeals
Unpublished

Coles v. Commonwealth: April 19, 2022

Caroline: Defendant appeals his convictions for Burglary and Robbery on sufficiency of the evidence.

Facts: The defendant forced his way into a stranger's home, smashing through the door and attacking the residents. One victim had recently been hospitalized and was weakened, but attempted to escape, leaving the home. The defendant attacked him and wrested a firearm away from the victim. The

defendant then fled back into the home as the victim escaped. As he fled, the victim heard the defendant fire the gun repeatedly.

Police responded and saw the defendant at the home, carrying the firearm. They ordered the defendant out of the home. Eventually, the defendant exited the home, naked, and surrendered. Police found the firearm and multiple bullet holes inside the victims' home.

At trial, the defendant testified and alternately claimed self-defense and voluntary intoxication. He claimed that the drugs he consumed triggered a state of paranoia, causing him to act erratically, so he entered the home to obtain assistance. The defendant specifically argued that he was not guilty of Robbery because that he did not attempt to leave with the firearm and instead left the gun in the house when he exited naked. Instead, he claimed that he took the gun only to prevent the victim from using it against him.

Held: Affirmed. The Court agreed that the evidence was sufficient to prove that defendant entered the home with the intent to commit a larceny or felony therein and to prove that the defendant intended to permanently deprive the victim of his firearm. The Court repeated that a person may act with multiple intents or purposes. The Court pointed out that, after disarming the victim, the defendant kept the gun until police arrived—and even fired the gun into the victim's home.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0930212.pdf

Young v. Commonwealth: August 3, 2021

Richmond: Defendant appeals his conviction for Robbery on sufficiency of the evidence.

Facts: The defendant entered a bank and slid a folded note into the teller's tray stating: "This is a robbery." The defendant then said, "Give me all the money; this is a robbery." At trial, the teller testified she was in shock. She testified that bank procedure requires that when someone comes into the bank and uses the word "robbery," the teller is to comply with the demands. She followed bank procedure by handing all the money in her teller drawer to the defendant. The teller also set off an alarm.

At trial, the teller testified she did not know what the defendant's intentions were and was unsure if the defendant would hurt her. Immediately after the incident, the teller began crying and shaking. The teller also testified that during the incident she was thinking about four tellers at a different branch of her bank who had been shot and killed during a robbery.

At trial, the defendant argued that the teller gave her the money not because of intimidation, but because of bank policy requiring compliance during a robbery.

Held: Affirmed. The Court repeated that the atmosphere of intimidation created by a defendant, even if not accompanied by threats of violence or bodily harm, is sufficient to prove that the taking was accomplished by intimidation.

The Court rejected the defendant's argument that she only obtained the money due to bank policy. The Court pointed out that "the policy exists precisely because of the risk of bodily harm associated with bank robberies." Thus, the Court explained that the trial court could infer the atmosphere of intimidation and the apprehension of bodily harm from the teller's acquiescence to the demand for money and use of the term "robbery." The Court noted that the defendant's remark that "this is a robbery" has an obviously intimidating quality and concluded that her robbery note alone was a sufficient basis to find intimidation.

The Court also noted that, despite the teller's description of her state of mind as "shock" instead of "fear," the teller started shaking and crying after the incident. The Court quoted *Bivens* and wrote: "Although, during the incident, the teller "maintain[ed] her fortitude despite intimidation[,] it [was] intimidation nonetheless."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1128202.pdf

Unlawful Filming

Virginia Court of Appeals
Published

Johnson v. Commonwealth: July 27, 2021
73 Va. App. 393, 860 S.E.2d 408 (2021)
Middlesex: Defendant appeals his conviction for Unlawful Filming on sufficiency of the evidence.

Facts: During a romantic relationship with the victim, the defendant made many recordings while he and the victim were engaged in sexual activity in the victim's bedroom. At no point did the victim appear aware that the defendant was recording. The victim testified at trial that she did not consent to the recordings. At trial, the defendant argued that, because the victim was knowingly and consensually nude and engaging in sexual activity in her bedroom at the time of recording, that she had no "reasonable expectation of privacy" as required § 18.2-386.1. The trial court rejected his argument.

Held: Affirmed. The Court held that the statute prohibits recording another person, naked, without her consent, when in her bedroom, where she had a reasonable expectation of privacy. The Court further held that the evidence supported the circuit court's finding that the victim had a reasonable expectation of privacy that she would not be videorecorded, regardless of her consent to the defendant's presence, and regardless of her inability to expressly object at the time he made the recordings.

The Court rejected the defendant's argument that consenting to being undressed in front of, or sexual activity with, the other person provides consent to being recorded. As in the recent *Haba* case, the Court explained that, in the context of a statute criminalizing unlawful recording of another, the

phrase "reasonable expectation of privacy" concerns one's privacy from being recorded, not from being seen.

The Court also rejected the defendant's reliance on his relationship with the victim as a defense. The Court explained that "the absence of language in Code § 18.2-386.1 limiting the prohibited conduct to people not in a relationship or surreptitious recordings signifies that the legislature did not intend to provide such limits." The Court acknowledged that, unlike in *Haba*, the victim in this case did not expressly protest the recordings while the defendant filmed. But in this case, the Court found no evidence that the victim was aware that the defendant was recording, which the Court concluded meant that she was non-consenting.

The Court also pointed out that the statute contains no mention of or requirement that the unlawful recording be disseminated

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0443202.pdf

Haba v. Commonwealth: June 15, 2021
73 Va. App. 277, 858 S.E.2d 436 (2021)
Arlington: Defendant appeals his conviction for Unlawful Creation of an Image on sufficiency of the evidence

Facts: While dating the victim, the defendant took video of the victim without her consent while she was undressed in her bedroom. When the defendant began recording her, she tried to shield her naked body from him and demanded that he stop recording. The defendant later used the videos to threaten the victim. At trial, the defendant argued that the victim did not have a reasonable expectation of privacy. The jury convicted the defendant of unlawful creation of an image under § 18.2-386.1.

Held: Affirmed. Explaining that § 18.2-386.1(A)(i) encompasses a person's act of videorecording another person, naked, without her consent, in her bedroom, when she had a reasonable expectation of privacy, the Court held that the evidence supported the jury's finding that the victim had a reasonable expectation of privacy.

The Court found that the jury was entitled to find that the victim had a reasonable expectation of privacy in her bedroom at the time that the defendant was recording her. The Court concluded that the fact that she may have permitted him to see her naked before he started recording was irrelevant. The Court noted that the victim covered her body, clearly communicated her desire not to be videorecorded, and made a reasonable attempt to keep her naked body from view, asserting her expectation of privacy from him both viewing and recording her body at the time of the offense.

The Court explained that the analysis of whether the victim had a reasonable expectation of privacy focuses on the circumstances that existed when the defendant made the recording in the location, not the events that transpired beforehand. In a footnote, the Court rejected the argument that one cannot consider evidence relating to the elements of location and non-consent also as evidence of whether the victim had a reasonable expectation of privacy. The Court explicitly rejected the

defendant's argument that, under the statute, the victim cannot have a reasonable expectation of privacy if she knows another person is present at the time of the offense.

The Court also rejected the argument that § 18.2-386.1 "was not designed for people in a relationship in their private homes" or for non-secretive recordings. The Court noted that the absence of language in § 18.2-386.1 limiting the prohibited conduct to people not in a relationship or surreptitious recordings signifies that the legislature did not intend to provide such limits.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0256204.pdf

DEFENSES

Claim of Right

Virginia Supreme Court

Pinedo v. Commonwealth: July 8, 2021
300 Va. 116, 860 S.E.2d 53
Aff'd Court of Appeals ruling of May 5, 2020
Rockingham: Defendant appeals his conviction for Murder on denial of his "Claim of Right" defense.

Facts: The defendant murdered a man for stealing money from his drug operation. At trial for First-Degree Murder, the defendant requested a jury instruction on "claim of right." The trial court denied the instruction, finding that a claim of right instruction requires "more than a mere belief," but also good faith. The Court of Appeals affirmed the ruling.

Held: Affirmed. The Court held that the claim-of-right defense does not apply under these circumstances. The Court repeated that the claim-of-right defense requires a predicate showing of "good faith," or a bona fide belief by the taking party that he has some legal right to the property taken. The Court concluded that the Court of Appeals correctly determined that an individual cannot have a good faith or bona fide claim of right regarding contraband, money earned from the sale of contraband, or other "fruits of a crime." Thus, because the stolen money was "drug money," the Court agreed that the defendant could not have possessed the money in good faith.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1200748.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0515193.pdf

Intoxication

Williams v. Clarke: March 31, 2022

Rockingham: Defendant seeks Habeas relief from his convictions for Attempted Capital Murder and Use of a Firearm

Facts: Defendant, intoxicated and riding a horse, shot at a child. Police responded and demanded that the defendant surrender, but he cursed at them and fled, only to return and shoot in the

direction of police. One officer was struck by a ricocheted object. At trial, although witnesses testified that they saw the defendant with a gun and heard the gunshots, no one could testify that they saw the defendant fire the gun. Defense counsel focused his trial argument on identity, rather than voluntary intoxication.

On appeal, the Court of Appeals affirmed. The Court found the evidence was sufficient to demonstrate that the defendant was firing at the officers and had the intent to kill them, since a natural consequence of shooting a gun repeatedly at people in their direction is to kill them.

The defendant then filed a *habeas* petition, contending that his trial counsel was ineffective for (1) failing to argue during closing arguments that the evidence did not prove premeditation or intent to kill the officers because it showed the shooter fired into the air, and firing into the air cannot support a finding of premeditation or intent to kill; and (2) failing to request an instruction on voluntary intoxication and failing to argue to the jury that his voluntary intoxication rendered him incapable of deliberating or premeditating. The *habeas* court dismissed the petition.

Held: Affirmed. The Court first noted that a defense based on the Commonwealth's failure to prove premeditation or lack of specific intent would essentially have required the defendant to admit that he was, in fact, the shooter. The Court concluded that it was therefore entirely reasonable for trial counsel to focus on the issue of identity and avoid a defense based on intoxication and the corresponding instruction.

The Court also ruled that trial counsel was not deficient in litigating a response to a jury question.

Full Case At:
https://www.vacourts.gov/courts/scv/orders_unpublished/210294.pdf

Self-Defense

Virginia Court of Appeals
Published

Meade v. Commonwealth: May 17, 2022

Roanoke: Defendant appeals his conviction for Maliciously Shooting at an Occupied Building on sufficiency of the evidence.

Facts: The defendant and his attacker argued in a parking lot. After the argument, the attacker's associates attacked the defendant, knocked him to the ground, and repeatedly hit and kicked him as he lay on the pavement. Someone fired a gun. The attacker and his associates dispersed and the attacker ran in the direction of a motel. The defendant stood in the parking lot and pointed his gun at the attacker, but suddenly a car sped toward the defendant, struck him, and knocked him to the pavement. The attacker pointed his gun at the defendant and the defendant fired at the attacker.

Just as the attacker reached the motel room door, the defendant stood and fired his gun in the attacker's direction. After the attacker entered the motel room, the defendant fired a second time in the direction of the room. The defendant later testified that his intention in firing the two shots toward the attacker was not to strike, injure, or kill him, but rather, "[t]o get him away from me." The defendant conceded that, at the time he fired the shots, the attacker was "away" from him. At trial, the defendant contended that he was innocent of maliciously shooting at an occupied building because the shots he fired at the motel room were fired in self-defense.

The trial court acquitted the defendant of attempted murder, attempted malicious wounding, and the associated use of a firearm charges. However, the trial court convicted the defendant of Malicious Shooting at an Occupied Building concluded that, prior to the defendant firing the shots, the attacker was retreating into the motel room, and therefore, was not an immediate threat. The defendant contended that these verdicts were unlawfully inconsistent.

Held: Affirmed. The Court repeated that the fact that a person may represent an imminent harm and immediate threat at one point in a confrontation does not require the conclusion that he or she retains that status throughout an encounter. The Court agreed that the defendant did not have a reasonable apprehension of the attacker, who was running away and seeking refuge in the motel room, posing an immediate threat of imminent harm when he fired the shots. Accordingly, the Court concluded that the trial court did err in rejecting the defendant's claim of self-defense.

The Court also ruled that "there is nothing inherently inconsistent about verdicts that acquit a shooter of attempted murder and attempted malicious wounding but convict him or her of maliciously shooting at an occupied building in violation of Code § 18.2-279." The Court noted that the defendant claimed that he did not intend to kill or injure the attacker, but rather, that his intention was "[t]o get [the attacker] away from me." If accepted as true by the factfinder, the Court agreed that statement was sufficient to negate the specific intent to injure or kill necessary to support convictions for attempted murder and attempted malicious wounding.

Accepting that statement as true, though, the Court found that the defendant's "decision to fire was not the result of rage or passion but represented a considered plan. The statement reflects both thought and calculation, and therefore, is sufficient to provide a reasonable basis for a factfinder to conclude he fired the shots with a "deliberate mind.""

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0651213.pdf

Virginia Court of Appeals
Unpublished

Warren v. Commonwealth: March 15, 2022

Newport News: Defendant appeals his conviction for Aggravated Malicious Wounding on sufficiency of the evidence.

Facts: The defendant pursued and stabbed an unarmed woman with a knife as she was retreating from him with her arms raised in surrender. The defendant had forcefully entered a woman's home, violently accosted the victim in the kitchen, threw her into a bush, and brutally attacked another woman as she lay defenseless on the ground. When the victim attempted to defend the other woman by brandishing the knife, the defendant disarmed her, ignored her pleas of surrender, and delivered a near-fatal stab to the victim's unprotected abdomen. The defendant then withdrew the knife, ignored her pleas for help, and fled the scene. The victim suffered permanent, visible scarring of her abdomen, damaged internal organs, impaired bowel function, loss of employment, and a miscarriage.

The defendant claimed self-defense. He testified that the victim charged and tried to hit him with the knife and that he "smacked her hand" as she charged with the knife, causing the blade to point toward her abdomen. He claimed that, as he tripped backward during the charge, the victim impaled herself on the blade as she fell on top of him.

Held: Affirmed. The Court found that in this case, because he was "at fault" in provoking the altercation, the defendant could resort to deadly force only if he had retreated as far as possible and announced his desire for peace while reasonably fearing imminent danger.

However, in this case, the Court concluded that the victim did not pose a threat of "imminent bodily harm" to the defendant at the time of the stabbing. Moreover, even if the defendant could conceivably have viewed the victim's surrender as presenting an immediate danger to his safety, his use of a deadly weapon to attack her was "excessive . . . in relation to the perceived threat." By stabbing a surrendering, unarmed individual with a knife, the Court explained that the defendant "clearly exceeded any claim to self-defense that he may have asserted."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0931211.pdf

Smith v. Commonwealth: March 1, 2022

Henrico: Defendant appeals his conviction for First-Degree Murder on sufficiency of the evidence.

Facts: The defendant killed his stepson by shooting him four times with a twelve-gauge shotgun, pumping the gun between each shot, including shooting him once in the head from close range. The victim had allegedly brandished a knife, but the defendant admitted that he separated himself from the immediate threat, did not call the police, went upstairs in their home to retrieve a shotgun, and returned and shot the victim repeatedly, including nearly blowing off his face from close range, even after having immobilized him.

At trial, the defendant unsuccessfully claimed both self-defense and heat of passion. [*Good work to Andrew Kolp and Cynthia Micklin, ACAs Henrico, in this case – EJC*]

Held: Affirmed. The Court agreed that the jury concluded the defendant intended to kill the victim and deliberately and premeditatedly did so, all while intentionally dismissing opportunities to avoid reengaging in the altercation altogether. Rejecting the defendant's self-defense claim, the Court found it unlikely that the defendant, if he ever faced an imminent threat from the victim, faced an imminent threat after he shot the victim even once with the shotgun. The Court quoted *Williams* in rejecting the defendant's heat-of-passion defense: "Heat of passion requires the simultaneous 'reasonable provocation' by the victim and resulting passion by the defendant, such that the defendant acts 'on impulse without conscious reflection.'"

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0523212.pdf

EVIDENCE

Authentication

Virginia Court of Appeals
Unpublished

Penn v. Commonwealth: March 8, 2022

Martinsville: Defendant appeals her conviction for Felony Child Abuse on admission of Video and Physical Evidence and sufficiency.

Facts: The defendant attacked the father of her child with a knife while the father was holding their seven-month-old daughter during a meeting they were having at a gas station. The father tried to escape and dropped the child while fleeing. The defendant picked up the child and continued to assault the father. Two witnesses saw a portion of the incident. The gas station surveillance camera captured the entire incident. On video, the defendant appeared to put an object in the driver's side door of her car after the assault. Police responded and searched the door, finding a straight-razor style knife.
At trial, the defendant objected to the video, contending that it was not accurate because it "skipped" often. However, the witnesses testified that the video "a fair representation" of the portion of the incident that they saw. A store witness also testified that the store's cameras captured the incident, and that the video is "tamper-proof," meaning that sections of video cannot be added to or deleted from the original video.

At trial, the defendant also argued that the knife was not relevant because the Commonwealth did not establish that the knife found in the car was the same knife that the defendant used.

The trial court convicted the defendant of felony child abuse under § 18.2-371.1(B).

Held: Affirmed. Regarding the video evidence, the Court explained that, though neither witness saw the entire incident, that level of proof is not required to authenticate video evidence. In addition, the Court found that, even if the witness' testimony was insufficient to establish that the video was a fair representation of the altercation, the video would still be admissible as a "silent witness." While the video was not of the highest quality, the Court concluded that did not render it inadmissible.

Regarding the knife, the Court reasoned that the defendant's objections went to the weight of the evidence, not its admissibility.

Lastly, regarding sufficiency, the Court reasoned that the defendant knew or should have known that by using a knife to threaten someone holding a baby, there was a risk of actual physical harm to the baby. Thus, the Court agreed that a rational fact-finder could determine that her actions went beyond ordinary negligence and into the scope of criminal negligence.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0529213.pdf

Experts

Virginia Court of Appeals
Published

McDaniel v. Commonwealth: June 29, 2021
73 Va. App. 299, 858 S.E.2d 828
Richmond: Defendant appeals his convictions for Murder and related charges on admission of Blood Spatter Expert Testimony

Facts: The defendant murdered a woman who was subpoenaed to testify against him and left her body in a trash can along with the subpoena, her protective order, and other such documents. Police found a large blood stain on the victim's mattress. Police visited the defendant's home and found that the defendant's shoes had the victim's blood on them. The defendant also had the victim's DNA underneath his fingernails. It appeared that the defendant murdered the victim at her home and then moved the body into the trash can later.

At trial, the Commonwealth introduced "blood spatter" expert testimony from a Virginia State Police expert who had a master's degree in science which included advanced biology. She also had more than forty additional hours of training to become blood spatter-certified and attended several blood spatter training courses, including an advanced course and one where she helped train new examiners. The expert was an assistant instructor at another training. The expert had consulted in over 200 cases and had qualified as a blood spatter expert in court on three prior occasions and had never been rejected as an expert.

The defendant objected that the expert lacked the expert qualifications described in the National Research Council's 2009 publication "Strengthening Forensic Science in the United States: A Path Forward" (SFSUS) and therefore was not in fact qualified to testify as an expert in blood spatter. The trial court overruled the defendant's objection and permitted the expert to testify.

The expert explained that of the more-than-200 times she had consulted on blood spatter evidence, on 95% of those occasions she looked only at photographs. She explained that she had eighty hours of "photography experience and training." In this case, the expert testified that she referenced several materials when conducting her analysis, including photographs, certificates of analysis, and the autopsy report. She offered an opinion that was limited to three conclusions: First, that the blood on the defendant's shoe had dropped from a nearly ninety-degree angle, that the mattress had a saturation blood stain, and that blood stains police found in a car were "transfer stains." She based her opinion testimony regarding the drip on the shoe only on the photograph in evidence.

The defendant objected that the expert reached her conclusions after reviewing photographs only and did not go to the crime scene. The defendant also contended that the expert's opinion was impermissibly based in part on her out-of-court conversations about the photographs with the Commonwealth's Attorney.

Held: Affirmed. The Court held that the trial court acted within its discretion in ruling that the expert was qualified to testify as an expert in blood spatter evidence and give her opinion based on a photograph in evidence, and consequently, the trial court did not abuse its discretion by admitting her expert testimony at trial.

Regarding the expert's qualifications, including her academic degree in science and vocational training, the Court agreed that the witness was qualified to testify as a blood spatter expert. The Court repeated that Virginia law allows an expert to gain expertise solely through vocational training. The Court found that the record supported the conclusion that expert possessed a degree of knowledge of the subject matter of basing blood spatter opinion on photographs beyond that of persons of common intelligence and ordinary experience.

The Court also found that the fact that the expert reached her conclusions after reviewing photographs and did not go to the crime scene at most went to the weight of her testimony rather than its admissibility. As for the argument that the expert impermissibly based her opinion on her conversation with the prosecutor, the Court concluded that her conversation with the Commonwealth's attorney did not affect the admissibility of her opinion because, in testifying, she did not base her opinion on that conversation but instead on the photograph that was in evidence. The Court ruled that the trial court acted within its discretion by concluding that the Commonwealth laid an adequate foundation for the expert opinion regarding the blood on the shoe.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0153202.pdf

Virginia Court of Appeals
Unpublished

Smith v. Commonwealth: May 17, 2022

Richmond: Defendant appeals his convictions for Rape and Sexual Assault of a Child on Denial of Expert Testimony and Prosecutorial Misconduct

Facts: For several years, the defendant raped and sexually assaulted a child under the age of 13. He later confessed to law enforcement. Prior to trial, the defendant requested expert funds for two experts. The first expert was for a neuropsychological evaluation, alleging that he may be suffering from HIV-Associated Neurocognitive Disorder ("HAND"). The defendant proffered evidence, including that his longtime HIV doctor believed he "fit the profile" for HAND, that "half of all treated HIV patients have cognitive impairment," and that cognitive impairments caused by HAND "cannot be reversed" by "antiretroviral therapy."

The second expert he sought was an expert to testify that mental illness, including such disorders as major depression and anxiety, render a person more susceptible to confessing falsely. He proffered that he wanted to inform the jury as to the intrinsic (personal) and extrinsic (circumstantial)

factors that render an individual particularly susceptible to falsely confess under the pressure of interrogation techniques. The trial court denied the motion for both experts.

The defendant also requested funds for an expert in the police "Reid Technique" and a "police interrogation expert." The trial court denied those requests as well. The trial court excluded testimony from the defendant's proposed interrogation expert on "the surprising frequency of false confessions" because the science of false confession work was not sufficiently reliable and because the proposed expert had insufficient experience.

While the defendant was incarcerated, the jail recorded his phone calls and video recorded his movements in the jail. The video system's software automatically recorded all audio and video calls, including with counsel but the deputies could change a setting to indicate the visit was professional and thereby prevent the video call from being recorded. Later, however, the Commonwealth provided discovery that included a disc containing recordings of the defendant's phone calls and video visits, including privileged videos of two meetings with his own attorneys.

Although several police recruits listened to some of the phone calls for training purposes, no investigator, police officer, or prosecutor listened to or watched privileged materials, including the video recordings of the trial strategy meetings. The defendant moved to dismiss the indictments or, in the alternative, exclude at trial all recordings of his communications from the jail. The trial court denied the motion.

Held: Reversed and Remanded. The Court first found that the trial court erred in denying the defendant's request for funds for an expert to testify that mental illness, including such disorders as major depression and anxiety, render a person more susceptible to confessing falsely. The Court found that the defendant's "many proffers of proposed expert testimony made clear that mental illness and cognitive impairment, among other things, render a person more susceptible to interrogation techniques."

Regarding the HAND expert, the Court also found that, based on the indications that the defendant suffered from HAND, "a careful review of the entire record reveals that the proffers were sufficient to show that this was no mere fishing expedition. It was enough to provide significant and uncontradicted evidence of cognitive decline and of some cognitive impairments and to point out the sorts of cognitive impairments that can accompany HAND. In light of those proffers and the constitutional rights explained in Ake, we have no choice but to hold that the trial court erred."

The Court repeated that an expert may testify to a witness's or defendant's mental disorder and the hypothetical effect of that disorder on a person in the witness's or defendant's situation. In this case, the Court noted that the defendant's evidence was that he suffered from major depression and anxiety and had not been taking his anxiety medications for some time before the interrogation. The Court concluded that the defendant was therefore entitled to present expert testimony from a qualified expert on the susceptibility of a person suffering from major depression and unmedicated anxiety to making a false confession.

The Court wrote: "although many people have some familiarity with depression and anxiety and some other relatively common mental illnesses, an expert would have been appropriate in this case because of the diagnosis of major depression and the defendant's failure to take his anxiety medication for some time prior to the interrogation. The nature of the trial court's refusal to admit this testimony

and refusal to provide expert funds prevents us from being "sure that [the error] did not 'influence the jury' or had only a 'slight effect.'" … We do not know how the experts Smith requested would have testified regarding the hypothetical susceptibility to falsely confessing a person would be who suffered from major depression and had not taken his anxiety medications in some time. Therefore, we cannot draw a firm conclusion about how such testimony would or would not have affected the jury's decision."

The Court agreed, however, that the trial court properly denied the defendant's requests for experts in the "Reid Technique" and police interrogation. The Court found that the defendant's expert's proposed testimony on the "false confessions" was unreliable under *Spencer*. The Court wrote that "Simply watching many interrogations does not give a person experience in understanding whether those confessions are false in the same way that arresting drug users and distributors teaches a police officer what quantities are kept for personal use and what quantities are kept for distribution, or in the same way that working with tracking dogs for years makes a person aware of how accurate those dogs are at tracking."

The Court continued, "The science or field of false confessions work is narrow in scope and is still in the early stages of development. The peculiar difficulties of verifying the truth or falsity of confessions have not yet been resolved in any way that allows observers in the field of false confessions to gather sufficient samples of empirical data from which to draw sufficiently reliable conclusions about how likely the Reid Technique is, in general, to produce a false confession in the context of an accusation of a serious crime such as murder or child abuse." "An additional empirical problem arises from the need to compare false confessions to the total number of confessions, and to then compare true and false confessions secured by interrogation techniques to those secured by purely investigative techniques. In light of these uncertainties in a developing field of knowledge, we cannot say that no reasonable jurist could have reached the same conclusion as the trial court on this point."

Regarding the jail recordings, the Court explained that *Gheorghiu* required the defendant to show that the recording and disclosure of his privileged trial strategy meetings harmed him during the criminal proceedings. In this case, just as in *Weatherford*, prosecutors and investigators never learned or used any confidential information. The Court concluded, "Even if we were to hold that Smith's Sixth Amendment right to counsel had been violated, we would still conclude that he is not entitled to any remedy because he failed to show that he was prejudiced."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0750211.pdf

Walden v. Commonwealth: February 22, 2022

Richmond: Defendant appeals his sentence for Robbery and Abduction on refusal of funds for a Mitigation Expert.

Facts: Prior to sentencing for Robbery and Abduction, the defendant's counsel sought funds to retain an independent defense expert for consultation and evaluation for mitigation at his sentencing hearing. The defendant maintained that he had lashed out because of his "emotional trauma" and a

mitigation expert could expand his ability to address that trauma, inhibit impulses, and control his behavior in the future. The Commonwealth, in response, cited a "very detailed" presentence investigation report which in many ways contradicted the defense proffer. The trial court denied the defendant's request.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion by giving the proffer little weight and holding that the defendant failed to demonstrate a particularized need for expert assistance. The Court quoted *Hoverter* that "a mere hope or suspicion that favorable evidence may result from an expert's services does not create a constitutional mandate." The Court wrote: "Surely every defendant could justify a request for expert funds if the test only required an allegation that they might benefit from a psychological expert, but that is not the standard nor is it the Commonwealth's burden to fund such an expert in every case."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1376202.pdf

Hearsay

U.S. Supreme Court

Hemphill v. NY: January 20, 2022

Certiorari to the Court of Appeals of New York: Defendant appeals his conviction for Murder on Sixth Amendment grounds.

Facts: During a fight, the defendant fired a bullet that struck and killed a 2-year-old child. Initially, witnesses identified a third party as the perpetrator. Police executed a search warrant at the third party's residence and recovered two handguns, a revolver and a semi-automatic, which was the handgun used in the murder. After prosecutors indicted the third party for the murder, though, they determined that the defendant had framed the third party. They allowed the third party to plead guilty to unlawful possession of the revolver and dismissed the murder charge. At his plea colloquy, the third party explained that he possessed the revolver only, not the semi-automatic handgun used in the murder.

Later, police obtained DNA evidence implicating the defendant. The defendant's clothing was identical to the clothes described by the witnesses. The state charged the defendant for the murder. At trial, the defendant noted that police had recovered ammunition for the semi-automatic handgun at the third party's apartment and argued that the third party had killed the victim. The third party was not available for trial. Instead, the state introduced the transcript of the third party's plea allocution to suggest that he had only possessed the revolver.

The defendant objected on *Crawford* Sixth Amendment grounds. However, New York has a rule that a criminal defendant could "open the door" to evidence that would otherwise be inadmissible

under the Confrontation Clause if the evidence was "'reasonably necessary to correct a misleading impression'" made by the defense's evidence or argument. Based on that rule, the trial court admitted the transcript. The New York appellate division and court of appeals affirmed.

Held: Reversed. The Court wrote, "the role of the trial judge is not, for Confrontation Clause purposes, to weigh the reliability or credibility of testimonial hearsay evidence; it is to ensure that the Constitution's procedures for testing the reliability of that evidence are followed." The Court pointed out that *Crawford* had explicitly overruled the "reliability-based" approach in *Ohio v. Roberts.*

The Court acknowledged that the Sixth Amendment leaves states with flexibility to adopt reasonable procedural rules governing the exercise of a defendant's right to confrontation, such as contemporaneous objection requirements and, in the context of forensic evidence, "notice-and-demand statutes." However, the Court rejected the state's argument that its rule was a mere "procedural rule" that "treats the misleading door-opening actions of counsel as the equivalent of failing to object to the confrontation violation."

The Court also reaffirmed that, under *Illinois v. Allen*, the Confrontation Clause will not bar a defendant's removal from a courtroom if, despite repeated warnings, he "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." However, the Court explicitly did not decide the validity or application of the common-law "rule of completeness" as applied to testimonial hearsay.

Justice Alito filed a concurring opinion, joined by Justice Kavanaugh. He emphasized that a defendant can impliedly waive the Sixth Amendment right to confront adverse witnesses through conduct. He also pointed out that an implied waiver can take place when a defendant engages in a course of conduct that is incompatible with a demand to confront adverse witnesses. Thus, he contended, there are circumstances under which a defendant's introduction of evidence may be regarded as an implicit waiver of the right to object to the prosecution's use of evidence that might otherwise be barred by the Confrontation Clause, such as the traditional "rule of completeness."

Justice Alito wrote, "Having made the choice to introduce the statements of an unavailable declarant, a defendant cannot be heard to complain that he cannot cross-examine that declarant with respect to the remainder of that statement or the declarant's related statements on the same subject."

Justice Thomas filed the lone dissent, contending that the defendant did not raise his Sixth Amendment claim in the New York Court of Appeals, and therefore the Court lacked jurisdiction to review that court's decision.

Full Case At:
https://www.supremecourt.gov/opinions/21pdf/20-637_10n2.pdf

Virginia Supreme Court

Cortez-Rivas v. Commonwealth: February 3, 2022

Prince William: Defendant appeals his conviction for Rape on Sixth Amendment grounds.

Facts: The defendant sexually assaulted a child. Police interviewed the defendant, whose native language is Spanish, and recorded the interview on camera. During the interview, a detective asked questions and a Spanish-speaking officer translated. The officer who translated at the interview, however, retired prior to trial.

Prior to trial, another officer, who is fluent in Spanish, reviewed the body camera footage and independently translated the statements that the defendant made during the interview. The new officer generated a transcript of this interview in English and testified to her translation at trial. The defendant objected on Sixth Amendment *Crawford* confrontation grounds, but the trial court overruled his objection.

Held: Affirmed. The Court reaffirmed that the Constitution does not require that all persons who had some involvement in a criminal investigation be produced as witnesses. In this case, the Court noted that the retired officer was not a witness and no statements at all from him, testimonial or otherwise, were offered into evidence. Therefore, since he was not a witness, there was no constitutional requirement for the retired officer to be confronted at trial; the fact that he originally translated at the scene for the detective was immaterial for Confrontation Clause purposes.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1210011.pdf

Virginia Court of Appeals
Published

Davis v. Commonwealth: September 28, 2021

Stafford: Defendant appeals his conviction for Murder, Aggravated Malicious Wounding, and Use of a Firearm on Hearsay grounds.

Facts: The defendant shot and killed a man and shot and severely wounded a woman after luring them to the parking lot of a convenience store. The defendant and others set up the victim by luring him to an apparent drug deal. At trial, the Commonwealth introduced photographs of "Snapchat" text conversations that one of the defendant's friends had with various individuals prior to and after the murder. The trial court overruled the defendant's hearsay objection.

In one set of texts, prior to the murder, the defendant's friend asks the victim's friend to ask the victim how much five bars of Xanax are, and then tells the person to tell the victim that she is "five minutes from the McDonald's." The friend then asked what kind of car the victim was in. In another set of texts, while the defendant's friend and the victim's friend are discussing selling drugs, the victim's friend asserted that the victim did not like selling to "boys." The defendant's friend then said that he was on his way and that they were in a red Toyota.

Held: Affirmed. The Court concluded that most of the out-of-court statements in the text messages contained no assertions at all, and the statements that were assertions were not offered for their truth; therefore, the jury was entitled to consider them.

The Court analogized this case to *Fuller*, where statements made by an alleged assault victim to police were not admissible to prove that an assault happened but were admissible to explain to the jury why the police interacted with the defendant. The Court repeated that if evidence is admissible for any purpose, it is admissible, and therefore, if a hearsay statement has legitimate probative value that is unrelated to the truth of the matters asserted, it should be admitted, even if it could also be offered to prove the truth asserted (absent a showing that such evidence is inadmissible under some other rule of evidence).

In this case, the Court first noted that the friend's out-of-court statements prior to the murder contained no factual assertions whatsoever, and were instead non-assertive inquiries or instructions. Thus, the Court found that the statements did not assert any fact that could be proven true or untrue, nor did they impliedly assert some fact that could be proven true or untrue. Equally, the Court agreed that the question about what car the victim was in was also not an assertion of fact. Thus, because the defendant's friend did not assert anything in these inquiries, the Court concluded that the jury could not have possibly considered them for their truth and the hearsay rule did not prohibit their admission.

The Court then turned to the two purported assertions of fact that the Court admitted: first, the victim's friend's statement that the victim did not like selling to "boys"; and second, the defendant's friend's statement that he was in a red Toyota. The Court noted that the first assertion—that the victim did not like to sell drugs to boys—was not offered for its truth, but instead was an explanation of why the victim's friend was assisting the defendant's friend in contacting victim.

As for the second assertion, that is, that the defendant and the declarant were in a red Toyota, the Court also noted that this statement was not offered for its truth; the value of the evidence was not derived from whether the jury believed that the man was in a red Toyota (the Court pointed out that other evidence at trial showed that the defendant and his friends were in not in a red Toyota at all). Instead, the Court found that the statement showed that there were ongoing communications between the defendant's friend and the victim in the minutes leading up to the shooting.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1134204.pdf

Virginia Court of Appeals
Unpublished

Cobbs v. Commonwealth: May 17, 2022

Suffolk: Defendant appeals his convictions for Forgery of a Public Record, Identity Theft, and related charges on Admission of Court Records.

Facts: The defendant stole identifying documents from the victim. He later provided the victim's information to a police officer in Portsmouth. Later, when police arrested him for felony offenses, he again provided the false information, signing a legal rights document with the victim's name in front of the police and a financial statement form and recognizance form in front of the Magistrate.

At trial, the Commonwealth admitted certified copies of the financial statement form and recognizance form. No eyewitness testified that the defendant signed the financial statement and recognizance forms with the false name. However, the officer confirmed that he took the defendant before a magistrate and confirmed that the financial statement and recognizance forms were documents given to the defendant when he was before the magistrate. The defendant objected to the admission of the financial statement form and recognizance form, contending that the Commonwealth did not establish a sufficient foundation before admitting the form bearing the defendant's forgeries of the victim's signature into evidence.

Held: Affirmed. The Court ruled that under § 8.01-389 and Va. R. Evid. 2:902, the certified court records were authentic, and therefore the defendant's objection to admitting the two forms was more fairly characterized as a challenge to the weight to be given that evidence rather than a challenge to its admissibility.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0776211.pdf

Walker v. Commonwealth: May 3, 2022

Fairfax: Defendant appeals his conviction for Petit Larceny, 3rd offense, on Admission of Electronic Evidence and sufficiency of the evidence.

Facts: The defendant concealed several items while inside a Target store in shopping bags that had the Target logo on them. He then attempted to leave, paying for only a few items. Staff captured the defendant and brought him back into the store. After identifying the items in the defendant's possession that had not been paid for, staff used a scanner in "training mode" to print a "training receipt" that listed those items along with their value after any discounts. The defendant then tried to escape, but staff restrained him. He continued to struggle until police arrived.

At trial, the defendant objected to a "training receipt" that listed items he stole. He argued that the "training receipt" was inadmissible hearsay because it contained information that came from Target's system rather than the witness' personal knowledge and did not meet the criteria for the business record exception to the rule against hearsay. The witness explained that he generated the receipt by scanning the bar codes of the items. He further explained that the training receipts accessed the same information in the "Target system" as a normal receipt, with the only distinction being that they do not affect the records of the store's sales. The trial court admitted the receipt.

Held: Affirmed. The Court wrote: "We need not decide whether the training receipt was a business record because the record demonstrates that it was admissible under this Court's opinion in *Twine v. Commonwealth*, 48 Va. App. 224 (2006)." In *Twine*, the Court had held that the price tag exception to the hearsay rule in shoplifting cases permits the admission into evidence of a cash register receipt generated by scanning the bar codes on the stolen items of merchandise. The Court reasoned that the inherent unreliability of hearsay was not present because "the bar code imprinted on or attached to the item is scanned at a cash register," which reads the bar code and "access[es] the electronic data associated with that bar code" and "displays its name and purchase price."

Regarding sufficiency, the Court repeated that a defendant "may be said to have taken another's property by trespass though he has not removed it from the other's premises or from his presence." In this case, the Court agreed that the defendant committed a trespassory taking when he hid items.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0676214.pdf

Moser v. Commonwealth: March 1, 2022

Campbell: Defendant appeals her conviction for DUI on Exclusion of Hearsay Evidence.

Facts: The defendant drove herself and two children while under the influence of several drugs. An officer encountered her and administered field sobriety tests, which she failed. A blood draw revealed methamphetamine, amphetamine, buprenorphine, norbuprenorphine, and flualprazolam. At trial, the defendant's boyfriend attempted to testify about statements that a third party made to him, allegedly taking responsibility for putting the drugs in the defendant's drink. The defendant contended that the statements sought were against the declarant's penal interests and therefore within an exception to the rule against hearsay. The defendant further argued that the declarant was unavailable as a matter of law because her Fifth Amendment privilege against self-incrimination protected her from testifying against her penal interests at the defendant's trial. The trial court sustained the Commonwealth's objection to the statements.

Held: Affirmed. Because the third-party declarant never invoked her privilege against self-incrimination at trial, the Court held that the defendant did not meet her burden to prove unavailability. The trial court therefore properly rejected the defendant's argument that the boyfriend's hearsay testimony on the alleged statements fell within Rule 2:804(b)(3)'s exception to the rule against hearsay. The Court explained that the privilege against self-incrimination cannot be asserted by proxy. For that reason, the proponent of a statement against a declarant's penal interests bears the burden to secure the declarant's presence at trial, and from there, it is up to the declarant to decide whether she will invoke the privilege. In this case, the Court noted that the defendant made no effort to call the third-party declarant to the stand or otherwise secure her testimony for the trial court's benefit.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0134213.pdf

Impeachment

Virginia Court of Appeals
Published

Virginia Court of Appeals
Unpublished

Vaughn v. Commonwealth: February 1, 2022

Pittsylvania: Defendant appeals his convictions for Attempted Murder, Aggravated Malicious Wounding, and related charges on refusal to admit of Impeachment Evidence and sufficiency of the evidence.

Facts: The defendant shot the victim in the head at point-blank range while the victim was driving the defendant to go fishing. The defendant and the victim had been drinking together, and the defendant was complaining that the victim was driving too fast.

At trial, on cross-examination, the victim admitted that he was probably weaving while driving. Defense counsel then asked the witness "you've had problems driving drinking and weaving all over the road in the past, have you not?" The defendant explained that he seeking to inquire about an incident from 2014 where the victim was weaving while driving under the influence. He argued that such evidence was permissible and probative as it contradicted the victim's "claim that he was not weaving on the highway." He also argued that any past acts of weaving are "probative on the issue of credibility." This weaving was relevant, he claimed, because it supported his claim of self-defense, as he purportedly shot the victim out of fear for his life based upon the victim's alleged reckless driving. However, the trial court sustained the Commonwealth's objection to the question.

Held: Affirmed. The Court first held that the trial court did not err in excluding the defendant's proffered impeachment evidence. The Court pointed out that the witness did not deny weaving while driving, or that alcohol could affect his driving; therefore, there was no contradiction, as required by Rule 2:607(a)(vii). The Court also concluded that an isolated incident of weaving while driving, that occurred half-a-decade before the events at issue, has no relevance to whether the witness' "perception, memory, or narration was defective or impaired," or that there was reason to question his "sincerity or veracity" under Va. R. Evid. 2:607(a)(viii).

Regarding sufficiency, the Court agreed that a reasonable fact finder could infer malice from the defendant's deliberate act using a deadly weapon when he fired a weapon directly at the victim's head, at point-blank range.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1440203.pdf

Identification

Virginia Court of Appeals
Published

Ray v. Commonwealth: February 1, 2022

Radford: Defendant appeals his conviction for Distribution, 3rd Offense, on an Out-of-Court Identification by a Witness

Facts: The defendant regularly sold cocaine to a person who later became a police informant. The informant described the defendant in detail, although he did not know the defendant's real name. The informant had known the defendant for two or three years and that he saw him on a weekly basis during that time. As part of his cooperation agreement, the informant agreed to perform a controlled buy from the defendant. On the day of the controlled buy, an officer showed a single, unmarked DMV photo of the defendant to the informant, who confirmed that the man in the photo was the person from whom he had been purchasing cocaine.

The defendant moved to suppress the informant's out-of-court identification, but the trial court denied the motion. The defendant also objected to the informant's in-court identification, but the trial court overruled that objection.

Held: Affirmed. The Court clarified that the due process clause applies as a check on eyewitness identifications where "the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime." The Court explained, however, that the "word 'identification' need not set off the constitutional fire bell."

The Court contrasted this case with *Neil v. Biggers*, which addressed a crime victim who testified about an encounter with a total stranger under circumstances of emergency or emotional stress. In this case, the Court observed that the informant was not a witness to a crime when the officer showed him the photo. Rather than trying to identify the perpetrator of the crime, the Court observed that the police were only seeking to confirm the identity of the person the informant suggested as a target for the controlled buy.

In a footnote, the Court also noted that after the informant identified the defendant, the police did a thorough investigation to verify the information. Thus, the Court explained, the deterrence rationale of excluding the identification was not present in this case.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0808203.pdf

Prior Bad Acts

Virginia Court of Appeals
Published

Conley v. Commonwealth: May 3, 2022

Albemarle: Defendant appeals his convictions for Marital Sexual Assault on Prior Bad Acts and Jury Instruction Issues.

Facts: The defendant repeatedly sexually assaulted the victim while she was unconscious. The victim discovered that the defendant had recorded the assaults on video. Several assaults took place in Albemarle, and several took place in Fairfax. As in the Albemarle videos, the Fairfax videos show defendant engaging in identical sexual assaults upon victim while she was sleeping or unconscious. Prior to trial, the Commonwealth filed a motion in limine seeking to introduce the Fairfax videos as evidence of "prior bad acts" under Rule 2:303(b). The trial court agreed to admit the Fairfax videos over the defendant's objection.

On one occasion, the victim observed sediment on one occasion in a beer that the defendant handed to her. She recalled that the beer that was foaming out of its can and when she poured it into a glass, she observed a "sediment that filtered down and settle[d] on the bottom." In overruling the defendant's motion in limine to exclude this testimony, the trial court reasoned that the evidence was relevant to the issue of consent and whether the victim was physically helpless or merely "feigning" sleep. The trial court ordered the Commonwealth to refer only to "sediment" in the beer, rather than a "pill."

Although there is no model jury instruction for object sexual penetration, the trial court gave the following instruction:
"1) That the defendant penetrated the outer lips of the female sexual organ of [the victim] with any animate object; 2) That at the time [the victim] was physically helpless; 3) That at the time of the offense the defendant knew or should have known [the victim] was physically helpless; and 4) That the object sexual penetration was accomplished through the use of [the victim's] physical helplessness."

The trial court also gave an instruction to the jury on sodomy that instructed the jury that the Commonwealth must prove "That the penis of the defendant penetrated into the female sex organ of [the victim]," instead of the anus. Despite the error, the defendant did not object.

The defendant also requested that the trial court instruct the jury that lack of consent is an element of or that consent is an absolute defense to rape by physical helplessness. The trial court denied the defendant's request and instead gave a version of Instruction No. 44.300, which instructs the

jury regarding the crime of rape where the complaining witness was mentally incapacitated or physically helpless.

Held: Affirmed.

Regarding the Fairfax videos, the Court first rejected the defendant's contention that the trial court was required to cite the specific exception in Rule 2:303(b) upon which it relied. The Court wrote: "We have not, and do not now, require a trial court to make specific citation to a particular evidentiary rule each time it decides to admit or exclude a piece of evidence." The Court then agreed that the videos were probative. The Court explained that the videos were evidence of the relationship between the parties and show the defendant's conduct and attitude towards the victim. The Court also found that they tended to negate the defendant's assertion that the victim was role playing or feigning sleep and show instead that she was deeply asleep and possibly heavily medicated or intoxicated, as well as his knowledge of her physical helplessness.

The Court equally agreed that the videos countered the defendant's claim that he was acting consistently with the victim's consent to waken her. The Court also found that the videos were relevant evidence of the defendant's modus operandi as they demonstrated an idiosyncratic pattern of behavior toward the victim. The Court concluded that the videos were highly probative and therefore their value was not outweighed by their prejudicial effect.

The Court also agreed with the trial court's analysis regarding the "sediment" that the victim observed in her beer.

Regarding the defendant's argument regarding a "consent" instruction, the Court wrote: "To hold that a person can give prior consent to sexual activity taking place when they are asleep would deny that person the ability to withdraw that consent… consensual sexual activity requires "continued consent" during the duration of the activity, whenever a sleeping person is unable to express consent, that person consequently cannot consent to sexual activity."

The Court rejected the argument that, based on his theory that the victim may have been feigning sleep in the videos, the defendant was entitled to a consent instruction. The Court explained: "If the jury was persuaded by Conley's defense that J.M. was feigning sleep, then it necessarily could not find that the Commonwealth had satisfied this physical helplessness element and it would have to acquit."

The Court also analyzed the defendant's argument regarding object sexual penetration, § 18.2-67.2. The Court held that the means of accomplishing object sexual penetration and sodomy parallel those for accomplishing rape. Moreover, although the Virginia Model Jury Instructions do not contain separate instructions for object sexual penetration and sodomy accomplished through use of the victim's physical helplessness, the Court ruled that the object sexual penetration instruction given to the jury in this case was an accurate statement of the law.

The Court pointed out that, under *Nelson*, force includes both actual and constructive force. The Court repeated that "sleep rendered the victim unable to consent and proved constructive force," and explained that, because the defendant was prosecuted on the theory that he committed object sexual penetration and sodomy on the victim while she was asleep, and thus physically helpless, consent was not a proper issue on which the jury should have been instructed.

Lastly, the Court addressed the sodomy instruction. The Court acknowledged that anal intercourse was the only form of sodomy alleged in this case and supported by the evidence. Nevertheless, the Court found that the trial court's failure to properly instruct the jury on the element of penetration of the anus was harmless error beyond a reasonable doubt, and accordingly failed to meet the "ends of justice" exception to Rule 5A:18.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0682212.pdf

Fields v. Commonwealth: November 16, 2021

Charlottesville: Defendant appeals his convictions for Murder and Related Offenses on Refusal to Change Venue and Evidentiary issues.

Facts: The defendant drove a car into a group of pedestrians, killing one person and injuring others. The defendant had traveled to join the "Unite the Right" rally in 2017 in Charlottesville. The night before the murder, the defendant was captured on video marching and chanting, "Jews will not replace us; you will not replace us." While counter-protesters were marching the next day, the defendant drove his car toward the group of counter-protestors, stopped, and reversed his vehicle away from the crowd.

However, minutes later, the defendant accelerated forward rapidly and drove his vehicle directly into the crowd of counter-protestors, striking several people, causing some to fly up into the air, and running over others. One of them, a young woman, died as a result of her injuries, and eight other people were seriously injured. Immediately after hitting the pedestrians and another vehicle, the defendant reversed his vehicle away from the intersection, hitting another person in the process, before driving away. Police captured him as he attempted to flee.

Prior to trial, the defendant moved for a change of venue. He asserted that the trauma to the Charlottesville community, coupled with the significant pretrial publicity that his case received, impaired his constitutional right to have his case heard by an impartial jury. The trial court took the motion under advisement. After three days of selecting 16 jurors from an initial panel of 75, the trial court denied the motion for change of venue. The circuit court pointed out that "most of the news reports are carried by national news agencies, the Washington Post, New York Times, CNN, and MSNBC . . . and I'm thinking 'where could you go that people wouldn't be privy to that?'"

Prior to trial, the Commonwealth moved *in limine* to admit text messages between the defendant and his mother. In messages before the rally, the defendant's mother told him, "Be careful." In reply, the defendant said, "We're not the one[s] who need to be careful." He attached a photo of Adolf Hitler to that text message. The trial court admitted the messages over the defendant's objection.

At trial, the Commonwealth introduced two "memes" that the defendant circulated months before the murder (a "meme" is typically an image or video that it is spread widely through sites on the Internet.) The "memes" depicted a motor vehicle violently driving into a group of pedestrians, running some over, and flinging others into the air, because the driver was "late for work." The images included

the captions, “When I see protestors blocking” and “You have the right to protest, but I’m late for work.” The trial court admitted the images over the defendant’s objection.

At trial, the Commonwealth also admitted two taped phone conversations between the defendant and his mother that occurred while the defendant was confined pending trial. On the first call, the defendant stated that he had not done anything wrong. He told his mother that he had been “mobbed by a violent group of terrorists” and that he simply acted in self-defense. He also told his mother that the counter-protestors were waving the ISIS flag on the day of the attack and that the counter-protestors were communists. On the second call, the defendant specifically called the victim’s mother an “anti-white communist” and referred to her as “the enemy.” The trial court ordered redactions from the calls but admitted them over defendant’s objection.

[*Great Job to Joe Platania, Nina Antony, and their team in Charlottesville in this case – EJC*]

Held: Affirmed. The Court first held that the trial court did not err in denying the defendant’s motion for a change in venue. The Court agreed that the record supported the trial court’s conclusion that selecting jurors willing to honor their oath to keep an open mind and follow the court’s instructions was relatively easy, that the publicity was accurate and noninflammatory, and that there was not such widespread prejudice against the defendant that he could not obtain an impartial jury.

Regarding the change of venue, the Court repeated that: “whether to grant a venue change is not merely a mathematical calculation based on the number of prospective jurors considered and length of voir dire, but rather, a careful judicial review and analysis of the ‘totality of the surrounding facts.’” The Court then cautioned that the sheer volume of publicity is not sufficient, in and of itself, to justify a change of venue, particularly given the prolific volume of news available in the age of the internet. Instead, whether the publicity surrounding a defendant’s alleged crimes is accurate, temperate, and noninflammatory is a pertinent concern in assessing a change in venue.

The Court also cautioned that the shocking nature of a reported crime does not render the news articles themselves inherently inflammatory. Thus, articles that accurately report the facts, despite how shocking the facts are, will not be considered inflammatory. In this case, the Court noted that the trial court had reviewed the news articles and found that most of the news articles were factual in nature and accurate, most of them were not inflammatory, and the photos were inherently accurate because were photographs of what was happening.

Regarding the protest “meme” photographs, the Court first repeated that the fact that evidence is highly prejudicial to a party’s claim or defense, in and of itself, “is not a proper consideration in applying the balancing test.” Instead, Rule 2:403’s requirement that only unfair prejudice may be considered as grounds for non-admission reflects the fact that all probative direct evidence generally has a prejudicial effect to the opposing party. The Court clarified that the nature of the evidence must be such that it generates such a strong emotional response that it is unlikely that the jury could make a rational evaluation of its proper evidentiary weight. For example, the Court noted that particularly graphic crime scene or autopsy photos are inherently unfairly prejudicial because their shock effect prevents a layperson on a jury from being able to properly evaluate or weigh them in the context of the other evidence. In this case, the Court agreed that the “meme” photographs were probative of the defendant’s intent due to the memes’ striking similarity to the act.

Regarding the image of Adolf Hitler, the Court agreed that the prejudicial effect of such a picture would not necessarily substantially outweigh any probative value. In this case, the Court noted that the Commonwealth was arguing that the defendant was motivated by hatred for ethnic and political groups when he ran his car into the counter-protestors. Thus, the image of Adolph Hitler had significant probative value and was highly relevant because the defendant's intent, motive, and state of mind were at issue.

Regarding the jail calls, the Court also agreed that, because the defendant's intent was at issue in the case, the phone calls were relevant because they tended to show his state of mind and lack of remorse.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1964192.pdf

Virginia Court of Appeals
Unpublished

Sims v. Commonwealth: May 24, 2022

Newport News: Defendant appeals his convictions for Burglary, Assault, and related offenses on denial of his Motion to Sever.

Facts: The defendant kicked in the door of the victim's residence assaulted the victim. Police obtained warrants charging the defendant with burglary, assault and battery, and destruction of property. The defendant told another person: "Man I oughta shoot this bitch," referring to the victim, and "If I shoot this bitch, I ain't got no charges."

Two days later, someone kicked in the door of the victim's residence and shot and killed the victim while she was at home with her family. This person also shot a witness, who survived his injuries and identified the defendant as the shooter. The defendant was ultimately charged with first-degree murder, malicious wounding, armed burglary, discharge of a firearm in an occupied building, and use of a firearm in the commission of a felony, connected to this second incident.

The defendant moved to sever the two offenses, arguing that the "dates of offense are different," the "cases are different," and "[t]hey are not related and trying them together would result in prejudice to the defendant." He also argued that "these are two completely separate incidents, and they should not be tried together." The trial court denied the motion. At trial, the defendant was acquitted of the murder and related charges but was convicted of the earlier burglary and assault offenses.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion in finding the offenses were sufficiently connected considering that the victim was the same and that the first offense provided a motive and rationale for the second offense.

The Court first reviewed Rule 3A:10(c) and agreed that that the events were close in time (two days apart), the location was the same, and the means of commission was the same (in both the door was kicked in). The victim was also the same, and the evidence presented to the court was that the victim's reporting of the first incident, and the issuance of warrants to arrest the defendant for those offenses, are what caused the second incident. The Court also distinguished this case from *Cousett*.

The Court then analyzed the case by applying the law regarding "prior bad act" evidence. The Court concluded that evidence of the first incident would have been admissible in a separate trial on the second charges to prove motive as well as to establish the prior relations between the defendant and the victim.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0895211.pdf

Prior Convictions

Virginia Court of Appeals
Published

Parker v. Commonwealth: March 1, 2022

Suffolk: Defendant appeals his conviction for Possession of a Firearm by Felon on sufficiency of the evidence.

Facts: The defendant possessed a firearm after having been adjudicated delinquent of the felony offense of receiving stolen property. At trial, the Commonwealth offered three documents as proof that the defendant had been adjudicated delinquent of the felony offense of receiving stolen property: (1) a petition from the J&DR court, (2) a disposition order from the J&DR court, and (3) a signed order from the J&DR court requiring the defendant to be fingerprinted at the jail. The documents showed that the defendant had been charged with receiving stolen property in excess of $200 in violation of § 18.2-108. However, the J&DR court's disposition order contained two empty boxes, one for "misdemeanor" and one for "felony," and neither box had been checked by the court.

Held: Affirmed. The Court concluded that, unlike in *Palmer*, here the disposition order contained a judgment. Unlike in *Preston*, the Court pointed out that in this case, the disposition order clearly showed that the defendant pled guilty to receiving stolen property as the petition was amended. To the extent that the petition and disposition order were ambiguous, the Court also noted that the fingerprinting order—which was signed by the J&DR court on the same date as the disposition order—also stated that the offense was "Rec[eiving]/buy[ing] stolen goods > $200."

The Court also explained that the fingerprinting order supported the finding that the charge was never reduced to a misdemeanor. The Court wrote: "While it undoubtedly would have been clearer if the J&DR court had checked the box next to "felony" on the disposition order, upon reviewing the

record, the circuit court did not have to engage in impermissible conjecture or surmise to determine that Parker was adjudicated guilty of the delinquent act of feloniously receiving stolen goods."

Judge Callins wrote a concurring opinion, rejecting the panel's reasoning but agreeing with the conclusion.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0684211.pdf

Miscellaneous Evidentiary Issues

Fourth Circuit Court of Appeals

Plymail v. Mirandy: August 10, 2021
8 F.4th 308 (2021)
W.Va: Defendant appeals his conviction for Sexual Assault on Due Process grounds, regarding the Prosecutor's Closing Argument.

Facts: A jury convicted the defendant of sexual assault in 1993. At trial, in his closing argument, the defendant's attorney discussed alleged societal ills that would result from a guilty verdict. Defense counsel discussed the difficulty of disproving rape charges: "A rape charge is very easy to make but it is the most difficult to defend against." After focusing on how easy it was for an "angry, offensive" woman to harm "innocent . . . males," defense counsel warned the men in the jury: "This is dangerous, Gentleman. . . . it's dangerous to even look at a woman today because she can shout 'Rape' under any condition . . . and you have to disprove it and it's tough because there are only two people there and society tends to believe the woman."

Rather than object to the defense argument, the prosecutor addressed the arguments in rebuttal. The prosecutor warned the jury of the existence of "trickster lovers" who disguise themselves to "your sons and daughters" as well-intentioned individuals, but have a "sweet tooth . . . for masochistic, sadomasochistic horror." These "trickster lovers," the prosecutor explained, would be sent a message from the jury's verdict. That message would either be that the community would not condone such behavior or that the "sadomasochistic" persons are free to do as they please. The prosecutor then left the jury with a final thought: "[t]hink of the community" and deliver a verdict "for womankind, for all of us."

The defendant was no longer incarcerated for this sexual-assault charge while the *Habeas* was pending; he was released from incarceration on that charge. However, he remained in custody awaiting trial on a separate set of charges.

Held: Reversed. The Court found that the prosecutor's statements exhorting the jury to protect women and send a message to the community and to "sadomasochistic" persons rendered the trial so fundamentally unfair as to deny the defendant due process of law. Writing that "The details of his

conviction are disturbing," the Court concluded that the defendant was entitled to *habeas* relief based on the prosecutor's improper statements.

The Court first addressed whether the defendant's *habeas* petition was moot, due to his release from custody on the charge. The Court found that, because it is possible that the defendant's sexual-assault conviction could be used in the pending new proceeding or to enhance his sentence if convicted, the case was not moot.

Regarding the prosecutor's comments in closing argument, the Court repeated that prosecutors may not seek a conviction based on prejudice or passions and that they violate this edict when they stray beyond the defendant's crimes and ask the jury to convict in order to "send a message to the community." The Court also repeated that it may grant relief only if the prosecutor's remarks were so improper as to deny the defendant a fundamentally fair trial. Clearing this high bar requires two findings: first, that the remarks were plainly improper, and second, that the remarks so prejudiced the defendant's substantial rights that he was denied a fair trial.

The Court acknowledged that isolated passages of a prosecutor's argument often fail to violate due process. In this case, however, the Court criticized the prosecutor here for focusing the rebuttal argument on sending a message to the community and protecting the jurors' own children from sexual assault.

Regarding defense counsel's inappropriate arguments in closing, the Court wrote: "two wrongs do not make a right. Defense counsel's misconduct does not grant the prosecutor a "license to make otherwise improper arguments."" In this case, the Court concluded that "the prosecutor's powerful, extensive, and plainly improper statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process.""

Full Case At:
https://www.ca4.uscourts.gov/opinions/196412.P.pdf

Virginia Court of Appeals
Published

Howard v. Commonwealth: May 10, 2022

Stafford: Defendant appeals his conviction for Bomb Threats on Admission of Intent Evidence and sufficiency.

Facts: The defendant threatened the victim, his wife, that "I'll blow your car up with you in it or not if you try to leave." She later testified that she felt scared because the defendant, who was on active military duty, "has blown up things . . . on base" and "knows how to work on vehicles and he builds guns for a living."

Four hours later, the defendant returned home, crashing his vehicle into trash cans and holding down his car horn. He attempted to enter the house but became enraged when he encountered the front door barricaded and began pounding and beating on the door. The defendant entered the home

and spat on the victim. The victim barricaded herself in a room with the defendant's firearms and ammunition until the police arrived.

Prior to trial, the defendant pled no contest to the assault and battery charge for spitting on his wife. He then sought to exclude evidence of the 911 telephone call, the defendant's gun ownership, and testimony of about the evening argument and the victim's reactions to his behavior. The trial court excluded the evidence of the spitting but refused to exclude the other evidence.

The trial court also rejected the defendant's argument that, under § 18.2-83, he was not guilty because he owned the vehicle that he threatened to bomb.

Held: Affirmed. The Court concluded that the evidence that the trial court admitted related to the events following the threat, the defendant's ability to carry out the threat, the victim's belief in the threat, and the relationship between the defendant and the victim. The Court explained that the defendant was not entitled to a "sanitized" version of the facts and that the day's events were interconnected. The Court also explained that the caselaw does not support the defendant's argument that a four-hour period renders evidence irrelevant.

The Court rejected the defendant's argument that his other actions that day were evidence of another "bad act." Because the entire day was part of a continuing domestic dispute and a reasonable jurist could find that the evidence was not substantially more prejudicial than probative, the Court concluded that the trial court did not abuse its discretion in admitting evidence about the events following the threat.

The Court also rejected the defendant's argument that the *Perkins* ruling limited the application of § 18.2-83(A). Instead, the Court explained that "Nothing in the statute's plain language carves out threats to burn or bomb one's own property from the scope of the offense."

Tags: Evidence – Relevance – Intent; Threats to Burn – Personal Property

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0495214.pdf

Walker v. Commonwealth: April 5, 2022

Prince William: Defendant appeals his convictions for Abduction for Pecuniary Benefit, Robbery, and Use of a Firearm, on Enhancement of his Subsequent Convictions, Admission of Identification, and Fourth Amendment grounds.

Facts: The defendant robbed a bank using a firearm. The defendant threatened tellers and several customers, including one man whom he struck across the face and neck with his right arm. In response to being hit, the victim said he threw himself to the ground "because I saw that person with a weapon and I was fearful, I felt threatened." The victim remained on the floor for the duration of the bank robbery because he was fearful of the defendant and the gun.

The defendant wore a mask, gloves, and a yellow vest. He abandoned the mask near the bank, and law enforcement later found the defendant's DNA on it. The bank's surveillance video captured an image of the defendant. Police captured the defendant during a traffic stop two days later and found the bank's stolen money in the car.

Officers also found a cellphone in the defendant's car. Officers obtained a search warrant for the phone on June 23. On July 5, the forensic unit requested the phone, which they received on July 8. The forensic extraction of the phone's data began on July 25 and ended on July 28. Officers filed a return on the warrant on July 28. The return stated that the warrant was executed on June 23. Examining the phone, officers found that the defendant had read an article about the robbery multiple times and also had googled the phrase "Do sweat have DNA."

Prior to trial, the defendant objected to any in-court identification by any eyewitness. He argued that no witness should be allowed to identify him in court without first successfully identifying him out of court in a double-blind array. The defendant also moved to suppress the search of the cellphone, arguing that the search of the cell phone was not executed "forthwith" as required by Code § 19.2-56. He also challenged the warrant as void because the search had not been conducted within fifteen days of the issuance of the warrant.

At trial, the jury found the defendant guilty of four counts of Use of Firearm. The trial court instructed the jury to impose a three-year sentence for the first charge of use of a firearm and separate five-year sentences for each of the other three counts of Use of a Firearm charges for which the jury had found him guilty. The defendant argued that the trial court should have instructed the jury to find him guilty of four first offenses.

On appeal, the defendant also argued that he was not guilty of abduction of the customer whom he struck.

Held: Affirmed. Regarding the abduction of the customer, the Court acknowledged that the blow to the customer's head and neck did not knock the customer to the ground and that the defendant did not verbally command the customer to the ground or to remain in place. However, the Court agreed that, by his threatening actions, the defendant induced fear and exercised control over the customer, causing him to go to the floor and remain there for the duration of the robbery. Thus, the Court ruled that the evidence was sufficient to support the conclusion that the defendant seized or detained the victim within the intendment of § 18.2-47(A).

The Court also concluded that all the defendant's actions towards the victim, from striking him to waving the gun around, were designed to control the victim's movements so as to facilitate the robbery of the tellers. The Court rejected the defendant's argument that, because his overarching intention was to facilitate the bank robbery, he could not have possessed the necessary intent to restrict liberty. The Court found that the defendant's admitted intention to commit bank robbery does not negate that he simultaneously harbored the intent to restrict the victim's liberty.

The Court explained that to be guilty of abduction for pecuniary benefit in violation of § 18.2-48, the defendant had to possess both the intent to deprive the victim of his liberty and an intent to achieve pecuniary gain. Given the necessity of both intents existing simultaneously, the establishment of one does not negate the existence of the other. The Court agreed that the evidence presented at trial was

sufficient to raise jury questions as to whether the defendant seized or detained the victim and whether he had the intent to deprive the victim of his personal liberty.

Regarding the Use of a Firearm convictions, the Court agreed that, under *Batts,* in the single prosecution context, a defendant cannot be sentenced to the enhanced five-year mandatory minimum for a second conviction without the trial court having convicted of a predicate first such offense. However, unlike the situation in *Batts*, in this case the Court noted that all of the Use of a Firearm charges were tried in a single prosecution, and therefore the Court ruled that the trial court did not err in instructing the jury at sentencing that the second, third, and fourth guilty findings were to be treated as second or subsequent convictions subject to the enhanced sentencing provision of § 18.2-53.1.11.

Regarding admission of the in-court identifications by the witnesses, the Court concluded that the trial court did not err in admitting the witness' in-court identification of the defendant as the perpetrator or in refusing the defendant's request to implement protective procedures. In a footnote, the Court wrote: "Allowing a victim to identify the perpetrator of the crime is not unfair" under Rule 2:403. The Court continued that "identity will be a matter 'in issue' in any case in which a defendant is challenging an identification. It is hard to see how an eyewitness' identification of the perpetrator would not be relevant under this standard. Thus, with the exception of rare cases such as those involving drug-induced testimony or testimony while under hypnosis … witness identifications are likely to be relevant under Rule 2:402(a)."

The Court then rejected the defendant's argument that either the Fourth Amendment or §19.2-56(A) provide for suppression of the evidence when officers do not download evidence from a cellphone within 15 days of the issuance of the warrant. The Court wrote: "Even if we were to agree with Walker that the warrant was not executed within the time frame set forth in Code § 19.2-56(A), he still would not be entitled to the remedy— suppression—that he seeks. A mere violation of state statutory law does not require that the offending evidence be suppressed, unless the statute expressly provides for an evidentiary exclusion remedy… Code § 19.2-56(A) provides for no such remedy." The Court continued, "the United States Supreme Court consistently has rejected arguments like Walker's that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs."

Judge Lorish dissented on two grounds. First, Judge Lorish contended an initial identification during trial is unnecessarily suggestive and that, therefore, the court should have applied the *Biggers* factors to determine whether, under the totality of the circumstances, the teller's identification of the defendant was reliable enough to be presented to the jury. Judge Lorish argued that the evidence in this case was not strong. The majority countered, however, that "on multiple occasions, the dissent relied upon dissenting opinions from non-Virginia courts. These citations are not only not the law in Virginia, but also are not the law in the jurisdictions in which they were rendered."

Judge Lorish then addressed the enhanced punishments for Use of a Firearm. She argued that the Court should overrule *Ansell* because "so-called recidivist penalties serve no purpose where the "subsequent" offense occurs at the same time as the initial offense." She cited several studies and reports to criticize the law as written and contended that the Court should substitute her policy judgment for that of the General Assembly by judicially re-writing the statute to eliminate the enhancement.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1211204.pdf

Ndunguru v. Commonwealth: August 3, 2021
73 Va. App. 436, 861 S.E.2d 75 (2021)
Fairfax: The defendant appeals his convictions for Fraud on Violation of the Rule on Witnesses

Facts: The defendant committed extensive Medicaid fraud, stealing millions of dollars. At trial, one of the Commonwealth's witnesses arrived late, and had not been present when the trial court issued the rule on witnesses. The witness entered the courtroom during another witness' testimony. No one had told her to wait outside and she told no one she was present. She did not know the witness who was testifying and had never seen him before. She heard the testifying witness identify one of the exhibits offered by the Commonwealth, and nothing more. She was in the courtroom about twenty minutes, until the Commonwealth's investigator saw her and told her to leave the courtroom.

The defendant moved to exclude the testimony of the witness in violation of the rule on witnesses, but the trial court overruled the motion. The trial court found that the witness had not adulterated her testimony as a result of what she overheard of the testifying witness' testimony.

Held: Affirmed. The Court repeated that a trial court has discretion to decide whether a witness who violates a rule on witnesses should be prohibited from testifying. The Court quoted the Virginia Supreme Court's recent *Galiotos* ruling, a civil case from June, in defining the parameters of that discretion. Referring to the 1990 *Young* case, the Court explained that "without adulteration there can be no prejudice to a defendant."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0855204.pdf

Ruff v. Commonwealth: July 27, 2021
73 Va. App. 405, 860 S.E.2d 414 (2021)
Hanover: Defendant appeals his convictions for Child Sexual Assault on the use of Closed-Circuit Testimony.

Facts: The defendant sexually assaulted his daughter. The trial court granted the Commonwealth's motion to present the victim's testimony by closed-circuit pursuant to § 18.2-67.9, over the defendant's objection. At trial, the victim was in an anteroom with the Commonwealth, the defendant's counsel, and a police officer who operated the closed-circuit system. The defendant was able to view the testimony over the closed-circuit equipment and was provided with a direct telephone line connected to a telephone in the anteroom so that he could confer with his counsel during any examination or cross-examination. Specifically, the trial court provided the defendant with a telephone

on which he could press any two numbers, which would cause the phone to ring in the anteroom so that he could communicate with his counsel.

The defendant objected to this arrangement, arguing that argued that the closed-circuit equipment did not provide contemporaneous communication between him and his counsel.

Held: Affirmed. The Court held that providing a criminal defendant with a telephone to communicate with defense counsel meets the statutory requirement of § 18.2-67.9 that a defendant be provided with a means of "contemporaneous communication." The Court pointed out that, practically speaking, instantaneous communication during cross-examination is not possible in a courtroom and is certainly not required to meet the requirement of contemporaneous communication.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0694202.pdf

Virginia Court of Appeals
Unpublished

Smith v. Commonwealth: May 17, 2022

Richmond: Defendant appeals his convictions for Rape and Sexual Assault of a Child on Denial of Expert Testimony and Prosecutorial Misconduct

Facts: For several years, the defendant raped and sexually assaulted a child under the age of 13. He later confessed to law enforcement. Prior to trial, the defendant requested expert funds for two experts. The first expert was for a neuropsychological evaluation, alleging that he may be suffering from HIV-Associated Neurocognitive Disorder ("HAND"). The defendant proffered evidence, including that his longtime HIV doctor believed he "fit the profile" for HAND, that "half of all treated HIV patients have cognitive impairment," and that cognitive impairments caused by HAND "cannot be reversed" by "antiretroviral therapy."

The second expert he sought was an expert to testify that mental illness, including such disorders as major depression and anxiety, render a person more susceptible to confessing falsely. He proffered that he wanted to inform the jury as to the intrinsic (personal) and extrinsic (circumstantial) factors that render an individual particularly susceptible to falsely confess under the pressure of interrogation techniques. The trial court denied the motion for both experts.

The defendant also requested funds for an expert in the police "Reid Technique" and a "police interrogation expert." The trial court denied those requests as well. The trial court excluded testimony from the defendant's proposed interrogation expert on "the surprising frequency of false confessions" because the science of false confession work was not sufficiently reliable and because the proposed expert had insufficient experience.

While the defendant was incarcerated, the jail recorded his phone calls and video recorded his movements in the jail. The video system's software automatically recorded all audio and video calls,

including with counsel but the deputies could change a setting to indicate the visit was professional and thereby prevent the video call from being recorded. Later, however, the Commonwealth provided discovery that included a disc containing recordings of the defendant's phone calls and video visits, including privileged videos of two meetings with his own attorneys.

Although several police recruits listened to some of the phone calls for training purposes, no investigator, police officer, or prosecutor listened to or watched privileged materials, including the video recordings of the trial strategy meetings. The defendant moved to dismiss the indictments or, in the alternative, exclude at trial all recordings of his communications from the jail. The trial court denied the motion.

Held: Reversed and Remanded. The Court first found that the trial court erred in denying the defendant's request for funds for an expert to testify that mental illness, including such disorders as major depression and anxiety, render a person more susceptible to confessing falsely. The Court found that the defendant's "many proffers of proposed expert testimony made clear that mental illness and cognitive impairment, among other things, render a person more susceptible to interrogation techniques."

Regarding the HAND expert, the Court also found that, based on the indications that the defendant suffered from HAND, "a careful review of the entire record reveals that the proffers were sufficient to show that this was no mere fishing expedition. It was enough to provide significant and uncontradicted evidence of cognitive decline and of some cognitive impairments and to point out the sorts of cognitive impairments that can accompany HAND. In light of those proffers and the constitutional rights explained in Ake, we have no choice but to hold that the trial court erred."

The Court repeated that an expert may testify to a witness's or defendant's mental disorder and the hypothetical effect of that disorder on a person in the witness's or defendant's situation. In this case, the Court noted that the defendant's evidence was that he suffered from major depression and anxiety and had not been taking his anxiety medications for some time before the interrogation. The Court concluded that the defendant was therefore entitled to present expert testimony from a qualified expert on the susceptibility of a person suffering from major depression and unmedicated anxiety to making a false confession.

The Court wrote: "although many people have some familiarity with depression and anxiety and some other relatively common mental illnesses, an expert would have been appropriate in this case because of the diagnosis of major depression and the defendant's failure to take his anxiety medication for some time prior to the interrogation. The nature of the trial court's refusal to admit this testimony and refusal to provide expert funds prevents us from being "sure that [the error] did not 'influence the jury' or had only a 'slight effect.'" … We do not know how the experts Smith requested would have testified regarding the hypothetical susceptibility to falsely confessing a person would be who suffered from major depression and had not taken his anxiety medications in some time. Therefore, we cannot draw a firm conclusion about how such testimony would or would not have affected the jury's decision."

The Court agreed, however, that the trial court properly denied the defendant's requests for experts in the "Reid Technique" and police interrogation. The Court found that the defendant's expert's proposed testimony on the "false confessions" was unreliable under *Spencer*. The Court wrote that "Simply watching many interrogations does not give a person experience in understanding whether

those confessions are false in the same way that arresting drug users and distributors teaches a police officer what quantities are kept for personal use and what quantities are kept for distribution, or in the same way that working with tracking dogs for years makes a person aware of how accurate those dogs are at tracking."

The Court continued, "The science or field of false confessions work is narrow in scope and is still in the early stages of development. The peculiar difficulties of verifying the truth or falsity of confessions have not yet been resolved in any way that allows observers in the field of false confessions to gather sufficient samples of empirical data from which to draw sufficiently reliable conclusions about how likely the Reid Technique is, in general, to produce a false confession in the context of an accusation of a serious crime such as murder or child abuse." "An additional empirical problem arises from the need to compare false confessions to the total number of confessions, and to then compare true and false confessions secured by interrogation techniques to those secured by purely investigative techniques. In light of these uncertainties in a developing field of knowledge, we cannot say that no reasonable jurist could have reached the same conclusion as the trial court on this point."

Regarding the jail recordings, the Court explained that *Gheorghiu* required the defendant to show that the recording and disclosure of his privileged trial strategy meetings harmed him during the criminal proceedings. In this case, just as in *Weatherford*, prosecutors and investigators never learned or used any confidential information. The Court concluded, "Even if we were to hold that Smith's Sixth Amendment right to counsel had been violated, we would still conclude that he is not entitled to any remedy because he failed to show that he was prejudiced."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0750211.pdf

MISCELLANEOUS

Appeals

Virginia Court of Appeals
Published

Jacks v. Commonwealth: May 17, 2022
Aff'd Panel Ruling of August 24, 2021
Rockbridge: Defendant appeals his conviction for DUI on denial of his Misdemeanor Appeal.

Facts: The defendant drove while intoxicated. The General District Court found him guilty at trial on March 16, 2020. The defendant filed a notice of appeal of his DUI conviction from the general district court to the circuit court. The general district court documents were filed in the circuit court on June 10, 2020. The circuit court entered an order on June 16, 2020, denying the appeal and remanding the matter to the general district court. The circuit court reasoned that the notice of appeal was filed outside the 10-day period prescribed in § 16.1-132.

On the same day as the original GDC conviction, March 16, 2020, the Supreme Court of Virginia declared a Judicial Emergency in Response to the COVID-19 Emergency and suspended all non-essential court proceedings. The Court's order, entered pursuant to the authority of § 17.1-330, expressly "tolled and extended" all "deadlines."

On appeal, the defendant argued that the circuit court erred in finding that he did not timely file his notice of appeal of his misdemeanor conviction. Although he admitted that the notice of appeal was not filed within ten days of the conviction as required by § 16.1-132, he cited the Supreme Court's emergency orders pertaining to the COVID-19 pandemic, which, he argued, effectively tolled the deadline to appeal.

The Court of Appeals panel affirmed the dismissal, ruling that the defendant waived his argument by failing to raise this issue in the circuit court and obtain a ruling thereon, as required by Rule 5A:18.

Held: Affirmed. Like the Court of Appeals, the Court noted that nothing prevented the defendant from seeking a stay, modification, vacation, or reconsideration of the circuit court's ruling pursuant to Rule 1:1(a) so that he could ask the trial court to rectify its *ex parte* order on the ground that the Virginia Supreme Court's emergency orders extended the time limit for noting an appeal under Code § 16.1-132. The Court wrote: "Although appellant did not have the opportunity to note an objection at the time the circuit court denied his appeal of the lower court's decision, he had the opportunity to challenge and object to the circuit court's decision in a manner that would have been considered timely under Virginia law. See Rules 1:1(a) and 5A:18. For whatever reason, he chose not to do so."

Judge Huff dissented, as he had from the panel ruling, contending that the defendant had no opportunity to contemporaneously object to the trial court's denial of his appeal.

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/0833203.pdf

Johnson v. Commonwealth: February 15, 2022

Norfolk: Defendant appeals his conviction for Driving on Suspended but named the wrong party.

Facts: The defendant drove while suspended and was convicted in Circuit Court. The City Attorney prosecuted the defendant under the local Norfolk ordinance. Although the sentencing order listed the offense as a violation of § 46.2-301, the disposition notice included a reference to Norfolk City Ordinance § 25-152, the local ordinance that prohibits driving with a suspended license. The defendant appealed.

Although the defendant styled his notice of appeal "Commonwealth of Virginia v. Eugene Johnson," the certificate in the notice correctly identified the City of Norfolk as the appellee and the certificate of service states that it was served on the City Attorney. The City moved to amend the style of the case. The defendant and the Commonwealth did not object to the amendment.

Held: Amendment granted. The Court published an opinion, writing: "This issue arises with such regularity that members of the bar may benefit from the publication thereof." The Court explained that mistakenly identifying the Commonwealth, rather than the locality, as the prosecuting authority is not a fatal jurisdictional defect. The Court noted that the city had proper notice of the appeal, entered a general appearance, and requested that the Court amend the style of the case. By doing so, the Court found that the city waived any objection to the defect in the notice of appeal.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1085211.pdf

Extraordinary Writs

Virginia Court of Appeals
Published

Haas v. Commonwealth: April 19, 2022

Powhatan: Defendant seeks a Writ of Actual Innocence

Facts: In 1992, after a trial, the defendant received two life sentences for sexual assault of his sons. The defendant's wife had brought his sons to a counselor, who documented their statements, and then to the police. At trial, both sons testified that the defendant sexually assaulted them.

Police arranged a medical examination by at the hospital. At trial, a physician testified to injuries she had documented on the children, including tears and scarring on their bodies, including their anuses. Other experts, including Dr. Robin Foster, testified at trial as well and confirmed that the photos were consistent with external trauma. The trial court convicted the defendant.

The defendant sought *Habeas* relief in 1999 based on one of the sons' recantations of his testimony, but the defendant was not successful. In 2009 the defendant sought a Writ of Actual Innocence based on recantations by both of his sons, who filed affidavits explaining that the defendant had beaten them but did not sexually abuse them. The sons blamed their mother and their counselor for convincing them to make the false allegations. The Court of Appeals denied the writ and the Virginia Supreme Court affirmed in *Haas v. Commonwealth*, 283 Va. 284 (2012).

In 2020, the defendant filed a second petition for a Writ of Actual Innocence. In this new petition, the defendant included an affidavit from a psychiatry professor who argued that the children "were repeatedly subjected to a wide array of suggestive techniques by different interviewers who were highly biased to believe that [they] were abused."

In this second petition, the defendant also included an affidavit from Dr. Robin Foster, who had testified on behalf of the Commonwealth at the original trial. Dr. Foster explained that the standards for evaluation of child sexual abuse have changed since 1994 based on further research and clinical experience. Dr. Foster attested that she re-examined the medical records and photographs from the 1994 examinations and under current standards would reach different conclusions. The defendant also included similar affidavits from other physicians.

The Court of Appeals remanded the case to the trial court to take evidence. The physicians, including Dr. Foster, testified consistent with their affidavits. Dr. Foster testified that her present opinion is that the examination findings and photographs from the medical examinations that were utilized at trial do not support a finding of sexual abuse. She explained the change in her opinion, noting that, based on continued research in the field, "none of the physical findings that served as a basis for her medical testimony against [the defendant] in 1994 are regarded today as a sign of sexual abuse" and that the examination findings did not support a finding of sexual abuse.

Before the Court of Appeals, the Commonwealth did not oppose the defendant's petition.

Held: Writ Granted. Although the Court agreed that the trial evidence had been sufficient, the Court was convinced by a preponderance of the evidence that no rational factfinder considering all the evidence, would find that the defendant committed these offenses.

The Court first agreed that the affidavits and statements submitted by or on behalf of Dr. Foster and the other MCV physicians who testified in 1994 constitute new evidence for the purposes of § 19.2-327.11(A)(iv)(a) and § 19.2-327.11(A)(vi)(a). The Court of Appeals noted that the trial court had concluded that the medical consensus underpinning the new opinions simply did not exist in 1994. Thus, the evidence offered would not have been available in 1994 because the medical consensus upon which they are based did not exist at that time.

The Court concluded that the recantations and associated explanations of Dr. Foster and the other MCV physicians who testified at trial, the evidence regarding the new medical consensus completely undermining the corroborative force of the physical examination findings that were crucial to the original factfinder's guilt determination, the entirety of the new expert evidence, and the

affidavits of the children not only recanting their trial testimony, but explaining why and how they came to give that testimony, coupled with the circuit court's finding on remand and the Commonwealth's concession, it is more likely than not that "no rational trier of fact would have found proof of guilt beyond a reasonable doubt" pursuant to § 19.2-327.11(A)(vii).

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0878202.pdf

Parson v. Commonwealth: March 22, 2022

Henrico: Defendant seeks Writ of Actual Innocence regarding Murder conviction.

Facts: The defendant and his co-defendant murdered a man in his car by shooting at him repeatedly and killing him, in view of several eyewitnesses. Police recovered two firearms from the defendants' vehicle and DFS matched one of the firearms to the bullet that finally killed the victim; that firearm had been underneath the defendant's seat in the vehicle. Police arrested the defendant soon after the murder and recovered gunshot residue from his hands. Police arrested the co-defendant as well; he claimed that he had discarded his own firearm. The co-defendant later agreed to plead guilty and cooperate with the Commonwealth at trial.

The defendant pled guilty to the offense and confirmed at the colloquy that he was guilty of the crime. During the colloquy, the Commonwealth proffered the facts in detail, including what the co-defendant would have said at trial.

Three years later, the defendant sought a writ of actual innocence under §§ 19.2-327.10 et. seq. The defendant relied on an affidavit executed by his codefendant, who claimed that he, not the defendant, fatally shot the victim. The affidavit further stated that although the defendant was present at the scene of the murder, he "had nothing to do" with the killing. However, the co-defendant declined to answer questions posed by the Attorney General's investigator.

Held: Writ Dismissed. The Court ruled that the defendant did not meet his burden to prove that no rational fact finder, when considering the affidavit together with all the other evidence in the record—including the defendant's own sworn admission of guilt—would find proof of guilt beyond a reasonable doubt.

The Court reaffirmed that the evidence presented at the guilty plea hearing provided a record "against which any newly discovered evidence may be compared." In addition, the Court acknowledged that "solemn declarations during a plea colloquy in open court carry a strong presumption of verity."

The Court complained that the affidavit neither acknowledged nor explained the fundamental inconsistencies between the Commonwealth's proffer of the co-defendant's expected testimony and the conflicting account in the affidavit. The Court found those omissions especially significant considering that the co-defendant's plea agreement required him to "fully, completely and truthfully cooperate" with the Commonwealth "in any further investigation and/or prosecution involving" the murder. The Court also noted that the affidavit contradicted the accounts by the eyewitnesses and the

GSR testing. Lastly, the Court pointed out that the affidavit did not explain why the co-defendant placed the murder weapon under the defendant's seat or why he told the police he had discarded his firearm.

The Court concluded that the "compelling implication" of the defendant's new assertion of innocence is that he lied during his plea colloquy to secure the benefits of the plea bargain; namely, the nolle prosequi of additional charges and a cap on his active term of incarceration. Given the circumstances, the Court found "it "highly unlikely" that a rational fact finder "would have sympathy for [the defendant's] self-interested prevarication and trustingly accept his present protestations of innocence." Rather, the Court explained, "it is far more probable that a typical jury would find that" the defendant's sworn admission of guilt "diminishes his newly articulated claim of actual innocence."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0762212.pdf

Virginia Court of Appeals
Unpublished

Stiff v. Commonwealth: October 26, 2021

Norfolk: Defendant appeals his convictions for Strangulation, Felony Assault, Theft, and related charges on Denial of his Motion to Reconsider.

Facts: The defendant, a former tenant, attacked and abducted the victim, robbing her at gunpoint and threatening to kill her if she notified police. After the trial court convicted him, the defendant filed a motion to reconsider. In it, he pointed out that the victim had testified that she had been given two prescriptions from the emergency room, but the emergency room medical record supplied by the Commonwealth reflected only one prescription. The defendant also argued that when the Commonwealth asked him at trial if he "had been convicted of specific felonies," he incorrectly stated that he had, even though the presentence report indicated those charges had been reduced to misdemeanors.

The trial court denied the motion.

Held: Affirmed. The Court pointed out that the information in the motion to reconsider either was or would have been available to the defendant at the time of trial with the exercise of diligence. The Court also found that the defendant did not provide a valid excuse for his failure to present the information in the motion to reconsider during the trial.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1153201.pdf

Coleman v. Commonwealth: October 5, 2021

Petersburg: Defendant appeals his convictions for Aggravated Malicious Wounding and Use of a Firearm on refusal to Grant a New Trial and sufficiency.

Facts: The defendant and two other men shot the victim repeatedly. The victim made statements identifying the defendant as a shooter that police recorded in an officer's body camera footage. Before the officers arrived, the victim had also left a voicemail message for his girlfriend identifying the same men as the shooters.

The defendant initially told the police that he was not present when the shooting occurred and knew nothing about the incident. He gave the police the names of two would-be alibi witnesses who would testify that he was not there. However, he admitted at trial that these witnesses provided false information. The defendant also sent a text message before trial to a witness "to make sure she said the right things."

After the jury convicted the defendant, the defendant filed motions to set aside the verdict and for a new trial. He called the victim as a witness, who stated that although the defendant "was out there, he was with them, but I didn't honestly see him shoot me." The victim explained that he mistakenly identified the defendant as a shooter because "[a] lot was going on at the time" because he was "getting shot" approximately twenty times.

However, on cross-examination, the victim admitted he had been offered payment not to come to court and testify at the trial. Although the victim denied being threatened, he acknowledged that after the trial, someone shot at his vehicle while he was inside it. The trial court denied the motions.

Held: Affirmed. The Court first ruled that the victim's testimony and recorded evidence identifying the defendant as one of the shooters, coupled with the presence of bullet holes and shell casings at the scene, constituted sufficient evidence from which the jury could conclude that the defendant used a firearm and therefore acted with malice.

Regarding the motion for a new trial, the Court repeated that if a court finds that new recantation evidence does not establish by clear and convincing proof that the trial testimony was false, the court's original credibility determination controls, and the court must deny the motion for a new trial. In this case, the Court held that the court acted within its discretion in weighing all the evidence and concluding that the victim's new testimony – that he could not recall who shot him and that he mistakenly identified defendant – would not produce a different result in a new trial.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0993202.pdf

First Amendment

Fourth Circuit Court of Appeals

Courthouse News v. Schaefer: June 23, 2021

2 F.4th 318 (2021)
E.D.Va: Defendants, two Clerks of Court, appeal regarding their publishing of civil actions.

Facts: Plaintiff is a news service that reports on civil litigation in state and federal courts throughout the country. The plaintiff brought a complaint against the Clerks of Court for the City of Norfolk and Prince William County, arguing that it has a First Amendment right to access newly filed civil complaints. The plaintiff complained that, for example, in May 2018, the City of Norfolk court made only 19% of the complaints available on the day of filing, and 22% of the complaints were not available until two or more court days after filing. Similarly, in July 2018, the Prince William County court only made 42.4% of the complaints available on the day of filing and 41.5% of the complaints were not available until two or more court days after filing.

After the plaintiff filed the lawsuit, the Clerks provided access to substantially all (almost 90%) of complaints on the day of filing without changing any policies, hiring any new employees, or increasing employees' hours. From this evidence, the district court concluded that it was both possible and practicable to provide same-day access to most newly filed civil complaints. After a four-day bench trial, the district court found that the Clerks of those courts had not made the complaints timely available to the press and public, violating the First Amendment right of access to such documents.

The district court held that in order to satisfy the First Amendment's access requirement, the Clerks must make newly filed civil complaints available on the same day of filing when practicable, and where not practicable by the end of the next court day. The court went on to explain that minor deviations from this standard or deviations due to extraordinary circumstances would not amount to constitutional violations.

Held: Affirmed. The Court observed that the press and public enjoy a First Amendment right of access to newly filed civil complaints. The Court explained that this right requires courts to make newly filed civil complaints available as expeditiously as possible. The Court contended that the press and public have an important interest in reasonably contemporaneous access to civil complaints. The Court concurred that the facts of this case demonstrate that the Clerks did not do so, and so violated the First Amendment.

The Court agreed that the Clerks' practices resemble time, place, and manner restrictions, so it applied more relaxed scrutiny, which requires that delays in access be "content-neutral, narrowly tailored and necessary to preserve the court's important interest in the fair and orderly administration of justice." Although the Clerks put forth a variety of possible explanations as to why their delays prior to the filing of this action might have been necessary or unavoidable, the Court found that they failed to offer facts establishing that any of these explanations did actually cause delays. The Court acknowledged, though, that if the Clerks had conclusively demonstrated that delays during this period were substantially more frequent due to some unpreventable circumstance — inclement weather or a security threat, for example — the result might well be different.

Full Case At:
https://www.ca4.uscourts.gov/opinions/201290.P.pdf

Second Amendment

Fourth Circuit Court of Appeals

Hirschfeld v. ATF: July 13, 2021
5 F.4th 407 (2021)
Vacated by Fourth Circuit Panel, September 22, 2021
W.D.Va: Plaintiffs seek an injunction against the Federal Prohibition on Sales of Handguns to Persons Under 21 on Second Amendment grounds.

Facts: Plaintiffs seek an injunction and a declaratory judgment that federal statutes prohibiting Federal Firearm Licensed Dealers from selling handguns and handgun ammunition to 18-, 19-, and 20-year-olds (and the federal regulations implementing those statutes), contending that they violate the Second Amendment.

The court denied Plaintiffs' motion for summary judgment and dismissed the complaint. The district court held that the laws were facially valid because they "are among the 'longstanding prohibitions' and 'conditions and qualifications on the commercial sale of arms,' on which the Supreme Court in *Heller* did not cast doubt. The court also found that the laws fell outside the scope of the Second Amendment because similar regulations were historically common among the states. In the alternative, the court relied on the legislative record and some of the amici's evidence to find that the laws passed intermediate scrutiny.

Held: Reversed. The Court held that eighteen- to twenty-year-old people have Second Amendment rights, and the challenged laws impermissibly burden those rights.

The Court acknowledged that, at the time that congress enacted the statute in 1968, statistics, testimony from law enforcement, and other evidence showed that a large portion of violent crime and its escalation stemmed from minors with guns. They also found that "the handgun is the type of firearm that is principally used in the commission of serious crime" and "the most troublesome and difficult factor in the unlawful use of firearms."

The Court then extensively reviewed the history of firearms regulation in the United States, especially involving young people. The Court found that 18-year-olds are covered by the Second Amendment. The Court noted that there were no regulations restricting minors' ability to possess or purchase weapons until two states adopted such laws in 1856.

The Court then applied intermediate scrutiny to the laws in this case. The Court repeated that the Second Amendment's "core protection" is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Thus, when that right is severely burdened, courts must apply scrutiny, while if the right is burdened only on the margins, intermediate scrutiny applies. Intermediate scrutiny only requires the government to show "a reasonable fit between the challenged regulation and a substantial government objective." Because the Court found that the laws did not even pass intermediate scrutiny, the Court did not decide whether strict scrutiny applied.

The Court concluded that the arguments in favor of the laws failed for two reasons: (1) a showing of disproportionate bad conduct by a group cannot justify categorical restrictions on rights when the percentage of the group engaged in the unwanted conduct is minuscule, and (2) the evidence does not sufficiently link purchases from licensed dealers to crimes committed by youth.

The Court pointed out that, while 18- to 20-year-olds commit a disproportionate amount of crime compared to other age groups, very few members of that group commit crime, making the correlation between age and gun crimes "an unduly tenuous 'fit.'" In a footnote, the Court noted that the case amici's sources suggest that 0.3% of young adults ages 18 to 20 commit violent crime each year, while more recent data suggests only a slightly greater percentage, about 0.37%. The Court also contended that the data does not account for repeat offenders, pointing out that a year after being released, over 40% of criminals are arrested again, and that number approaches 80% in the 6 years after release. For the Court, that meant that an even smaller portion of the group is likely responsible for its disproportionate commission of violent crime. The Court wrote: "The rights of more than 99% of a group cannot be restricted because a fraction of 1% commit a disproportionate amount of violent crime."

The Court also wrote: "The irony does not escape us that, under the government's reasoning, the same 18- to 20-year-old men and women we depend on to protect us in the armed forces and who have since our Founding been trusted with the most sophisticated weaponry should nonetheless be prevented from purchasing a handgun from a federally licensed dealer for their own protection at home. We refuse to accept this conclusion. These men and women who, historically, have served either voluntarily or by conscription may not be read out of "the people" in the Second Amendment."

The Court also argued that the second major flaw with the laws at issue is that the licensed dealers whose sales to 18- to 20-year-olds are the subject of the challenged regulations are not connected to the incidence of crime Congress sought to control. The Court contended that it is not enough to target guns generally and argue that less access to guns means less crime, "as this would justify almost any restriction and eviscerate the Second Amendment." Reviewing the data that the defendants and amici submitted, the Court found that neither the government nor amici could show that the burden the challenged laws impose on 18- to 20-year-olds' rights has led to any meaningful or measurable positive effects.

Judge Wynn filed a dissenting opinion. He would also have assumed on the first prong of the two-part approach that the challenged provisions burden conduct protected by the Second Amendment, but would have then joined the Fifth Circuit in holding on prong two that the challenged provisions easily survive intermediate scrutiny. He would therefore have held that the challenged provisions were presumptively lawful as longstanding conditions and qualifications on the commercial sale of arms and thus are facially constitutional.

Full Case At:
https://www.ca4.uscourts.gov/opinions/192250.P.pdf

Innocence Petitions

Virginia Court of Appeals

Published

Tyler v. Commonwealth: August 10, 2021
73 Va. App. 445, 861 S.E.2d 79 (2021)
Gloucester: Defendant seeks a Writ of Actual Innocence regarding his conviction for Strangulation

Facts: In 2016, the defendant attacked and strangled a woman while they were driving to visit a club with two other companions. At trial in 2017, one of the two companions testified for the defendant. The other companion did not attend the trial, although he had he informed police on the night of the incident that he witnessed the defendant "choking out" the victim. Defense counsel did not ask for a continuance to allow him additional time to locate the missing witness. During the trial, the victim testified unequivocally that the defendant repeatedly strangled her; the defendant and the testifying companion testified that the defendant did not strangle her; and the missing witness did not testify. The trial court convicted the defendant of Strangulation.

In 2020, the defendant filed a writ of actual innocence, contending that he was entitled to relief based on the affidavit of the missing, non-testifying witness who had been present during the physical altercation and now avers that he did not see the defendant "strangle or choke" the victim. The petition also included a newspaper report that, in May 2020, the victim was indicted on a charge of malicious wounding for an unrelated incident that occurred in December 2019.

Held: Writ denied.

The Court first examined the defendant's burden of proof in seeking the writ under § 19.2-327.13. The Court pointed out that the standard under the old statute was "clear and convincing evidence," which requires a litigant to produce evidence sufficient "to render the assertion to be proved 'highly probable or reasonably certain.'" However, the current statute only requires proof by preponderance of the evidence. The Court explained that this standard, "sometimes referred to as the "greater weight of the evidence," … is satisfied when the evidence convinces a factfinder that a particular fact in dispute was 'more probable than not.'"

In a footnote, the Court also cautioned that, although evidentiary standards use mathematical sounding phrases, e.g., "more likely than not," "more probable than not," etc., it is a mistake to "seek mathematical precision in terms of percentages or view the standards as benefitting the party who calls the largest number of witnesses in support of his cause." The Court wrote: "Whether a particular quantum of proof, regardless of which standard is to be applied, has been met presents a qualitative and not a quantitative question." Thus, "[t]he preponderance of the evidence does not necessarily mean a greater number of witnesses."

The Court then explained that, although the 2020 legislative amendments lessened the quantum of proof required to carry the burden on the issues one must prove to be entitled to a writ, the 2020 amendments did not change what the defendant must prove in this case. Thus, the Court concluded, the questions in this case were whether the affidavit constitutes the type of "new" evidence that will support a petition for actual innocence, whether the affidavit represents evidence that is not merely cumulative or corroborative of evidence introduced at trial, and whether the evidence is such

that, had it been introduced at trial, no rational trier of fact would have convicted the defendant of strangulation.

The Court first complained that, although the defendant's trial counsel averred at trial that he had tried and failed to locate the missing witness, the record did not specify what, if any efforts, he made. In this case, the Court concluded that the record conclusively established that any efforts to have the missing witness testify at trial were less than diligent. The Court observed that the failure to even request a subpoena for a known witness demonstrated a complete lack of diligence. Thus, the defendant did not carry his burden to establish that the missing witness' affidavit constituted new evidence meeting the requirements set forth in §§ 19.2-327.11(A)(iv)(a) and 19.2-327.11(A)(vi)(a).

The Court then pointed out that the existence of conflicting testimony does not preclude a finding, beyond a reasonable doubt, that a defendant is guilty of the crime charged. Thus, the Court explained, the missing witness' affidavit provided no basis other than a "quantity of evidence" argument for concluding that every rational factfinder considering the affidavit along with the trial evidence would have concluded that the victim lied. As a result, the Court found that the defendant failed to prove by a preponderance of the evidence "that no rational trier of fact would have found proof of guilt . . . beyond a reasonable doubt" if presented with the affidavit along with the evidence at trial, pursuant to § 19.2-327.11(A)(vii).

The Court also rejected the victim's new criminal charges as a basis for actual innocence. The Court wrote: "Victims of crime, at different times and different places, also can be perpetrators of crimes. The fact that [the victim] committed a misdemeanor in December 2019 does not in any logical way suggest that she was not a victim of strangulation at the hands of Tyler in 2016."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0838201.pdf

Malicious Prosecution - Liability

Virginia Supreme Court

Dill v. Kroger: July 8, 2021
300 Va. 99, 860 S.E.2d 372 (2021)
Staunton: Plaintiff appeals the dismissal of her lawsuit for Malicious Prosecution and False Imprisonment.

Facts: A grocery store employee mis-identified the plaintiff in two shoplifting videos. The thefts took place at a self-checkout station. In the transactions, the employee noted that the person who conducted the transactions used a customer loyalty card. The card did not belong to the plaintiff. However, the employee believed that the person on the videos was the defendant. The store notified police, who obtained misdemeanor warrants for the defendant's arrest based on the employee's statements.

After the warrants were issued, the plaintiff reported to the police department, where police took her before a magistrate who placed her on bond, ordered her to remain in the Commonwealth, and prohibited her from visiting the store. On the day of trial, the Commonwealth viewed the videos and agreed that the person on the videos did not resemble the plaintiff. The Commonwealth moved to dismiss the cases. The plaintiff then brought a civil lawsuit for malicious prosecution, false imprisonment, and other claims.

At trial, the Court granted the defendant's motion to strike, holding that "this is a mistake case."

Held: Reversed, in part, affirmed, in part. The Court held that the trial court erred in granting the defendant's motion to strike the malicious prosecution claim, but also held that it did not err in granting the motion to strike the plaintiff's false imprisonment claim.

Regarding her claim for malicious prosecution, the Court found that the plaintiff presented sufficient evidence to raise a jury question as to whether there was probable cause to believe that the plaintiff was the shoplifter, and it was the jury's role to determine if malice could be inferred from the evidence presented. The Court repeated that malice may be inferred from lack of probable cause if the circumstances warrant that inference, the inference may be repelled by other circumstances, despite the lack of probable cause for the prosecution. This concept is sometimes called "legal malice."

Under "legal malice," an individual acts maliciously if she initiates a criminal prosecution "upon no or such slight grounds of suspicion as to indicate a general disregard of [others]." In other words, the Court explained, an individual pursues a criminal prosecution maliciously if her basis for suspecting a defendant is so tenuous that the prosecution can be said to have been "directed by chance" against the defendant.

The Court agreed, though, that the trial court did not err in striking the plaintiff's false imprisonment claim, because the plaintiff was detained pursuant to lawful process, which was lawfully executed. Even presuming that there was sufficient evidence in the record for a jury to find that the store instigated the plaintiff's arrest, the Court found no evidence to show that the plaintiff was illegally detained without lawful process. The Court explained that, even if the defendant's actions were malicious, and their allegations were not supported by probable cause, the plaintiff's arrest was lawful because it was a consequence of proper legal process.

The Court explained that a plaintiff cannot maintain an action for false imprisonment because of an arrest pursuant to a regular and valid warrant; that is, if the imprisonment results from her being "taken in due course to the magistrate and there admitted to bail or imprisoned regularly upon due order of commitment from him." Thus, unlike in an action for malicious prosecution, neither malice nor the lack of probable cause is an element of the tort of false imprisonment.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1200823.pdf

Eubank v. Thomas: August 5, 2021
300 Va. 201, 861 S.E.2d 397 (2021)

Matthews: Plaintiffs appeal the dismissal of their lawsuit for Malicious Prosecution and Abuse of Process.

Facts: The plaintiffs built an expansion to a house. The zoning board sent them a notice of violation. The plaintiffs disputed the violation. Several months later, the county initiated criminal proceedings against the plaintiffs. Two of the warrants alleged that the plaintiffs added a four-foot expansion of their residence and that this expansion encroached on the neighboring property. Two additional warrants alleged that the plaintiffs failed to obtain permits for the alleged four-foot expansion. However, later, all the warrants were either dismissed or nolle pros'd.

The plaintiffs filed a lawsuit against the county employees, claiming malicious prosecution and abuse of process. The plaintiffs claimed that the county employees, who wished to increase public access to the water, alleged groundless zoning violations to force the plaintiffs to tear down the house so that the property might be acquired via eminent domain at a reduced price. They argued that never was any probable cause because the encroachment had existed since 1966 and was, therefore, not actionable. Additionally, the plaintiffs claimed that the purported unpermitted expansion of the house in 2011 and 2012 did not happen.

In their lawsuit, the plaintiffs also alleged that the County Employees knew those facts, or should have known them, but nevertheless proceeded to initiate criminal charges. The plaintiffs claimed that, after instituting criminal proceedings, the County Employees met with the Commonwealth's Attorney and provided him with documentary evidence they knew to be false.

The trial court granted the county employees' demurrer and dismissed the case with prejudice.

Held: Reversed in Part, Affirmed in Part. The Court reversed the dismissal of the malicious prosecution claim but affirmed the dismissal of the abuse of process claim.

Regarding the malicious prosecution claim, the Court concluded that the allegations of the complaint with respect to probable cause were for the factfinder to resolve. Accordingly, the Court reversed the trial court's dismissal of the malicious prosecution claim.

However, regarding the plaintiff's claim for abuse of process, the Court found that the plaintiffs' claim failed as a matter of law. The Court repeated that, to prevail in a cause of action for abuse of process, a plaintiff must plead and prove: (1) the existence of an ulterior purpose; and (2) an act in the use of the process not proper in the regular prosecution of the proceedings. Thus, the abuse of process tort does not require the plaintiff to allege or prove that the process was maliciously issued. Instead, an action for abuse of process usually presupposes that the process was proper in its inception.

In this case, the Court complained that the plaintiffs did not point to any particular legal process that the defendants abused. The Court explained that meeting with the Commonwealth's Attorney does not constitute legal process within the scope of this tort; Neither does withholding adverse evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1201118.pdf

Police Use of Force & Liability

U.S. Supreme Court

Thompson v. Clark: April 5, 2022

Second Circuit: Plaintiff appeals the dismissal of his lawsuit for Malicious Prosecution

Facts: The plaintiff's sister reported to 911 that the plaintiff was sexually abusing his newborn daughter. EMTs responded, but the plaintiff refused to let them examine the child. EMTs summoned the police, but the defendant again refused to permit them to enter the home and examine the child. Officers forced entry. After finding red marks on the baby's body, EMTs took the baby to the hospital for evaluation. Officers arrested the plaintiff for obstruction of justice and resisting arrest.

The marks turned out to be a case of diaper rash. The medical professionals found no signs of abuse. Before trial, the prosecution moved to dismiss the charges, and the trial judge in turn dismissed the case. The prosecutor did not explain why she sought to dismiss the charges, nor did the trial judge explain why he dismissed the case.

The plaintiff sued the police officers under 42 U. S. C. §1983, including a Fourth Amendment claim for "malicious prosecution." However, under Second Circuit precedent, to prevail on that claim, the plaintiff had to show that his criminal prosecution ended with some affirmative indication of his innocence, not merely without a conviction. The trial court dismissed the plaintiff's lawsuit for lack of such indication, and the court of appeals affirmed.

Held: Reversed. In a 6-3 ruling, the Court held that a Fourth Amendment claim under §1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence. A plaintiff need only show that the criminal prosecution ended without a conviction. The Court remanded the matter to the district court to determine whether the defendants seized the plaintiff as a result of the alleged malicious prosecution, whether he was charged without probable cause, and whether the defendants are entitled to qualified immunity.

The Court examined the state of the law in 1871, when §1983 was enacted. At the time, courts described the elements of the malicious prosecution tort as follows:

(i) the suit or proceeding was instituted without any probable cause;

(ii) the motive in instituting the suit was malicious (which was often defined in this context as without probable cause and for a purpose other than bringing the defendant to justice); and

(iii) the prosecution terminated in the acquittal or discharge of the accused.

Because the American tort-law consensus as of 1871 did not require a plaintiff in a malicious prosecution suit to show that his prosecution ended with an affirmative indication of innocence, the Court similarly construed the Fourth Amendment claim under §1983 for malicious prosecution. The Court noted that law enforcement officers are still protected by the requirement that the plaintiff show the absence of probable cause and by qualified immunity.

Justice Alito filed a dissent, arguing that a malicious-prosecution claim may not be brought under the Fourth Amendment.

Full Case At:
https://www.supremecourt.gov/opinions/21pdf/20-659_3ea4.pdf

Rivas-Villegas v. Cortesluna: October 18, 2021

9th Circuit: Officers appeal the denial of Qualified Immunity in a Use of Force Lawsuit.

Facts: Officers responded to a 911 call from a child, who was crying and reporting that she, her young sister, and her mother were barricaded in a room for fear that the plaintiff, the mother's boy-friend, was going to hurt them. The plaintiff was reportedly intoxicated and using a chain saw to break into the house. The family had no way of escaping the house.

Officers arrived and commanded the defendant out of the house and onto the ground. When commanded, the defendant dropped a metal tool he had in his hand. However, officers saw a knife in the plaintiff's left pocket. Officers commanded the plaintiff to keep his hands up, but the plaintiff lowered his head and his hands in contravention of the officer's orders. Another officer twice shot the plaintiff with a beanbag round. At that point, the plaintiff complied and went to the ground.

While the officers were in the process of removing the knife and handcuffing the plaintiff, one officer briefly placed his knee on the left side of the plaintiff's back, near where the plaintiff had a knife in his pocket. The officer raised the plaintiff's arms up behind his back. The officer was in this position for no more than eight seconds before standing up while continuing to hold the plaintiff's arms.

The plaintiff later sued under 42 U. S. C. §1983, alleging that the officer used excessive force by leaning on his back with his knee, because the plaintiff was lying face-down on the ground and was not resisting either physically or verbally. The District Court granted summary judgment to the officer, but the 9th Circuit reversed, holding that the officer was not entitled to qualified immunity because existing precedent put him on notice that his conduct constituted excessive force.

Held: Reversed, Lawsuit Dismissed. The Court repeated that "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

The Court found that existing rulings were materially distinguishable from this case and were therefore insufficient to have made clear to every reasonable officer that the force used here was excessive. In this case, the Court specifically pointed to the fact that the plaintiff had a knife protruding from his left pocket for which he had just previously appeared to reach, and the fact that the officer put his knee on the plaintiff's back for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving.

Full Case At:
https://www.supremecourt.gov/opinions/21pdf/20-1539_09m1.pdf

Tahlequah v. Austin: October 18, 2021

10th Circuit: Officers appeal the denial of Qualified Immunity in a Use of Force Lawsuit.

Facts: Police responded to the plaintiff's call for help, concerned that her ex-husband had entered her garage, intoxicated, and was refusing to leave. She told 911 that if police did not arrive soon, "it's going to get ugly real quick." Three officers arrived and spoke to the plaintiff, who expressed concern that he would be taken to jail. Instead, the officers told him they just wanted to get him a ride. Officers noted that the plaintiff had something in his hands with which he was fidgeting. The plaintiff refused to permit the officers to pat him down.

While speaking with the officers, the plaintiff suddenly turned around and walked toward the back of the garage where his tools were hanging. The officers told the plaintiff to stop, but he kept walking. He then grabbed a hammer from the back wall over the workbench and turned around to face the officers. The plaintiff grasped the handle of the hammer with both hands, as if preparing to swing a baseball bat, and pulled it up to shoulder level. The officers backed up, drawing their guns.

The officers yelled at the plaintiff to drop the hammer. He did not. Instead, the plaintiff took a few steps to his right, coming out from behind a piece of furniture so that he had an unobstructed path to one of the officers. He then raised the hammer higher back behind his head and took a stance as if he was about to throw the hammer or charge at the officers. In response, the two other officers shot and killed the plaintiff.

The plaintiff's estate sued under 42 U. S. C. §1983, alleging that the officers used excessive force. The District Court granted summary judgment to the officers, ruling that the officers' use of force was reasonable, and even if not, qualified immunity prevented the case from going further. However, the 10th Circuit reversed, holding that the officers were not entitled to qualified immunity because their initial step toward the plaintiff and the officers' subsequent "cornering" of him in the back of the garage recklessly created the situation that led to the fatal shooting, such that their ultimate use of deadly force was unconstitutional.

Held: Reversed, Lawsuit Dismissed. The Court wrote: "Neither the panel majority nor the respondent have identified a single precedent finding a Fourth Amendment violation under similar circumstances. The officers were thus entitled to qualified immunity." The Court repeated that it is not enough that a rule be suggested by then-existing precedent; instead the "rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

Full Case At:
https://www.supremecourt.gov/opinions/21pdf/20-1668_19m2.pdf

Fourth Circuit Court of Appeals

Knibbs v. Momphard: March 30, 2022

W.D.N.C.: Plaintiff appeals the dismissal of his lawsuit against a Law Enforcement Officer for Use of Force.

Facts: While responding to a dispute between neighbors, a law enforcement officer shot the plaintiff and killed him, while the plaintiff was standing inside his home holding a loaded shotgun that he had just "racked" in front of the officer. The officer had responded during the night to the plaintiff's home regarding a claim that the plaintiff had set up nails in a shared driveway to disable vehicles. The officer knocked on the plaintiff's door and announced his presence but heard no audible response. He then heard the plaintiff loading a shotgun by "racking" it, preparing it to fire. He ordered the plaintiff to drop the firearm twice, but the plaintiff refused. The officer tried to escape from the porch, but when he saw the plaintiff pointing the shotgun at him from a window, he shot and killed the plaintiff.

The plaintiff sued the officer, arguing that the physical evidence did not corroborate the officer's claim that the plaintiff was pointing the shotgun at him. The plaintiff also argued that the officer's decision to seek cover on the porch after hearing the plaintiff rack his shotgun was "reckless and contradicted his training."

At the summary judgment stage, the district court held that the officer was entitled to qualified immunity from the plaintiff's 42 U.S.C. § 1983 claim, on the grounds that he had probable cause to believe that the plaintiff posed an immediate threat of serious physical harm, and therefore acted reasonably in shooting him.

Held: Reversed. The Court found that there were underlying factual issues, specifically whether the officer was readily recognizable as a law enforcement officer and whether the plaintiff aimed his gun at the officer, which were in dispute at the summary judgment stage. The Court concluded that, if a jury accepts the plaintiff's version of the events, the officer could be found to have violated the plaintiff's clearly established Fourth Amendment right to possess a firearm in his own home in a non-threatening manner while investigating a nocturnal disturbance on his premises.

The Court also concluded that it was clearly established that an officer may not use deadly force against a homeowner who possesses a firearm inside his own home while investigating a nocturnal disturbance but does not aim the weapon at the officer or otherwise threaten him with imminent deadly harm. The Court argued that is so even after the homeowner hears the officer announce himself—but cannot visually verify that to be true—and ignores commands to drop the weapon.

The Court contended that an officer's announcement of his presence is not dispositive in assessing whether an officer reasonably feared for his or her life before using deadly force. Rather, it must be considered under the totality of the circumstances, which the Court considered along with the lack of light at the house and the officer's failure to activate the blue emergency light equipment on his patrol vehicle.

The Court agreed, however, that the plaintiff did not have a valid 14th Amendment claim, as the U.S. Supreme Court has never recognized such a claim in a case such as this one. Judge Niemeyer filed a dissent.

Full Case At:

https://www.ca4.uscourts.gov/opinions/202243.P.pdf

Doe v. Syverud, et. al.: February 24, 2022
(Unpublished)
W.D.Va: Plaintiff appeals dismissal of her lawsuit against medical staff on Qualified Immunity grounds.

Facts: Plaintiff attempted to kill herself by asphyxiation, but police intervened and stopped her. Officers took her into custody under a "paperless custody order" per § 37.2-808(G) and brought her to the hospital for treatment. At the hospital, medical staff attempted to take blood and urine samples, but the plaintiff objected. The staff told her that the Emergency Custody Order authorized the taking of samples and the provision of medications even if she objected. The plaintiff continued to object strenuously, so nurses administered a series of injections, including a psychotropic drug and a sedative, at the direction of hospital doctors.

The plaintiff later sued under the Fourth and Fourteenth Amendments and under Virginia common law for Assault and Battery and False Imprisonment. However, the trial court dismissed the lawsuit on Qualified Immunity grounds, ruling that, under § 37.2-808, reasonable medical staff would have had no cause to believe the seizure was in violation of Fourth Amendment rights.

Held: Dismissal Affirmed. The Court agreed that § 37.2-808 authorizes a law enforcement officer to take a person suffering a mental health episode into custody and transport that person to an appropriate location to assess the need for hospitalization or treatment without prior authorization. The Court further noted that the Code specifically provides that the officer may "obtain[] emergency medical treatment or further medical evaluation at any time for a person in his custody as provided in this section." Va. Code Ann. § 37.2-808(A), (I).

Thus, the Court agreed, a reasonable medical professional would not have understood that his or her conduct was unlawful in this case. Instead, the Court explained, "As state actors, Appellees had a constitutional duty to safeguard Doe as a suicidal individual lawfully in their custody … that duty did not clearly prohibit them—based on their judgment as medical professionals under the circumstances of Doe's admission for attempted suicide—from medicating Doe in order to collect blood and urine samples for analysis."

The Court criticized the plaintiff for failing to cite a single case involving a mental health detainee or to otherwise demonstrate that the "clearly established" nature of her liberty interest was "beyond debate." The Court found no right of a mental health detainee in lawful state custody to forego necessary medical examination after attempting suicide or what medical professionals may reasonably do to administer basic medical care against that detainee's will.

Full Case At:
https://www.ca4.uscourts.gov/opinions/192252.U.pdf

Oates v. Chapman: July 22, 2021

Unpublished
N.C.: Plaintiff appeals the dismissal of her Fourth Amendment lawsuit on Grand Jury Immunity issues.

Facts: An agent of the North Carolina Bureau of Investigation presented evidence to a prosecutor that the plaintiff, a town mayor, had embezzled funds. The agent had concluded that the plaintiff had made charges without receipts, listing a non-existent economic development committee as a justification. The prosecutor presented the agent's testimony to a grand jury, who indicted the defendant with embezzlement by a public official. The plaintiff was arrested and released on bond.

Prior to the investigation, the North Carolina local government commission had seized the town's financial records. However, the commission failed to comply with repeated production requests for those records – from both the plaintiff and the prosecutors – and moved to quash the subpoenas. When the court finally ordered the commission to produce the records, the records revealed that the plaintiff had, in fact, submitted detailed receipts for her expenses and that there was an economic development committee after all. The prosecution moved to dismiss the charges.

The plaintiff filed a multi-count complaint under 42 U.S.C. § 1983, claiming that the agent, and others, violated her constitutional rights or conspired to do so. The plaintiff claimed that the agent testified falsely regarding the economic development committee, both omitting evidence of its existence and fabricating evidence that it did not exist. At summary judgment, the district court dismissed the plaintiff's claim for violation of Fourth Amendment rights by the agent on grand jury immunity grounds.

Held: Affirmed. The Court concluded that absolute immunity bars much, if not all, of the plaintiff's Fourth Amendment claim against the agent for allegedly false or misleading testimony before the grand jury. The Court acknowledged that, under *Rehberg v. Paulk*, a grand jury witness has absolute immunity from any § 1983 claim based on the witness' testimony – including allegedly "false testimony" – and also from claims based on "preparatory activity" leading up to that testimony. The Court observed that such absolute immunity is broad in scope, extending to claims that the agent presented or conspired to present false evidence, and to claims based on the agent's preparatory activity in advance of testifying.

The Court reasoned that the information given to the prosecutors, though mixed, was sufficient to sustain a finding of probable cause. The Court explained that, because the defendant failed to make out a Fourth Amendment violation, she cannot show the underlying "deprivation of a constitutional right" required to support a § 1983 conspiracy claim.

In a footnote, the Court noted that the plaintiff's claim may better have been viewed as one for malicious prosecution. The Court explained that, although a grand jury indictment generally will preclude a malicious prosecution claim by establishing probable cause, there is an exception for cases in which the decision to indict is influenced by a state actor's deliberately false testimony before a grand jury. However, the district court had dismissed that argument as well and the plaintiff had not appealed that ruling.

Full Case At:
https://www.ca4.uscourts.gov/opinions/201093.U.pdf

Prosecutor Liability

Fourth Circuit Court of Appeals

Sex Offender Registration

Fourth Circuit Court of Appeals

Doe v. Settle: January 28, 2022

E.D.Va: Plaintiff seeks removal from the Sex Offender registry on Eighth Amendment and Equal Protection grounds.

Facts: Two months after he turned 18, the plaintiff was caught having sex with his 14-year-old girlfriend. Instead of Carnal Knowledge of a Child, he was charged with and pleaded guilty to a lesser felony, Indecent Liberties with a Child. Although the Indecent Liberties offense was a lesser offense, it led to worse treatment by Virginia's sex-offender registry. Both crimes generally put an offender on the highest tier of the registry for life, but there is a narrow exception to that rule that only applies to Carnal Knowledge: When an offender is less than 5 years older than his victim, he may be removed from the registry in time. Because of that difference, the plaintiff will likely spend the rest of his life on Virginia's sex-offender registry.

The plaintiff sued to have his name removed from the registry, making a Fourteenth Amendment equal protection claim that he is similarly situated to a hypothetical person convicted of carnal knowledge whose victim was also within the "Romeo-and-Juliet" provision's 5-year window. He also made an Eighth Amendment claim that the registry constituted cruel and unusual punishment. The district court dismissed his lawsuit.

Held: Affirmed. The Court ruled that Virginia's sex-offender registry, and its narrow "Romeo-and-Juliet" provision, are constitutional.

Regarding the plaintiff's equal protection claim, the Court assumed without deciding that the plaintiff was similarly situated to the offender convicted of carnal knowledge. The Court then applied "rational-basis" review, as this case involved no suspect class nor fundamental right. The Court found that the differential treatment between carnal knowledge and indecent liberties offenders satisfied rational-basis scrutiny.

To assess the plaintiff's Eighth Amendment claim, the Court looked to the list of seven factors first compiled in *Kennedy v. Mendoza-Martinez*. The Court focused on 5 of these factors: whether the scheme:

(1) has been regarded in our history and traditions as punishment,

(2) imposes an affirmative disability or restraint,
(3) promotes the traditional aims of punishment,
(4) has a rational connection to a nonpunitive purpose, [and]
(5) is excessive with respect to this purpose.

The Court found that the Virginia sex-offender registry is "more like the common regulatory devices used at the founding than it is like historical forms of punishment." The Court held that the effect of the Virginia sex-offender registry is not so clearly punitive that it overcomes the intent of the legislature. The Court further held that Virginia's sex-offender registry is rationally related to the legitimate public interest in public safety because it "alerts the public to the risk of sex offenders in their community."

Full Case At:
https://www.ca4.uscourts.gov/opinions/201951.P.pdf

Virginia Supreme Court

Watson-Buisson v. Commonwealth: October 7, 2021
Unpublished
Norfolk: Defendant appeals his conviction for Entering a School After Conviction of a Sexually Violent Offense on Equal Protection grounds.

Facts: In 2010, the defendant was convicted in Louisiana of "computer-aided solicitation of a minor" in violation of La. Stat. Ann. § 14:81.3. The defendant then entered a school with that offense, which qualified as a predicate "sexually violent offense" for conviction.

At trial, he argued that requiring out-of-state offenders to register as a "sexually violent offender" in Virginia for any offense requiring registration, even if the offense was not "sexually violent" in Virginia, infringed his constitutionally protected right to travel and burdens out-of-state offenders. He also contended that the Commonwealth did not show a rational basis to justify the distinction between persons convicted in Virginia and persons convicted in a sister State.

Held: Affirmed. The Court acknowledged that, in *Turner v. Commonwealth*, it had criticized the former sex offender registration regime for treating some persons convicted in another state differently than some persons convicted in Virginia by imposing on some out-of-state convicts a more onerous registration regime. However, in a footnote, the Court also acknowledged that the General Assembly amended the registration regime in 2020 to eliminate that distinction.

The Court first concluded that the defendant does not meet the criteria to mount a facial challenge to the statute. The Court then rejected the defendant's "as-applied" challenge. The Court compared the Louisiana statute and § 18.2-370 and concluded that the statutes are similar. Therefore, the Court concluded that the defendant was not treated differently than a Virginia defendant who is convicted of a similar crime in Virginia. Consequently, the Court ruled that the defendant suffered no "as-applied" equal protection violation.

Full Case At:
https://www.vacourts.gov/courts/scv/orders_unpublished/200955.pdf

Virginia Court of Appeals
Published

Esposito v. Virginia State Police: January 11, 2022

Rockingham: Plaintiff appeals the denial of her request to have her name removed from the Sex Offender Registry

Facts: In 2009, the plaintiff pled guilty to oral sodomy with a seventeen-year-old minor in violation of § 18.2-361. In 2014, the General Assembly repealed the language in § 18.2-361 that had previously made oral sodomy per se illegal. Asserting that her conduct is no longer illegal under § 18.2-361, the plaintiff contacted the State Police and asked to be removed from the Registry, but the State Police refused. The plaintiff appealed the State Police's decision to the circuit court pursuant to Virginia Administrative Procedure Act, § 2.2-4026(A). The circuit court denied the petition.

Held: Affirmed. The Court held that the State Police could not grant the plaintiff's ex parte "request" to be removed from the Registry without an order from a circuit court as required by § 9.1-910(C) because it did not have the discretion to do so. The Court found that the law does not give the State Police authority to decide who is and is not required to register, nor does it allow the State Police the discretion to determine if and when registered offenders may be removed from the Registry. Instead, the Act specifically establishes a petition process independent of VAPA that effectively removes all discretion from the State Police regarding who is and is not required to be listed on the Registry, under § 9.1-910.

The Court also concluded that it need not decide whether maintaining the Registry is a "customary police function" and thereby exempt from VAPA because the plaintiff was required to satisfy the specific statutory requirements of the Act to be removed from the Registry.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0090213.pdf