2020 VIRGINIA LAW ENFORCEMENT APPELLATE UPDATE

MASTER LIST
Cases Reported from June 1, 2019 to June 1, 2020

CRIMINAL PROCEDURE

Bail

Virginia Court of Appeals
Unpublished

Commonwealth v. Johnston: April 14, 2020

Hampton: The Commonwealth appeals the granting of bond.

Facts: In 2018, the defendant shot and killed a man after the defendant had assaulted the victim's pregnant daughter. The defendant claimed self-defense. The defendant had a prior conviction for violating a court order and a conviction for reckless driving. The trial court denied bond in 2018. However, the Commonwealth suffered a February, 2019 mistrial. In September, 2019, just before the re-trial, the Commonwealth moved for a continuance based on a medical issue concerning the victim's daughter. The trial court granted the continuance over the defendant's objection, but agreed to re-hear the defendant's motion for bond.

The trial court examined facts regarding the defendant's family ties, employment, length of residence in the community, community ties, and criminal history. The trial court stated: "I'm going to establish a bond, the circumstances of bond that I think will protect the public and in particular protect the complaining witness in this case." The trial court set a bond of $10,000, secured, and conditioned Johnston's release on pretrial supervision, GPS monitoring, and limiting his ability to leave his uncle's residence. The Commonwealth appealed.

Held: Affirmed. The Court first held that the trial court did not "articulate the basis of its ruling sufficiently to enable [this Court] to make an objective determination that [it] ha[d] not abused its discretion." However, the Court found that the record nevertheless supported the trial court's ruling.

The Court held that the trial court's ruling that the defendant had rebutted the presumption against bond had significant "factual support" and was made after the court thoroughly considered the factors enumerated in § 19.2-120(E). The Court found that the trial court's statements and questions made throughout the bond hearing and when it rendered its decision, demonstrated that the court's decision represented a proper exercise of discretion, based on the facts presented to it and guided by the factors enumerated in § 19.2-120(E).

In light of the mistrial and the continuance in this case, the Court also concluded that the trial court did not abuse its discretion by considering the passage of time as a factor in its decision. The Court explained that § 19.2-120(E) does not provide an exhaustive list of factors that a court "may" consider when determining whether a defendant has rebutted the presumption against bail.

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/1720191.pdf

Commonwealth v. Wade: September 10, 2019

Hampton: The Commonwealth appeals the granting of bond in a Child Sexual Assault case.

Facts: The defendant is charged with rape of his 8-year-old step-child as well as abuse and neglect. Prior to his arrest, the defendant had attempted to get his children back from CPS and to leave the State. The children reported that, while living with the defendant, they were forced to urinate and defecate on the floor. Police confirmed that report by finding urine and feces on the floor, even though it was months after the report.

The defendant has no other criminal history. He owned a home in Virginia Beach and had a girlfriend in Richmond with whom he could stay. Neither option would require him to have contact with minors. He had lived in the area for nine years and had family in the area. The defendant worked at a consistent employer for five years, and he said he would attempt to resume that job if released on bail. He also served in the Army National Guard for several years. The victim resides in Florida and the defendant proffered that he would not have any contact with her or any other people involved in the case.

The J/Dr Court denied the defendant bail. The defendant appealed. After hearing the facts, the circuit court set a $50,000 cash bond. In granting bond, the trial court stated "So I'm hearing proffers from both of you which doesn't really give the Court a whole lot of definitive information as far as what the facts of this case are."

Held: Reversed. The Court noted that the trial court did not mention the presumption against bail, nor did it explain how the facts it recited applied to the factors the statute requires the court to consider in overcoming the presumption under § 19.2-120(E). The Court wrote: "the circuit court made it virtually impossible for this Court to determine if the trial court abused its discretion in granting bail. By doing so, the circuit court erred." The Court reversed the grant of bail and remanded the matter for the circuit court to apply the presumption against bail when reconsidering whether to grant bail to the defendant.

The Court criticized the trial court's implication that the lack of clarity supported an award of bail, complaining that the trial court appeared to have assumed that any gap in the proffers favored the defendant. The Court repeated that, under *Duse*, the presumption of innocence is a trial presumption that is inapplicable in bail proceedings

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0327191.pdf

Continuance

Virginia Court of Appeals

Unpublished

Merlino v. Commonwealth: September 25, 2019

Virginia Beach: Defendant appeals his conviction for Murder on Denial of a Continuance and Expert Testimony issues

Facts: The defendant murdered the mother of his child on Valentine's Day using cyanide. Prior to trial, the defendant sent encrypted letters from the jail in attempts to intimidate witnesses for the Commonwealth to change their testimony. Eight months after indictment and following multiple continuances, the defendant's counsel moved for a continuance the day before trial, claiming that the defendant was weak due to a two-month hunger strike and that the defendant had just provided him with a list of potential witnesses. The trial court denied the continuance.

On the first day of trial, the defendant acknowledged that he had had enough time to discuss the case and any possible defenses with his attorneys. He further stated that he had provided the names of his witnesses to his attorneys and that they were present. However, he indicated that he was not entirely satisfied with his attorneys, claiming that they had not spent sufficient time reviewing the case with him. Defense counsel renewed his motion to continue, arguing that he needed more time to prepare. The trial court denied the motion again.

At trial, the Commonwealth presented computer forensic evidence through an expert witness in the field of "digital forensics, particularly computer examinations." The witness testified regarding his examination of the defendant's computer. The witness identified the software, Internet Evidence Finder (IEF) and Forensic Toolkit (FTK), that he used to copy the original hard drive so that he would make no changes to it. The witness reported those findings.

The defendant objected to the introduction of the expert's testimony because he did not create the IEF or FTK software programs. The defendant claimed that it was outside the expert's expertise to testify that the programs were reliable. In response to questioning by the trial court, the expert specifically explained how IEF and FTK searched through information on the computer for particular types of data stored there, and then reported the findings. The witness testified that he obtained consistent findings from the defendant's computer using both software programs. The witness testified that IEF and FTK were relied upon by numerous law enforcement agencies. The trial court overruled the defendant's objection and admitted the expert's testimony.

Held: Affirmed. Regarding the continuance, the Court complained that the defendant failed to identify additional evidence he would have been able to present if granted a continuance and failed to show a specific need for additional investigation to prepare a defense. The Court pointed out that it was the defendant's own decision to delay providing the names of witnesses to his attorney and that he voluntarily engaged in a hunger strike, further complicating his participation in the case. The Court agreed that the circumstances suggested that he was manipulating the situation to delay his trial and attempting to influence witness testimony.

Regarding the expert's testimony, the Court found no abuse of discretion in the trial court's decision to admit the expert's testimony about his forensic examination of the defendant's computer.

The Court noted that the witness demonstrated his expertise, testified that both IEF and FTK were widely used as tools for law enforcement, and testified that he received consistent results using both programs.

Full Case At:
https://www.dropbox.com/s/2auvk9ym725ldly/merlino%20expert%20ruling%20va%20beach.pdf?dl=0

Discovery & Brady

Virginia Court of Appeals
Published

Church v. Commonwealth: November 12, 2019
71 Va. App. 107, 834 S.E.2d 477 (2019)
Richmond: The defendant appeals his conviction for Child Sexual Assault on *Brady* discovery issues and admission of DNA evidence.

Facts: The defendant sexually assaulted his own daughter, who was eleven years old at the time. The Commonwealth disclosed shortly before trial the fact that the victim's stepmother noticed nothing amiss when she checked on the victim upon returning home from work at around midnight on the date of the offense. At trial, the defendant called the stepmother as a defense witness. The trial court denied the defendant's motion to dismiss due to the alleged failure to timely disclose exculpatory evidence.

On the first day of trial, the victim testified that the defendant had made her put her mouth on his penis and threatened her sister; the victim had not made those disclosures before. On the second day of trial, the prosecutor reported that the victim had also newly mentioned that the defendant asked her for sex on the morning after the sexual abuse. The court provided the defendant with the opportunity to cross-examine the victim further regarding the purportedly inconsistent statements, but the defendant did not recall the victim, nor did he request a recess or continuance to review his strategy in light of that information.

The defendant moved to dismiss on this issue as well, arguing that the Commonwealth did not timely reveal the victim's claims that (1) the incidents included oral sex, (2) the defendant had threatened to sexually abuse her sister, and (3) the defendant asked her for sex again the morning after the incident.

A detective had collected a pair of the victim's underwear less than two days after the offenses occurred from a laundry pile with the victim's other clothing that she wore on the night of the assaults. The pair of underwear was the victim's size, and the only other child in the house was the victim's sister, who wore underwear four sizes smaller. An analyst found a mixture of genetic material to which both the defendant and the victim contributed on the crotch of the underwear.

At trial, the victim could not specifically identify the underwear analyzed as the underwear she wore the night of the assault. The defendant challenged the inference that the underwear belonged to

the victim or that she wore it on the night of the assaults based on the possibility that the DNA was transferred to the underwear from other clothing in the laundry pile.

Held: Affirmed. The Court held that the alleged late disclosures of evidence did not violate the requirements of *Brady*. The Court noted that, regarding the victim's alleged inconsistent statements, the defendant had the opportunity to make effective use of the evidence of the statements at trial and chose not to do so, and pointed out that he also failed to request a recess or continuance in order to consider whether his trial strategy should be altered in light of the complete information. Consequently, the Court concluded that no *Brady* violation occurred.

Regarding the stepmother's statements, the Court repeated that evidence is not suppressed for *Brady* purposes when the Commonwealth discloses it in time for effective use by the defense at trial. The Court agreed that, for purposes of a *Brady* analysis, the evidence failed to demonstrate that the Commonwealth suppressed the purportedly inconsistent statements made by the victim or the stepmother's report that she noticed nothing wrong on the night of the offenses.

The Court also held that the victim's inability to identify the underwear was not exculpatory.

The Court also held that the trial court did not err in admitting the underwear and related DNA evidence. The Court concluded that the Commonwealth met its burden of proving by a preponderance of the evidence that the underwear belonged to the victim and was worn by her on the night of the assaults. The Court found that the evidence tended to prove that the victim wore the underwear on the night of the offenses and the defendant's DNA was transferred to her body.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0264182.pdf

Castillo v. Commonwealth: June 4, 2019
70 Va. App. 394, 827 S.E.2d 790 (2019)
Loudoun: Defendant appeals his convictions for Murder, Burglary, and Violation of a Protective Order on grounds including: Joinder/Severance, Refusal to Strike Jurors for Cause, Admission of Cadaver Dog Evidence, Denial of a Mistrial, Closed-Circuit Testimony by a Child, Denial of Cross-Examination, *Brady* and discovery grounds.

Facts: The defendant murdered his wife after she sought a divorce from him and had obtained a protective order. The defendant suffocated her and then set up her body to make it appear that she had killed herself. The protective order had granted the victim the exclusive possession of the marital residence and ordered the defendant to "stay away" from the property. Eight days after the victim's death, the defendant filed a motion to dissolve the divorce. Having survived the victim, the defendant became sole owner of the marital estate, the value of which was estimated at between $2.6 and $3.6 million.

Prior to her death, the victim had plans to travel and to engage in athletic activities. Two of the defendant's friends and his adult son identified the defendant from security footage where he approached the victim's home on the night of her death. Another of the defendant's sons testified that he had seen the defendant in the victim's home the night of the killing. Additionally, the defendant's

DNA was identified from bloodstains found in the victim's bedroom and on the victim's sweatshirt after the defendant had been barred from the residence pursuant to a protective order for over a year. The medical examiner opined that the victim was strangled and suffocated and that her death was inconsistent with suicide.

Two weeks after police discovered the victim's body, police used a "cadaver dog" to examine the victim's residence. The cadaver dog, trained to alert to the odor of human decomposition and dried blood, alerted to an area in the victim's bedroom, as well to the bathroom where her body was found. An expert testified that the odor of human decomposition is "very persistent" over time. At trial, the handler testified to the dog's training and experience and his own training and experience working with the dog. He opined that "to a reasonable degree of scientific certainty" that his dog alerted to human decomposition.

Prior to trial, the Court joined the three offenses of Murder, Burglary, and Violation of a Protective Order over the defendant's objection. The Court refused the defendant's motion to sever the Protective Order Violation.

During jury selection, one juror revealed that his neighbor had committed suicide in a manner similar to how the defense alleged the victim had killed herself. That juror affirmed that he would be able to separate his past experience from the current case, stating: "I think I can listen fairly and make a judgment based on what was presented." The trial court denied the defendant's motion to strike the juror for cause.

During the trial, after the jury heard testimony from one of the defendant's children, a juror began "crying to the extent of howling" outside the courtroom and the sheriff had to separate her from other jurors. However, on examination by the trial court, the juror unequivocally stated that she could wait to form an opinion until all the evidence was presented.

Prior to trial, the trial court granted the Commonwealth's motion prohibiting any questioning regarding an investigating deputy's work history. The defendant had sought to cross-examine the deputy on his employment performance history based on the fact that he had not been re-sworn by the sheriff. However, the evidence was that the sheriff had no issues with respect to the deputy's truthfulness, veracity, or integrity; instead, the new sheriff did not re-swear in the deputy due to the deputy's support for another candidate during the primary campaign for sheriff.

Prior to trial, the trial court granted the Commonwealth's motion to permit one of the children to testify by closed-circuit testimony. The Court rejected the defendant's arguments that § 18.2-67.9 is unconstitutional and that it is limited to child abuse cases only. Based on testimony by the child's clinician, the trial court made specific findings pursuant to § 18.2-67.9. The trial court found that the child would be traumatized, not by the courtroom generally, but by the presence of the defendant and that his emotional distress would be more than mere nervousness or excitement or reluctance to testify.

Prior to trial, the Commonwealth informed the defense of several inconsistent statements that the children made during pre-trial meetings. During the meetings, the Commonwealth had met with the children, along with a Doctor, who took notes and then turned the notes over the Commonwealth. The Commonwealth indicated that the meeting was for witness preparation, not for investigation. The defense moved to examine the notes, but the Commonwealth asserted that the notes were attorney-work product. The trial court denied the defendant's request.

During the trial, the defendant claimed that one of the children made a statement that he had not been aware of. The defendant again demanded to compel the Commonwealth to turn the notes over to counsel. The Commonwealth responded that child's statements were a result of new questions and were not inconsistent with his prior statements. The trial court refused to review the notes *in camera* and refused to order their production.

During the trial, the defendant made two motions for a mistrial, but the trial court denied both. In the first, he complained that during closing argument, the Commonwealth commented that the "greatest part" of the judicial system was the jury's ability to decide the case according to the law, "no matter how many lawyers you have, no matter how many lawyers you pay to sit . . . ," In the second motion for a mistrial, the defendant complained after the Commonwealth's mentioned to the jury that the defendant's alibi notice "gives notice that he 'may' introduce evidence of an alibi, and said: "'May?' Or may not?" The court promptly instructed the jury to disregard the Commonwealth's statement.

The defendant also complained that, during closing argument, the Commonwealth referred to the fact that he had paid his "high-priced" experts. On cross-examination, the Commonwealth had elicited testimony from the defendant's experts on how much they had been paid for their involvement in the case. The trial court found that the statement regarding the experts was "fair argument."

After trial, the defendant moved to set aside the verdict and to dismiss due to government misconduct. He claimed that the Commonwealth had failed to disclose the fact that, in an unrelated case, the deputy who testified in this case wrote an incorrect statement in a report about the other case that he had met with an ACA and she declined prosecution. The defendant argued that the evidence that the deputy had made a false statement on a police report would have damaged his credibility in his trial and thus could have been used as impeachment evidence under Rule 2:607(a)(viii).

Held: Affirmed. In a highly detailed, 66-page opinion, the Court of Appeals examined and rejected each of the defendant's grounds for appeal.

Regarding the issues of joinder and severance, the Court ruled that the charged offenses met the requirement of Rule 3A:6(b) and justice did not require separate trials, and that the joinder requirements of Rule 3A:10(c) were met. Regarding joinder, the Court ruled that the case met Rule 3A:6(b)'s requirements for joinder because all three offenses were clearly "based on the same act or transaction." The Court pointed out that the defendant broke into the victim's house in violation of the protective order with the intent to murder her, he did not leave the residence until he had committed the murder, and each offense took place at the same location and at the same time.

Regarding the defendant's motion to sever the Protective Order Violation, the Court agreed that the protective order would have been admissible in both the Murder and Burglary trials as it was relevant to an issue or element in each of those cases. In the Burglary case, the Court explained that the protective order demonstrated that the defendant acted without authority in entering the home. Thus, the protective order was relevant "to establish guilty knowledge or to negate good faith."

In the Murder case, the Court reasoned that the protective order was admissible to prove the defendant's opportunity to commit the murder. The Court noted that the protective order showed that it was unlikely he had entered the residence prior to the night of the murder, and thus tended to prove that his DNA found in the bedroom was a result of his presence in the victim's bedroom the night of her death. Because the protective order was relevant to show that there was no reasonable explanation for

the presence of the defendant's DNA on the victim's clothing and bedding other than his presence in her bedroom on the night of the murder, it served a purpose "other than to show a mere propensity or disposition on the part of the defendant to commit the crime."

Regarding the "cadaver dog" testimony, the Court held that expert testimony relating to a dog's reaction to the odor of human decomposition is admissible after a proper foundation has been laid to show that the handler was qualified to work with the dog and to interpret its responses, that the dog was sufficiently trained in the detection of human decomposition odor, and that the circumstances surrounding the identification were conducive to a dependable scent identification by the animal.

The Court explained that cadaver dog evidence does not require a scientific foundation for its admission; rather, the cadaver dog evidence must be shown to be reliable from experience, which can be met through the testimony of the cadaver dog handler. The Court concluded that it did not need to consider whether the science underlying the expert testimony concerning the cadaver dog evidence was reliable. Instead, it explained that it only needed to determine whether a proper foundation was laid for the admission of the evidence. Thus, as with dog trailing evidence in *Pelletier*, the Court agreed that a trial court may admit cadaver dog evidence without a showing of its precise scientific basis.

In this case, the Court held that the court did not err in admitting the expert testimony regarding the cadaver dog evidence. The Court found that the record contains evidence that the handler was qualified to work with the dog and to interpret his responses. The Court then concluded that the evidence demonstrated that the dog was sufficiently trained in detecting the odor of human decomposition. Finally, the Court agreed that there was evidence showing that the circumstances surrounding the identification were conducive to dependable scent identification by the dog.

Regarding the "cadaver dog" testimony, the also Court observed in a footnote that the handler's opinion was derived from his personal observation of the dog the day of the search and from his prior training with the dog. Thus, the Court concluded that the Commonwealth had provided a proper foundation for the expert testimony and that the evidence did not violate Rule 2:703(b). The Court explained that the arguments relating to the likelihood that the dog falsely alerted or alerted to a presence other than the victim's body went only to the weight of the evidence, not its admissibility.

Regarding the juror issues, the Court agreed that the trial court properly refused to strike the juror who had given the "I think" statement, finding that the statement was not too equivocal to ensure his impartiality. The Court also agreed that the juror who had become emotional could impartially continue her service on the jury.

Regarding the child's closed-circuit testimony, the Court found that the record supported the trial court's findings. The Court also rejected the argument that § 18.2-67.9 is unconstitutional and found that the trial court complied with *Craig*. The Court specifically rejected the argument the language of *Craig* is limited to child abuse cases.

Regarding the defendant's motions for mistrial, the Court found that the challenged statements in both mistrial motions did not create indelible prejudice against the defendant as to require a new trial. The Court also agreed that the fact that the experts that testified for the defense were paid was a fact in evidence and constituted a proper subject for closing argument.

Regarding the defendant's cross-examination of the deputy, the Court ruled that the trial court did not abuse its discretion by denying the defendant the opportunity to cross-examine the deputy

about his employment history because there was no evidence before it that his employment history, or the fact that he was not re-sworn, was relevant to a material issue at trial.

Regarding the deputy's allegedly false statement, the Court ruled that the defendant failed to satisfy the first prong of *Brady* because he did not establish that the evidence would have been favorable to him. Therefore, the Court concluded that no *Brady* violation occurred by virtue of the Commonwealth's failure to disclose the deputy's alleged false statement on the report prior to trial. The Court noted that the defendant attempted to attack the deputy's credibility based upon one specific act of conduct; However, Rule 2:608(b) explicitly limits the application of Rule 2:607(a)(i) by providing that "specific instances of the conduct of a witness" may neither be "used to attack or support credibility" nor "proved by extrinsic evidence," and here the Court pointed out that the alleged false statement in the police report was inadmissible to prove the deputy's general untruthfulness, because even if his statement that he had consulted with the ACA was untrue, it was only a specific act of untruthfulness regarding an extrinsic matter.

Regarding the Doctor's notes on the prosecutor's interviews with the children, the Court ruled that the trial court properly exercised its discretion in declining to review the Dr.'s notes *in camera*. The Court repeated that the mere possibility or speculation that the evidence sought "might contain 'potentially exculpatory evidence' imposes neither a duty of disclosure upon the Commonwealth, nor a duty of inspection in camera by the court.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0140174.pdf

Virginia Court of Appeals
Unpublished

Vejarano v. Commonwealth: May 12, 2020

Spotsylvania: Defendant appeals his convictions for Murder and related charges on *Brady* and discovery grounds.

Facts: The defendant and another man, both members of a violent criminal street gang, murdered a woman. At trial, the Commonwealth presented six witnesses who testified about what the defendant had told them while they were fellow prisoners. One of those witnesses testified that the defendant told him about shooting the woman. During direct examination, the Commonwealth asked the witness whether there was a possibility that a portion of his active sentence could be reconsidered later as a result of his testimony. The witness admitted that that was true, although he denied that he was promised anything.

The trial court convicted the defendant. Later, that witness wrote a letter in which he accused the Commonwealth of asking him to lie. The defendant moved to set aside the verdict, arguing that the Commonwealth failed to disclose material impeachment evidence related to one of the Commonwealth's witnesses. The defendant claimed he discovered, after trial, that the witness was

offered "favorable treatment" regarding a criminal sentence. The Commonwealth agreed that it had told the witness that "we'd take a look at getting his sentence reconsidered" and would "try to do him a solid."

The defendant also requested to subpoena the Commonwealth's attorneys whom he averred made the offer. The trial court denied the defendant's requested subpoenas, found that all requisite disclosures had been made, and denied the defendant's motion to set aside.

Held: Affirmed. The Court found that, at trial, the Commonwealth elicited the testimony which the defendant contended was withheld. The Court noted that, by eliciting the testimony itself, the Commonwealth made such impeachment evidence available to the defendant at a point when the defendant had sufficient time to make use of it. The Court noted that neither of the Commonwealth's statements are promises; they are conditional, aspirational statements that match the witness' testimony that, although he wasn't promised anything, he was eligible to have his sentence reconsidered due to his testimony.

Furthermore, Court concluded that the evidence supported the trial court's finding that the witness did not commit perjury. The Court also noted that, under Rule 3A:12(a) and *Howard,* "in order to assert a right to compulsory process, the accused is required to make a plausible showing that the testimony sought would be both material and favorable to his defense." The Court concluded that the defendant failed to meet the requisite materiality. The Court found that the newly discovered evidence after trial was collateral and immaterial. Accordingly, the testimony of the assistant Commonwealth's attorneys who were the subjects of the challenged subpoenas was likewise immaterial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0526192.pdf

Fifth Amendment: Double Jeopardy

Virginia Court of Appeals
Unpublished

Commonwealth v. Brock: February 18, 2020

Spotsylvania: The Commonwealth appeals a dismissal on Double Jeopardy grounds.

Facts: The defendant stood trial for distribution and related offenses. Just prior to trial, the Commonwealth asked the trial court to enter a *nolle prosequi* on the charges, but the trial court refused. During the Commonwealth's case, the Commonwealth called a witness who asked about immunity from prosecution based on his anticipated testimony. The judge told the witness that the court could not give him immunity but he had a right to refuse to testify. The witness indicated that he was willing to testify but was concerned that he might incur charges based on his testimony.

The judge *sua sponte* declared a mistrial because the "witness . . . ha[d] not been properly vetted with a lawyer." Immediately, the defendant's attorney said, "Thank you, sir." The court announced that it would reschedule the case in order to allow the witness the opportunity to consult with legal counsel before testifying. Defense counsel stated that she "accept[ed] the [c]ourt's decision as to a mistrial." She complained, however, that the mistrial "le[d] right back" to the prosecutor's earlier motion to *nolle prosequi*. Defense counsel then argued: "This puts [the defendant in] a very precarious position. So instead of a mistrial, I'm asking this Court . . . to reconsider and dismiss the case entirely with prejudice because the jury has been called, witnesses have been called, so jeopardy has attached." The court denied the request.

After the parties set a new trial date, the defendant filed a motion to dismiss the charges on double jeopardy grounds, which a new trial judge granted. The Commonwealth appealed.

Held: Dismissal reversed. The Court found that the defense counsel tacitly consented to the mistrial when she thanked the judge for declaring a mistrial and "accept[ed]" the ruling. The Court complained that "She did not even suggest that a mistrial was unnecessary." Therefore, the Court ruled that the defendant waived his constitutional protections against double jeopardy.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1438192.pdf

Guerrant v. Commonwealth: February 11, 2020

Roanoke: Defendant appeals his convictions for Possession of a Firearm and Possession of Ammunition by Felon on Double Jeopardy and sufficiency grounds.

Facts: The defendant, a felon, carried a gun concealed on his person while trying to enter a club. Security officers saw the gun and barred him from entering. They called the police, but the defendant fled in his car at high speed, driving into oncoming traffic. The pursuing officer saw an object being thrown out of the passenger side of the defendant's vehicle; his in-car video captured that as well. The defendant crashed into a house.

Officers did not locate a firearm at the crash scene, but later, officers recovered a loaded handgun from the road along which the defendant had just earlier driven as he was fleeing the police. At trial, an officer testified to finding ammunition in the handgun's magazine. At trial, the two security guards, one of whom was a military veteran, testified that they saw the defendant holding a gun. Both testified that they were familiar with firearms.

At trial, the defendant challenged the sufficiency of the evidence that he possessed the gun, the sufficiency of the evidence that the ammunition in the gun met the statutory definition of "Ammunition," and argued that the trial court could not convict him of possessing both the firearm and the ammunition in the same proceeding.

Held: Affirmed in part, Reversed in part.

The Court agreed that the trier of fact could find that the defendant possessed a firearm. In addition, because the recovered handgun was loaded with a magazine that contained five bullets, the Court agreed that the trial court could reasonably infer that those projectiles described by the officer were in cartridges that contained primer or propellant, thus meeting the statutory definition of "ammunition" in § 18.2-308.2(D). The Court found that, based on the officer's descriptions of the bullets and the evidence that the bullets were in a magazine and actually loaded in the handgun, a factfinder could reasonably infer that the projectiles were in cartridges that contained primer or propellant.

However, the Court then applied the *Groffel* and *Gregg* cases and again held that it was error for the trial court to impose two convictions and sentences for simultaneous possession of a firearm and possession of ammunition because doing so is a violation of the Double Jeopardy Clause. Therefore, the Court remanded this case to the trial court for the Commonwealth to elect only one conviction and sentence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1446183.pdf

Commonwealth v. Ferguson: January 14, 2020

Spotsylvania: The Commonwealth appeals the dismissal of a Possession with Intent to Distribute offense on Double Jeopardy grounds.

Facts: The defendant was engaged in selling heroin. Police investigated and followed him from his home in the City of Fredericksburg to Spotsylvania County, where they spoke with him. The defendant admitted that he sold heroin, and the officers found heroin in his pocket. Officers then searched the defendant's house in the City of Fredericksburg and found more heroin. The Commonwealth obtained two certificates of analysis—one for the heroin recovered from the defendant's person in Spotsylvania and one for the heroin found in his Fredericksburg home.

The Commonwealth charged the defendant in Fredericksburg with possession of heroin with the intent to distribute based on the heroin found in his home. During the trial in Fredericksburg, the Commonwealth mistakenly represented that the heroin actually found on his person in Spotsylvania was found in the house in Fredericksburg. The trial court found the defendant guilty and, taking into account the heroin the defendant also had in Spotsylvania, sentenced the defendant.

The Commonwealth proceeded against the defendant for Possession with Intent to Distribute in Spotsylvania County. The defendant filed a pretrial motion to dismiss, arguing that the prosecution of the charge would violate double jeopardy. The defendant also argued that double jeopardy protections were implicated because the Fredericksburg court, in sentencing him, considered the total amount of heroin found in both locations, rather than only the amount found in his house, which actually constituted the basis for the conviction.

The trial court granted the motion and dismissed the charge on double jeopardy grounds. The Commonwealth appealed.

Held: Reversed, case reinstated. The Court concluded that the trial court erred because the conduct alleged to have occurred in Spotsylvania County constituted a separate and distinct act from the offense that the defendant committed in the City of Fredericksburg. The Court found that the defendant's possession of the drugs on his person and in his home constituted two separate and distinct acts and the acts occurred in two different jurisdictions.

The Court ruled that the Commonwealth's mistake of fact at the Fredericksburg hearing on his guilty plea did not affect the double jeopardy analysis. The Court also noted that the Fredericksburg court did not err by considering the evidence relevant to the yet-to-be-prosecuted possession of the heroin on the defendant's person, and such consideration had no impact on the subsequent prosecution. The Court repeated that, during sentencing, a trial court may consider evidence of "unadjudicated criminal activity."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1245192.pdf

Fifth Amendment: Interviews & Interrogations

Fourth Circuit Court of Appeals

U.S. v. Oloyede: July 31, 2019
933 F. 3d 302 (2019)
M.D.: Defendant appeals her conviction for Conspiracy to Commit Wire Fraud on Fifth Amendment grounds.

Facts: The defendant and her co-defendants engaged in a multi-million-dollar online dating fraud scheme that induced elderly victims to transfer money to the defendants' bank accounts based on postured romantic relationships. During the execution of a search warrant and an arrest warrant at the defendant's house, an FBI agent handed the defendant a locked cell phone that had been found in her bedroom and asked her, "Could you please unlock your iPhone?" The defendant took the phone, entered her passcode, and handed the phone back to the agent, who then gave the unlocked phone to a forensic examiner for it to be searched. The agent did not ask for the passcode; the defendant did not reveal the passcode to the agent; and the agent did not see the defendant enter her passcode.

The defendant moved to suppress the search of the phone on the grounds that the agent had not given her a *Miranda* warning and "[o]nly through her communicative conduct of unlocking the iPhone was the government able to ascertain that it belonged to her" and that her act was therefore a testimonial communication.

Held: Affirmed. The Court considered the question of "whether a person in custody, who has not been given Miranda warnings, was compelled to incriminate herself in violation of the Fifth Amendment when she voluntarily, pursuant to an officer's request, used her passcode to open her cell phone but did

not disclose the passcode." The Court concluded that the defendant's act was not a testimonial communication to the agent.

The Court first noted that, to be a testimonial communication, the act must "relate a factual assertion or disclose information." Unlike a circumstance in which a defendant gives a passcode to an agent for the agent to enter, in this case the Court pointed out that the defendant simply used the "unexpressed contents of her mind" to type in the passcode herself. The Court cited *U.S. v. Hubbell,* where the U.S. Supreme Court distinguished "surrendering the key to a strongbox," which is not communicative, from "telling an inquisitor the combination to a wall safe," which is communicative. The Court then observed that the ownership of the phone was neither an issue before the district court at the suppression hearing nor an issue before the jury.

However, the Court also found that, even if it were to accept the defendant's argument that she made a testimonial communication when she unlocked her phone, the fruit of that voluntary communication, even though made without a *Miranda* warning, would nonetheless be admissible into evidence. The Court adopted the U.S. Supreme Court's plurality opinion in *Patane*, finding that the self-incrimination clause "is not implicated by the admission into evidence of the physical fruit of a voluntary statement." Thus, the admission into evidence of data from the defendant's phone — the fruit of her opening it — presented no risk that coerced statements would be used against her at a criminal trial.

The Court also addressed several other unrelated issues in the defendant's and her co-defendant's cases.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174102.P.pdf

Virginia Court of Appeals
Published

Saucedo v. Commonwealth: October 29, 2019
71 Va. App. 31, 833 S.E.2d 900 (2019)
Rockingham: Defendant appeals his conviction for Forcible Sodomy of a Child on Fifth Amendment and sufficiency grounds.

Facts: The defendant sexually assaulted a six-year-old child. The child disclosed soon thereafter, but quickly recanted, only to report the offense again when she was ten years old. During the investigation, the defendant went to the police station voluntarily for the polygraph examination. He was not handcuffed or restrained; the officer assured the defendant that he could leave at any time and demonstrated that the door to the polygraph suite was not locked. The single officer was the only law enforcement officer in the room with the defendant. The defendant appeared "relaxed" throughout the interview. However, the officer remarked that if the defendant touched the child's vagina with his tongue, he "needed to get up and walk out of the room now." The defendant continued to speak with the officer and eventually confessed.

The defendant later moved to suppress his statement, arguing that the interview became custodial due to the officer's comment advising the defendant to "walk out of the room" if he was guilty. The defendant contended that this statement constituted a "verbal handcuff [that] invalidated the otherwise consensual nature of the encounter" and rendered the interview a custodial interrogation. The trial court rejected his argument.

During her videotaped forensic interview, the victim stated that the defendant "open[ed]" her vagina and "lick[ed] around all of [her] vagina." She also gestured to a picture of a vagina on the table when she was indicating where the defendant touched her. At trial, the victim testified that the defendant touched her vagina with his tongue. Although she admitted that she did not know the meaning of the terms "labia majora" or "vulva," she described the area where the defendant touched her as her "private area."

At trial, the victim could not remember the forensic interview, other than "going to a place where [she] sat in a blue chair to talk with a video." The defendant cross-examined the victim about her inability to remember the interview. The Commonwealth introduced the child's forensic interview as evidence. To authenticate the recording, the Commonwealth offered testimony from the interviewer, who told the jury that the video was a "true and accurate copy and depiction of [her] interview."

The defendant objected to the admission of the victim's forensic interview at trial, arguing that it was not sufficiently authenticated and that the victim did not "testify" as required by § 19.2-268.3(B)(2)(a) because she could not recall the forensic interview. The trial court overruled the objections.

Held: Affirmed. The Court first rejected the defendant's argument that he was in "custody" under the Fifth Amendment. The Court found that, although the defendant may have felt psychological pressure to confess after the officer's comment, that alone did not amount to a restraint that rendered the interview a custodial interrogation.

The Court then found that the trial court did not err by admitting the forensic interview into evidence. As in *Campos*, the Court rejected the defendant's arguments that the child's faulty memory voided the hearsay exception in § 19.2-268.3(B) for prior statements by juvenile victims. The Court explained that the defendant's opportunity to question the victim about her faulty memory and attack her credibility satisfied the Confrontation Clause guarantee of effective cross-examination.

The Court also agreed that the interviewer's testimony met the requirements for admission into evidence under Rule 2:901.

Regarding sufficiency, the Court found that the evidence proved that the defendant penetrated not only the victim's vulva, but also specifically her vagina, in violation of § 18.2-67.1(A)(1), forcible sodomy by cunnilingus. The Court distinguished the *Moore* and *Ashby* cases on their facts.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1440183.pdf

Virginia Court of Appeals
Unpublished

Commonwealth v. Delcid: April 28, 2020

Fairfax: The Commonwealth appeals the granting of a motion to suppress on Fifth Amendment *Miranda* grounds.

Facts: Police arrested the defendant for soliciting a child online. An officer advised the defendant of his *Miranda* rights; in doing so, the officer reviewed the form verbally, line-by-line, with the defendant. Towards the end, the officer and the defendant had the following exchange:

> Officer: Okay. And, this is more for court. It's not exactly right this second, but can you read the fourth one?
>
> Defendant: If I cannot afford a lawyer and want one, . . . one will be provided for me.
>
> Officer: Okay. Do you understand that?
>
> Defendant: If I can't get a lawyer, the judge, the courthouse can appoint me one.
>
> Officer: Right.

Later, the defendant moved to suppress the statements he made. The defendant testified that he had felt pressured to sign the form and that the officer's statement that the fourth right on the form, the right to appointed counsel, was "more for court" led him to believe he was not entitled to appointed counsel at that stage of the proceedings. The trial court granted the defendant's motion to suppress. The Commonwealth appealed.

Held: Suppression affirmed. The Court concluded that the trial court did not err in concluding that the officer misinformed the defendant about his rights, that his purported waiver was invalid, and that his statements to the officer had to be suppressed.

The Court compared this case to the *Duckworth* and *Spinner*, where the Courts had affirmed similar statements from officers. In *Spinner*, the officer had read the same line and then stated: "And I always caveat that with: 'If you're charged with a crime.'" In *Spinner*, the Supreme Court declined to infer that the "caveat" implied a limitation on the substance of the right to appointed counsel and concluded that the defendant's waiver was valid so that his statements to law enforcement were properly admitted into evidence.

In *Duckworth*, the officer had stated "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." The *Duckworth* Court held that truthful statements about when counsel for an indigent will be appointed do not imply a limitation on an accused's entitlement to have appointed counsel present for questioning.

The Court interpreted those cases, finding that they stand for the principle that truthful statements about the process for the appointment of counsel—the how and when of the appointment—do not suggest anything about the substance of the right to counsel during questioning. So long as a suspect is informed that he has the right to appointed counsel during questioning, as the defendants in *Duckworth* and *Spinner* were, the Court explained that truthfully telling him the process for obtaining that counsel does not invalidate a waiver.

However, in this case, the Court found that the officer's statements strayed from timing and procedure when he said that the appointed counsel right was "more for court," and therefore created a

substantive limitation of the previously described general right to counsel, literally informing the defendant that appointed counsel is "for court" not questioning.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1957194.pdf

Keepers v. Commonwealth: April 14, 2020

Montgomery: Defendant appeals her conviction for Accessory Before the Fact to Murder on Fifth Amendment and Jury Selection issues.

Facts: The defendant and her co-conspirator planned a murder of a 13-year-old girl. Her co-conspirator murdered the child, and afterwards the defendant assisted the defendant in moving the victim's body and discarding evidence.

The defendant's co-conspirator told police that the defendant could provide an alibi for him. Police invited the defendant to the police department to talk about the case. She agreed. The questioning, which was initially "conversational" and non-confrontational, occurred in a room with the door closed, but not locked. The investigators consistently advised the defendant that she was "not in trouble." Although the officers did not specifically tell the defendant that she could leave at any time, she never asked to go. Officers provided her with food and water and allowed to keep her purse, backpack, and cell phone, which were not searched.

Initially, the detectives did not believe that the defendant was a suspect. Rather, they were interviewing her to gain more information about her co-conspirator. However, soon, the defendant confessed that she had assisted in the murder plot. The officers advised of her *Miranda* rights, specifically telling her that she was free to refuse to answer any questions and could stop talking any time she chose. Several times during the interview, the detectives indicated that the defendant's honesty would benefit her. They told the defendant that her cooperation would "go a long way" with their superiors and the prosecutor. The defendant confessed to her role in the murder.

The defendant moved to suppress her statement, arguing that the officers had failed to read her *Miranda* warnings even though she was in custody from the beginning. However, the trial court found that interview was non-custodial until after she had confessed and that police treated her as a potential witness, not a suspect, prior to that time. The trial court also rejected the argument that her statement was involuntary, which was based on officers' remarks that their duty to advise her of her rights was a "procedural issue" that "really doesn't change anything." The defendant claimed that these statements, along with psychological pressure, vitiated her waiver and rendered her statements inadmissible.

At trial, the defendant challenged two jurors, requesting strikes for cause. The defendant had examined the first juror's Facebook page and discovered that she had "liked" a story where the defendant had been denied bond, commenting "Great. Now give her the needle." The first juror, however, explained that she and her husband share the same Facebook account. She stated that did not "like" the news story about the defendant being denied bond, and she was not the one who posted the comment about the defendant receiving capital punishment. She unequivocally stated that she could be fair and impartial. The trial court made a factual determination that the first juror was being honest that

she did not engage in the activity on Facebook and did not hold any preconceived beliefs about the defendant's guilt.

A second juror's response to the question of whether she could be fair and impartial was: "I think I can." She acknowledged that "I . . . cannot sit here and honestly say that what I heard is not going to bias me." The second juror expressed an understanding that murder was a separate and distinct crime from concealing a dead body. She stated that she was not "just going to stick with [her] opinion" but would wait to hear the evidence and learn "what . . . the law is."

The trial court denied the defendant's motions to strike these jurors for cause.

Held: Affirmed. The Court first rejected the defendant's argument that the defendant was in "custody" for *Miranda* purposes when she first confessed. Instead, the Court agreed that that a reasonable person would have felt free to leave under the circumstances of the defendant's interview.

Regarding voluntariness, the Court concluded that the officers' implications regarding potential leniency did not amount to actual promises of leniency. Therefore, based on the totality of circumstances, the Court found the court did not err in finding that the defendant's statements to the police were voluntary.

Regarding the two jurors, the Court refused to gainsay the trial court's conclusion that they could be fair and impartial. The Court repeated that, when jurors make potentially equivocal statements, it will defer to the trial court because of its opportunity to observe the juror's tone and demeanor.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0279193.pdf

Johnson v. Commonwealth: February 18, 2020

Virginia Beach: Defendant appeals his convictions for Aggravated Involuntary Manslaughter on Fourth and Fifth Amendment grounds.

Facts: The defendant drove a furniture truck while intoxicated, crossed into oncoming traffic and struck another vehicle, killing the driver and permanently injuring the passenger. The defendant fled the scene, but an officer found him in the backyard of a house nearby. The officer identified the defendant and administered several field sobriety tests. The officer arrested the defendant and immediately advised him of his *Miranda* rights. The defendant voluntarily stated that he understood his rights and was willing to speak with the police.

The officer read the defendant implied consent. The defendant asked the officer if he could "say no" to having additional blood drawn. The officer responded that he could decline the blood test, but that if he refused, he would get a "second charge" in addition to the DUI charge for which he was already under arrest. The defendant stated that he had "no choice," he did not want another charge, and agreed to the blood test. The blood sample taken pursuant to the implied consent law indicated a BAC of .09.

The defendant moved to suppress the evidence in this case. He first argued that he was in custody, for the purposes of *Miranda*, when he was detained by the police officers in the backyard of the home near the scene of the accident. Second, he argued that the injuries suffered in the accident, his difficulty in remaining awake, and his voluntary intoxication rendered him unable to voluntarily and intelligently waive his rights under *Miranda*. Third, the defendant also argued that the officer's use of the word "charge" when describing what would happen if the defendant refused the blood test created an unconstitutional condition upon him that rendered his consent to the blood draw unconstitutional under the Fourth Amendment. The trial court rejected all three arguments.

Held: Affirmed. Regarding the *Miranda* issue, the Court likened this case to *Nash* and found that the defendant was not in "custodial interrogation" when the officer conducted the field sobriety tests in this case.

Regarding the voluntariness issue, the Court complained that the defendant could point to no examples of coercive police activity for the assertion that his waiver was involuntary, but rather relied on his intoxication to show that his will was overborne. The Court noted, however, that the defendant's memory regarding the details of the accident was not impaired, since he provided a coherent attempt at explaining the accident by blaming it on defective equipment.

The Court found that the officer's use of the word "charge" when describing the possible consequences that the defendant would face if he refused the blood draw pursuant to the implied consent law did not place an unconstitutional condition upon the defendant. The Court repeated that the holding in *Birchfield* should not be read to cast doubt on "laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1591184.pdf

Jones v. Commonwealth: January 14, 2020

Alexandria: Defendant appeals his conviction for Possession of a Firearm by Violent Felon on Fifth Amendment grounds and admission of his Prior Conviction.

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.

At trial, the trial court prohibited the Commonwealth from introducing evidence of the defendant's actual prior conviction for second-degree murder. Instead, the trial court allowed the defendant to stipulate that he had been convicted of a prior violent felony. The defendant objected to admitting the stipulation, arguing that his conviction should not go to the jury at all. The trial court overruled the objection, instructing the jury that "[t]he Commonwealth has offered this stipulation into evidence for the sole purpose of proving that [the defendant] was convicted of the prior offense. You should not use this fact for any other purpose in your deliberations."

Held: Affirmed. Regarding the 5th Amendment issue, because the defendant did not make an unambiguous invocation of his right to have counsel present at the interrogation, the Court found that the trial court did not err in denying his motion to suppress the statements that he made during this interrogation.

The Court concluded that the defendant's first statement, "Hey, can you call my wife to tell her to call my lawyer for me?," did not indicate a clear invocation of his right to counsel because a reasonable officer would not know with clarity that the defendant wanted to have an attorney present for his interrogation. Rather, the Court observed that the question could have indicated that he wanted his wife to call a lawyer so that a lawyer could be present at his interrogation, or it could have indicated that he wanted to notify a lawyer that he faced future legal issues, or it could have indicated that he wanted a lawyer to assist him at some future stage in the legal proceedings.

Similarly, the Court concluded that the defendant's second statement, "You're gonna make the phone call," presented the same ambiguity. While the defendant asked the detective if he was going to call his wife in order for her to call an attorney, the Court found no indication in his words that he wanted an attorney present for his interrogation.

Regarding the fact of his violent conviction, because the stipulation was clearly less prejudicial than the admission of his actual prior offense, the Court rejected the defendant's argument that the stipulation was unduly prejudicial. The Court then repeated that, where there are concerns that evidence may be unfairly prejudicial, a limiting or clarifying instruction is the appropriate remedy. The Court concluded that any undue prejudice was cured by the court's cautionary instruction.

In a footnote, the Court, for the first time, explicitly distinguished *Old Chief* from the case at hand. The Court explained that *Old Chief* concerned a federal firearm statute, 18 U.S.C. § 922(g)(1), which has fundamental differences from the Virginia statute. The Court explained that in this case, pursuant to Code § 18.2-308.2(A), the Commonwealth was required to prove that the defendant had previously been convicted of a specific type of felony—a violent felony—rather than simply a felony. The Court found that *Old Chief* was not controlling in this case, where the Commonwealth was required to prove that that the defendant had committed a specific type of felony and the defendant was allowed to stipulate that he had previously committed this type of felony, rather than have his actual prior offense admitted into evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1359184.pdf

Argueta-Diaz v. Commonwealth: November 5, 2019

Henrico: The defendant appeals his conviction for Gang Recruitment on Fifth Amendment, Expert Testimony, and sufficiency grounds.

Facts: The defendant, an MS-13 member, attacked a student from rival gang at school. Prior to the attack, police had interviewed the defendant about his gang affiliation at the school where the defendant was a student. The only officer in uniform was a school resource officer whose function at the interview was to translate. There was no physical restraint and the officer explained to the defendant "that he was not in trouble in any way, that it is not illegal to be a gang member in the United States." The defendant sat closest to the door and was positioned between the officer and the translator. No one threatened him or drew a weapon during the interview. At the time, the defendant was seventeen years, eight months old.

The defendant admitted that he wanted to fight the victim because he had "something to do with the 18th Street gang." The defendant referred to the drawing on the victim's hand with the Spanish word for 18. The defendant moved to suppress his statement to the police, but the trial court denied the motion.

At trial, an expert for the Commonwealth testified regarding two prior convictions of two previous MS-13 gang members. The defendant challenged the evidence about the prior conviction on the ground that the expert had been on the Gang Task Force for only two years and had not personally worked on the case resulting in the prior conviction. The defendant also argued that the evidence regarding the other prior conviction did not meet the definition of "criminal street gang" under § 18.2-46.1 because his conviction was the "same event" as the first conviction.

At trial, the expert for the Commonwealth testified as an expert on criminal street gang activity and gang culture, particularly the MS-13 gang. He explained how photos of the drawings on the defendant's hands and his name tag, his "grim reaper" shirt, and his Chicago Bulls cap, contained various indicia of MS-13 gang membership. The defendant objected to admission of those photos, but the trial court overruled the objection.

Held: Affirmed. The Court held that the trial court did not err in denying the motion to suppress, admitting the convictions of two MS-13 gang members, admitting evidence that established appellant was a member of MS-13, and finding the evidence sufficient to convict appellant of violating Code §§ 18.2-46.2 and 18.2-46.3:3.

The Court ruled that the defendant was not in custody during the interview. The Court pointed to four factors: First, there was no evidence as to the manner in which the defendant summoned by the police. Second, the interview took place at a more "neutral surrounding" than the police station, and the only officer in uniform was a school resource officer whose function at the interview was to translate. Third, there was no physical restraint and the officer explained to the defendant "that he was not in trouble in any way." Fourth, the defendant had been free to leave throughout the interview. The Court specifically rejected the notion that *J.D.B*. always requires *Miranda* warnings when the police question a minor.

Regarding the prior convictions, the Court repeated that § 18.2-46.1 does not require that the defendant had been personally involved in the prior convictions. The Court also rejected the argument

that a local law enforcement officer must have personal involvement in the investigation or prosecution of any crime committed anywhere in order to testify that the offense was a "predicate criminal act," explaining that such a requirement would violate legislative intent and "defy reason and logic."

The Court agreed that the expert's testimony and the federal conviction orders sufficiently established that both individuals named in the prior conviction orders were MS-13 gang members and had committed the requisite criminal acts. Therefore, the Court concluded that the trial court did not abuse its discretion in admitting the evidence to prove the existence of a "criminal street gang." The Court also agreed that the trial court properly admitted the exhibits used by the expert, finding that the expert's testimony connected the exhibits to the defendant's charges and sufficed to authorize their admission into evidence.

The Court did not gainsay the trial court's conclusion that the defendant was a member of MS-13, pointing to the various exhibits introduced by the Commonwealth and the expert testimony linking them to MS-13 membership. Based on the defendant's own statements, the Court lastly agreed that the assault and battery was shown to be for the benefit of, at the direction of, or in association with the MS-13 gang.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1141182.pdf

Commonwealth v. Capps: August 20, 2019

Virginia Beach: The Commonwealth appeals the granting of a motion to suppress on Fifth Amendment grounds.

Facts: The defendant stole property from a store after having prior larceny convictions. An officer captured the defendant while he was attempting to flee. The defendant was visibly intoxicated. The officer read the defendant his *Miranda* rights. The defendant refused to acknowledge that he understood them, even though the officer asked him repeatedly. However, the defendant subsequently answered the officer's questions in the back seat of a police car and at the jail and was able to clearly describe to the detective his method of stealing the items.

The defendant moved to suppress his statements as involuntary. Although the trial court stated in its ruling that it did not find that the officer "did anything wrong," the trial court found that "these were not the actions of someone's who's rational" and that the statements that he made were statements that were not made by someone who was rational with rational intellect or free will. The trial court suppressed the defendant's statements as involuntary and inadmissible.

Held: Suppression Reversed. The Court held that the trial court erred in determining that the defendant's statements were involuntary because the record shows that there was no police coercion that produced his statements. The Court examined the Virginia Supreme Court's ruling in *Yarborough* in light of *Colorado v. Connelly* and subsequent Virginia cases. The Court concluded that coercive police activity must occur in order for a confession to be found involuntary.

While the Court agreed that the defendant was "highly intoxicated" when the officer read him his Miranda rights, the Court noted there was no indication that the detective harmed or threatened to harm the defendant if he did not subsequently answer the detective's questions. The Court also pointed out that there was no indication that the officer pressured the defendant in any way to answer the questions posed to him or used deceptive or confusing questioning tactics.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0500191.pdf

Johnson v. Commonwealth: June 11, 2019

Chesapeake: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth and Fifth Amendment grounds as well as sufficiency of the evidence.

Facts: The defendant possessed MDMA and LSD for distribution. While the defendant was driving, an officer stopped the defendant for an equipment violation and smelled burnt marijuana emanating from the car. The defendant was the only person in the car. The officer searched the car and found marijuana. The officer then searched the defendant's pockets and found MDMA and LSD, which were divided into small amounts and separately packaged.

For about 30 seconds after the officer had asked a question, the defendant rambled about how his life was over and he had tried to do better. The defendant then spontaneously stated: "I have to try to sell some drugs and make a $%*ing living and not die."

Prior to trial, the trial court denied the defendant's motions to suppress the search of his pockets, which the defendant argued lacked probable cause, and to suppress his statement to the officer, which he argued was inadmissible without a *Miranda* warning.

At trial, the defendant provided his own expert. The defendant's expert stated that the evidence "teeter[ed] on the line" between distribution and personal use based on the weight of the MDA alone, although other factors were consistent with distribution. The expert testified that the packaging of the drugs was consistent with distribution. However, when the expert heard the defendant's statement, he ultimately concluded that the facts "would be consistent with distribution."

Held: Affirmed. The Court rejected the argument that the officer's search was invalid because she did not originally intend to arrest the defendant. Instead, the Court explained that, because the objective facts establish that the officer had probable cause to arrest the defendant for possession of marijuana, she had the authority to search him incident to arrest, regardless of whether she actually intended to arrest him.

Regarding the defendant's spontaneous statement, the Court ruled that, because the statement was voluntary, it did not fall within the purview of *Miranda*, and the trial court did not err in denying the motion to suppress. The Court found that the defendant's statement was not a foreseeable result of any question or action by the officer, nor could it be considered responsive to the last question asked.

Regarding sufficiency, the Court ruled that the defendant's admission and the circumstantial evidence of the packaging was sufficient to establish that the defendant intended to distribute the drugs.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0899181.pdf

Fourth Amendment – Search and Seizure

U.S. Supreme Court

Kansas v. Glover: April 6, 2020

Certiorari to the Supreme Court of Kansas: The state appeals the granting of a motion to suppress on Fourth Amendment grounds.

Facts: The defendant drove on a suspended license. An officer ran the defendant's license plate and learned that it returned to the defendant. He also discovered that the defendant's license was revoked. The officer assumed the registered owner of the truck was driving and stopped the defendant on that basis.

The trial court granted the defendant's motion to suppress. The Kansas Court of Appeals reversed, but the Kansas Supreme Court affirmed granting the motion to suppress.

Held: Suppression Reversed. The Court examined whether a police officer violates the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license. In an 8-1 ruling, the Court held that, when an officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable.

The Court rejected the argument that, because the registered owner of a vehicle is not always the driver of the vehicle, the officer's inference was unreasonable. The Court noted that drivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians.

The Court further held that specialized training and experience is not required in every instance to find reasonable suspicion. The Court pointed out that the inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis.

The Court cautioned, however, that if an officer is aware of exculpatory information, that information could eliminate reasonable suspicion. For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not "raise a suspicion that the particular individual being stopped is engaged in wrongdoing."

Justices Kagan and Ginsburg concurred, but cautioned that they did so because Kansas almost never revokes a license except for serious or repeated driving offenses. They explained that this would be a different case if Kansas had barred the defendant from driving on a ground that provided "no similar evidence of his penchant for ignoring driving laws."

Justice Sotomayor dissented, arguing that reasonable suspicion is more than the "likelihood that a given person or particular vehicle is engaged in wrongdoing."

Full Case At:
https://www.supremecourt.gov/opinions/19pdf/18-556_e1pf.pdf

Fourth Circuit Court of Appeals

U.S. v. Ferebee: April 22, 2020

W.D.N.C.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, possessed a firearm in a backpack while inside another person's home. Officers, while conducting a probation search regarding the other individual, entered the home and saw the defendant holding marijuana. They arrested the defendant for possession of marijuana. As the officers patted the defendant down, the defendant held out the backpack and stated that it was not his. The officers moved the defendant to just outside the residence. After the officers handcuffed the defendant and led him outside, the defendant managed to wad up and throw away his marijuana joint without attracting the attention of the police officers around him. Another officer, who had not heard the defendant disclaim ownership of the backpack, re-entered the residence and located the backpack near the entrance. He searched it and found the defendant's firearm and his identification.

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

Held: Affirmed. The Court agreed that the defendant clearly and unequivocally disavowed ownership of the backpack, and thus he abandoned the backpack and any legitimate expectation of privacy in its contents. The Court also held that the warrantless search of the backpack was a proper search incident to arrest under *Gant*.

The Court rejected the defendant's argument that a court cannot find abandonment in cases where the defendant has physical possession of the property he has disavowed. Instead, the Court explained that abandonment "is complete upon the disclaimer of ownership." The Court further clarified that "if the individual seeking to challenge a search does not have a legitimate expectation of privacy in the property or place being searched, the individual lacks "standing" and the inquiry ends without consideration of the merits of the search claim."

The Court also rejected the defendant's argument that, because the officer who searched the backpack did not hear the defendant's statement, the defendant retained the right to object to the search. Instead, the Court concluded that that the defendant lost his privacy interest in the backpack

after disavowing ownership to the police, writing: "one who disavows ownership is disassociating himself from the property such that any expectation that the property would remain private would not be reasonable."

Regarding the search incident to arrest, the Court explained that it did not believe that the defendant was "secured" within the meaning of *Gant*, noting that the defendant was able to tamper with evidence while handcuffed. The Court also pointed out that the defendant was only a few steps away from the backpack. Although he was handcuffed, the Court agreed that he still could walk around somewhat freely and "could easily have made a break for the backpack inside the house." The Court therefore conclude that, despite the fact that the defendant was handcuffed, the police reasonably could have believed that the defendant could have accessed his backpack.

Judge Floyd dissented.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184266.P.pdf

U.S. v. Miller: April 15, 2020

S.C.: Defendant appeals his convictions for Use of a Firearm and Kidnapping Resulting in Death, as well as Conspiracy to Distribute, on Fourth Amendment grounds.

Facts: The defendant and a group of co-conspirators participated in the robbery, torture, and murder of a rival drug trafficker. Later that day, police officers visited the defendant's home in response to an unrelated complaint that the defendant's wife had not returned a rental car on time. The car rental agreement listed the defendant's residence as her home address. When police arrived, they parked in the driveway and activated their emergency lights. The officers saw a group of people standing just beside the home and approached the group to speak to them.

The defendant provided a false identity. Officers arrested another man on scene. While the officers arrested the other man, they noticed the defendant walk over to the arrestee's car and get inside of it. The officers quickly removed the defendant from the arrestee's car and briefly searched it, discovering two handguns that the arrestee identified as belonging to the defendant. Officers also discovered a large amount of cocaine in the car. They then learned that the defendant was a person of interest in the homicide.

Officers obtained a search warrant for the defendant's residence. The search warrant affidavit linked the defendant to the residence in question, explaining that the officers had encountered him there while attempting to recover an overdue rental car tracked to the same location and leased to a woman that they presumed was the defendant's wife. It also linked the drugs uncovered on the scene to the house, describing the crack cocaine discovered in the rental car on the premises and the officers' experience-based knowledge that drugs commonly are found "within the curtilage of illegal drug sales locations."

The state of South Carolina indicted the defendant for the murder and related charges. The trial court denied the defendant's motion to suppress. The South Carolina Court of Appeals affirmed, but the South Carolina Supreme Court reversed, finding that the affidavit for the home search warrant "failed to

establish probable cause that evidence of a crime may be contained within the residence sought to be searched."

The Federal Government then indicted the defendant for use of a firearm and kidnapping resulting in death, as well as conspiracy to distribute. The defendant again moved to suppress the searches. He argued that the officers, under *Collins*, unconstitutionally intruded into the curtilage of his home when they entered his driveway and approached the people standing nearby. He also argued that that the search warrant affidavit failed to establish any nexus at all between criminal activity in general and his house in particular. The trial court denied the motion to suppress.

Held: Affirmed. The Court first addressed the question whether the officers were within the scope of their "knock and talk" license when they crossed into the defendant's driveway and approached the people standing beside the residence. The Court found that it was not "clear and obvious" that the officers exceeded the scope of their implicit license to enter the defendant's curtilage. The Court noted that the officers had reason to believe that both the defendant and his wife lived at the residence in question.

The Court also agreed that, seeing the group beside the house, the officers could reasonably proceed there directly as part of their effort to speak with the defendant and his wife. Although the Court acknowledged that the officers' use of emergency police lights was "coercive conduct that went beyond the customary invitation offered all visitors," the Court could not say that the officers so clearly exceeded their license to "knock and talk" at the residence that suppression was necessary.

Regarding the search warrant, because the executing officers relied in objectively-reasonable good faith on a warrant when they searched the defendant's home for evidence, the Court found that the search was lawful under *Leon*. Although the Court noted that the South Carolina Supreme Court held that the warrant application at issue here did not establish probable cause for a search of the defendant's home, the Court pointed out that the South Carolina Court of Appeals came to a different conclusion.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184796.U.pdf

U.S. v. Fall: April 3, 2020

E.D.Va: Defendant appeals his convictions for Receipt, Possession and Transportation of Child Pornography on Fourth Amendment and sufficiency grounds.

Facts: The defendant possessed thousands of images and videos of child pornography on several devices, storage media, and his Dropbox account. The defendant invited his niece and her boyfriend to stay with him. They looked at his laptop while he was absent and saw several images of child pornography. They took the laptop to the Virginia Beach police, who opened it and observed thumbnail icons on the desktop that appeared to be nude individuals. The officer thought the images could have depicted children. The officer then clicked on two video thumbnails on the laptop's home screen, both of which depicted child pornography.

Police spoke to the defendant at his workplace, but he refused to say anything. Officers then traveled to his home to secure it and obtain a search warrant. When they arrived, they learned that neighbors had seen a man crawl out of the defendant's second-story window behind the house, throw something on top of the lower-level roof and then jump off the roof and flee. The neighbors did not recognize the man.

In their application for a search warrant, the police detailed the facts. However, they stated that "an individual matching Mr. Fall's clothing description and identified by a neighbor as Mr. Fall was seen … throwing a laptop computer on the roof of the residence before exiting the yard."

The defendant moved to suppress the search of his residence and the digital evidence. He argued that the physical evidence should have been suppressed as "fruit of the poisonous tree"—to wit, the improper warrantless search of his computer that his niece and her boyfriend found in the guest bedroom and took to the police. According to the defendant, without that search, the police could not have obtained the warrant to search his home, and the physical evidence would not have been discovered. However, the district court ruled that the officers did not expand the niece's private search of the laptop and therefore their search was lawful.

Held: Affirmed. Regarding the motion to suppress, the Court refused to determine the boundaries of the private search doctrine in the context of electronic searches. Instead, the Court simply observed that, even if the search was not proper under the private search exception, the denial of the motion to dismiss should be affirmed under the good faith exception to the exclusionary rule. The Court pointed out that it had not addressed the private search doctrine in the context of electronic devices, and noted that other circuits have addressed the doctrine in different ways. However, the Court found that the information in the affidavit provided an objectively reasonable basis for the officers to objectively believe that probable cause existed.

Regarding the incorrect identification of the defendant in the search warrant, the Court agreed that the record indicates the neighbors did not identify the defendant. However, the Court also agreed with the district court that the error did not constitute evidence of dishonesty or recklessness in preparing the affidavit.

Regarding the defendant's "transportation" of child pornography, the Court ruled that the transportation charge was based on sufficient evidence, because the defendant transported child pornography from his laptop's hard drive to an online file-sharing website, even though the government presented no evidence that anyone other than the defendant accessed the file-sharing account. The Court found that "transportation" does not require conveyance to another person.

The Court distinguished this case from the 10th Circuit's *Dobbs'* case by noting that the evidence in this case, unlike *Dobbs,* contained evidence of over ten years of illicit conduct across multiple devices and thousands of images and videos of child pornography. While the Court agreed that the government offered no specific evidence tying contraband images located in the computer's temporary internet files to specific browsing activity or particular web searches, the Court refused to required direct evidence that the defendant sought out and acquired these specific images. Instead, the Court agreed that the evidence demonstrated that the defendant's receipt was knowing, based on the circumstantial evidence presented about his long-standing and extensive collection of child pornography on multiple devices.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184673.P.pdf

U.S. v. Jones: March 3, 2020

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

Facts: An officer knocked on the defendant's door to investigate a drug complaint. As soon as the defendant opened the front door, the officer could smell a strong odor of marijuana coming from inside the home. The officer secured the residence and performed a "check" of the residence in an effort to make sure there were no other people located inside. During that check, he observed what he believed to be a marijuana cigarette in the kitchen trash can, sitting on the top of the trash, still burning.

Based on those facts, officers obtained a search warrant and searched the home. In a safe in the defendant's bedroom closet, officers recovered a handgun, and elsewhere they recovered marijuana, crack cocaine, and items commonly used for packaging and weighing narcotics. The defendant moved to suppress, arguing that the warrant should have been limited in geographic scope because the smoldering marijuana cigarette in the trash can was the likely source of the marijuana odor, but the trial court denied the motion.

Held: Affirmed. The Court held that the magistrate, presented with evidence that the defendant was illegally possessing and smoking marijuana in his house, had a substantial basis for concluding that probable cause existed to search the entire house for evidence of marijuana possession, even if the source of the smoke was a smoldering marijuana cigarette found in the kitchen trash can. Because the warrant properly authorized a search of the defendant's house, including any safes and locked boxes, the Court therefore held that the officers legally discovered the handgun that the defendant kept in the safe in his bedroom closet.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184448.P.pdf

U.S. v. Jordan: March 3, 2020

E.D.Va: Defendant appeals his conviction for Drug Conspiracy, Possession of a Firearm, and related charges on Fourth Amendment grounds.

Facts: DEA agents learned that the defendant was selling drugs from an informant. The agents contacted a local police officer, who followed the defendant's car until he saw him run a red light. The officer stopped and approached the defendant's truck. The officer asked the defendant to step out of the truck and patted him down, observing a rubber glove – which he knew to be common packaging for drugs – in the defendant's pants pocket. The defendant's brother arrived on the scene in a separate vehicle, attempting to "interject himself" into the stop. The officer accordingly waited for about 11

minutes for back-up before walking his drug-detecting dog around the truck. The dog alerted, and the defendant admitted that he had cocaine in his possession.

The officer found cocaine in the rubber glove and a handgun in the vehicle, as well as other evidence. As a result of the stop, police eventually found over a kilogram of heroin and cocaine, several guns, and other evidence. The defendant moved to suppress, arguing that the length and extent of the stop exceeded *Rodriguez,* but the trial court denied the motion.

Held: Affirmed. The Court found that the officer had "ample reasonable suspicion of drug distribution, justifying the full length of the stop under the Fourth Amendment." The Court ruled that the initial reasonable suspicion justified the length of the stop in question, including the 11 minutes while the officer waited for back-up before completing his investigation. The Court repeated that investigating officers may take such steps as are reasonably necessary to maintain the status quo and protect their safety during an investigative stop.

The Court explicitly imputed the agent's knowledge of all the facts to the officer when the agent asked the officer to stop the defendant.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174751.P.pdf

U.S. v. Blakeney: February 6, 2020
949 F.3d 851
M.D.: Defendant appeals his conviction for DUI Vehicular Manslaughter and related offenses on Fourth Amendment grounds.

Facts: The defendant drove while intoxicated, crashing his vehicle and killing his passenger. Officers sought a search warrant for the defendant's blood via a telephone call to a magistrate judge. Based on the "gross driver error," the odor of alcohol coming from the vehicle, and the defendant's combativeness at the scene of the accident, the magistrate judge issued a verbal search warrant for the defendant's blood. Later, the officers obtained a search warrant to search the vehicle's event data recorder ("EDR") for information about the car's speed, brake status, and other conditions in the moments just before the crash.

The defendant moved to suppress the results of both warrants, arguing the lack of probable cause and that the search warrants were insufficiently particularized. The trial court denied both motions.

Held: Affirmed. The Court first agreed that the facts provided in the phone call established a "fair probability" that the defendant's blood would contain evidence that he was driving under the influence of alcohol at the time of the accident. The Court also found that the application for the EDR warrant likewise provided the judge who approved that warrant with a "substantial basis" for finding probable cause.

Regarding particularity, the Court explained that a warrant may satisfy the particularity requirement either by identifying the items to be seized by reference to a suspected criminal offense or

by describing them in a manner that allows an executing officer to know precisely what he has been authorized to search for and seize. Thus, where a warrant does not otherwise describe the evidence to be seized, that gap can be filled, at least sometimes, if the warrant instead specifies the relevant offense. The Court rejected the defendant's argument that a search warrant always must specify the crime for which the executing officers may seek evidence.

In this case, the Court concluded that the warrant applications in this case in fact did describe, to a reasonable degree of specificity, the crimes for which evidence was sought. The Court agreed that the blood warrant gave a reasonable executing officer notice that his or her authority was limited to drawing the defendant's blood and testing it to determine alcohol content.

Regarding the EDR warrant, for purposes of a search of a vehicle EDR, the Court explained that, so long as the executing officers know they are to search the EDR data only for evidence related to "a vehicular homicide or a vehicular-related fatality," the concerns underlying the particularity requirement – the avoidance of "exploratory rummaging" and general searches – are addressed. The Court observed that "no officer executing this warrant could have been mistaken as to the data he was authorized to obtain or the place where he was to find it."

The Court also concluded that both the results of the blood-toxicology test and the EDR data were admissible at the defendant's trial under *Leon*'s good faith exception to the exclusionary rule.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184921.P.pdf

Calloway v. Lokey: January 21, 2020
948 F.3d 194
W.D.Va: Plaintiff appeals the dismissal of her lawsuit against prison guards on Fourth Amendment grounds.

Facts: The plaintiff traveled to a Virginia prison to visit an inmate. The guards knew that, earlier in the year, the inmate had enlisted his mother to help in a conspiracy to smuggle tobacco into a different Virginia prison. Sometime after the inmate's transfer to this prison, the guards started to hear from informants that they should keep an eye on the inmate. Two days prior to the plaintiff's visit, the guards received a more concrete tip from an inmate that the inmate "was moving," a term that guards knew to be prison slang for drug smuggling.

A guard noticed that, while waiting, the plaintiff had brought her hand to her waistband and adjusted her clothing in such a way that it looked like she had just unbuttoned her pants. That guard had been "very successful" in the past in identifying suspicious actions that had led to the interception of drugs or other contraband. Guards strip-searched the plaintiff, but found no contraband.

The plaintiff filed a lawsuit against the guards and the facility on the grounds that they had violated her Fourth and Fifth Amendment rights. She also asserted state law claims for Assault, False Imprisonment, and Intentional Infliction of Emotional Distress. After discovery, the trial court granted summary judgment against the plaintiff.

Held: Affirmed. The Court first made clear that the standard under the Fourth Amendment for conducting a strip search of a prison visitor is whether prison officials have a reasonable suspicion, based on particularized and individualized information, that such a search will uncover contraband on the visitor's person on that occasion.

In this case, the Court concluded that the guards possessed the requisite reasonable suspicion to justify the search because the totality of the circumstances pointed to at least a moderate chance that the plaintiff was concealing contraband on her person. Therefore, the guards were entitled to summary judgment on the plaintiff's Fourth Amendment claim.

The Court found that it was reasonable for the guards to rely on others' reports, noting that the officers charged with maintaining safe and secure prisons must assume different roles and responsibilities and be able to rely on each other to perform their differentiated tasks.

The Court also rejected the defendant's argument that that the Fourth Amendment required the officers to escort her to an entirely different portion of the facility before conducting a search as "untenable." The Court equally agreed that, since the seizure and search were lawful, the plaintiff could not prove the elements necessary to establish her state law claims for assault, false imprisonment, and intentional infliction of emotional distress.

Judge Wynn filed a dissent in which he disagreed that this evidence was sufficient to show the individualized, particularized, and reasonable suspicion required for the invasive search.

Full Case At:
http://www.ca4.uscourts.gov/opinions/182193.P.pdf

U.S. v. Lewis: December 26, 2019
Unpublished
S.C.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, carried a concealed firearm. An officer knew an arrest warrant had been issued for an individual with the defendant's last name, that the warrant was for assault, and that the defendant had a reputation as a neighborhood bully. When the officer observed the defendant in the neighborhood, the officer approached him and mentioned the arrest warrant. In fact, the warrant was for the defendant's brother, who had the same last name as the defendant, but the officer did not remember the first name on the warrant when he saw the defendant.

The defendant was in the yard near his front door, outside the fence line. The officer was armed and in uniform during the encounter, but he was alone, did not draw his weapon or attempt to block the defendant's departure, restrain his movement, or touch him. When the officer mentioned the possible warrant, the defendant fled. The officer captured the defendant just before the defendant could get over his fence. The officer discovered the firearm.

Later, the officer learned that the warrant had been issued for the defendant's brother, not the defendant. The defendant moved to suppress the stop, but the trial court overruled the motion.

Held: Affirmed. The Court held that the facts, including the defendant's sudden flight, provided reasonable suspicion for the officer to detain the defendant after an initial consensual encounter. The Court also examined whether the officer had entered the "curtilage" of the defendant's home when he seized the defendant, but concluded that there is no plain statement of law announcing that a defendant's yard or an area near the fence line of his home must be considered curtilage.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184487.U.pdf

U.S. v. Small: December 6, 2019
944 F.3d 490
Baltimore: Defendant appeals his convictions for Robbery and related offenses on Fourth Amendment grounds.

Facts: The defendant robbed several people at gunpoint, stealing a car in the process. Several days later, officers noticed the stolen car and attempted to stop it, resulting in a chase. During the chase, officers called for aviation and K-9 assistance. The defendant fled onto the property of Fort Meade and crashed through a fence on NSA property. Fort Meade locked down its gates and only reopened them to allow entry by search personnel. After the crash, NSA police established a perimeter within the NSA and led a thorough, methodical search for the suspect.

The defendant escaped from the area. However, officers located the defendant's car, a bloody shirt, personal property, and a cell phone only fifty yards from the shirt. Police found the phone in a grassy area, not on a sidewalk or public area. Officers examined the phone without a warrant and used it to identify the defendant as the likely driver of the vehicle. They then obtained a search warrant for the phone and found further evidence that demonstrated his involvement in the robberies.

Prior to trial, the defendant moved to suppress the evidence from the phone, but the district court found that the defendant had abandoned his privacy interest in the phone by abandoning it at the scene of the crash.

Held: Affirmed. The Court agreed that when the defendant discarded the phone, he ran the risk that complete and total strangers would come upon it. Thus, in tossing his phone, he relinquished his reasonable expectation of privacy in it. The Court pointed out that, while *Riley* held that the search incident to arrest exception does not apply to digital information stored on cell phones, it emphasized that other case-specific exceptions may still justify a warrantless search of a particular phone and found that this is such a case.

The Court repeated that a finding of abandonment is based not on whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the articles alleged to be abandoned. The Court cautioned that abandonment should not be casually inferred, writing: "People lose or misplace their cell phones all the time. But the simple loss of a cell phone does not entail the loss of a reasonable expectation of privacy. Thus, such ordinary mishaps do not constitute 'abandonments.'" Instead, the Court agreed that there has to be some voluntary aspect to the circumstances that lead to the phone being what could be called abandoned.

In this case, the Court emphasized that police found the cell phone in a large crime scene, not in a crowded public area. The Court agreed that search personnel could well believe that this phone—located during the early morning hours in a grassy area in a facility on lockdown—belonged to the fleeing suspect who deliberately abandoned it during flight. The Court reasoned that, because a cell phone's GPS tracking can lead you to a suspect, it was credible that a fleeing suspect might intentionally discard his phone.

The Court also explained that, "while phones occasionally slip out of pockets, shirts do not accidentally fall off their wearers—at the exact same moments as hats—and cars do not ditch themselves after a crash." The Court found that the fleeing suspect's relinquishment of the car, the hat, and the shirt near where the cell phone was found support the district court's finding of abandonment.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184327.P.pdf

U.S. v. Seay: December 4, 2019
944 F.3d 220
E.D.Va.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: Officers assisted in ejecting the defendant and another person from a hotel. During the ejection, officers arrested the defendant's companion, who was carrying a plastic bag that she claimed belonged to both her and the defendant. The officer, in order to determine what property was whose and to search the property prior to taking the woman to the jail, searched the bag and found a firearm. The gun belonged to the defendant, who is a felon.

The defendant moved to suppress. At the hearing, the officer testified that if, hypothetically, the woman had requested that the plastic bag be given to the defendant instead of accompanying her to jail, the officers would have inventoried the bag before releasing it to the defendant. The officer explained that, when an arrestee requested that property be released to another individual, standard practice was to complete a field interview card for that individual and document the property being released. The officer explained that when officers wore body cameras (as they did in this case), they typically identified each item on camera and confirmed that the arrestee wanted her companion to take that item, but whether to use this procedure was left to the officer's discretion.

The trial court found that the evidence would have been inevitably discovered.

Held: Affirmed. The Court ruled that the district court did not clearly err in finding that discovery of the firearm during an inventory search was inevitable. The Court found that the officers' testimony explaining the inventory procedure was sufficient to satisfy precedent; the government was not required to produce a written policy.

The Court explained that, even though the officers had some discretion, their limited discretion based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment. For example, an inventory search policy may leave the inspecting officer sufficient latitude

to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself.

The Court rejected the defendant's argument that the officer could have clarified during an inventory search that the plastic bag actually belonged to the defendant, explaining that the argument was speculative and contrary to the evidence.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184383.P.pdf

U.S. v. Aigbekaen: November 21, 2019
943 F.3d 713
Baltimore: The defendant appeals his convictions for Sex Trafficking and related offenses on Fourth Amendment grounds

Facts: The defendant trafficked children for prostitution in multiple states, using Backpage.com. A victim reported the offense to police, who identified the defendant, a Nigerian national, as one of the two traffickers in the case. Officers learned that the defendant had left the country but would be returning to the United States at JFK International Airport. They alerted border agents, who stopped the defendant at customs and searched his electronic devices. Evidence from that forensic examination demonstrated that the defendant had created child pornography while trafficking multiple children for prostitution.

Several years after the search, in *Kolsuz,* the 4th Circuit ruled that "a search initiated at the border could become so attenuated from the rationale for the border search exception that it no longer would fall under that exception" and so requires a warrant. The defendant moved to suppress the evidence from the border search prior to trial, but the trial court denied the motion.

Held: Affirmed. The Court held that this attenuated, warrantless, nonroutine forensic search at the border was an unconstitutional search. Nevertheless, given the uniform body of precedent that permitted warrantless searches at the border at the time, the Court concluded that the good-faith exception applied.

The Court reaffirmed that, where a search at the border is so intrusive as to require some level of individualized suspicion, the object of that suspicion must bear some nexus to the purposes of the border search exception in order for the exception to apply. The Court explicitly refused to specify what quantum of individualized suspicion, if any, beyond the reasonable-suspicion standard is needed to justify a warrantless forensic search of a device at the border.

In this case, the Court complained that the Government lacked sufficient individualized suspicion of criminal activity with any nexus to the sovereign interests underlying the border search exception. While acknowledging that a border search's relation to the Government's sovereign interests is paramount, the Court warned that the "border search" exception cannot be invoked to sanction invasive and nonroutine warrantless searches of all suspected domestic criminals, nor the suspected instrumentalities of their domestic crimes. The Court complained that in this case, the Government has

offered no reasonable basis to suspect that the defendant's domestic crimes had any such transnational component.

The Court agreed that the agents had probable cause to believe that the defendant's laptop, at least, contained evidence of domestic sex trafficking. However, the Court also found no "particularized and objective basis" in the record for agents to reasonably suspect that the defendant possessed child pornography on his devices.

Judge Richardson concurred in the judgment, but argued that the border search was lawful under *Kolsuz*.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174109.P.pdf

U.S. v. Jones: November 6, 2019
942 F.3d 634
W.Va: Defendant appeals his conviction for Possession of Ammunition by Felon on Fourth Amendment grounds.

Facts: On Facebook, the defendant, a felon, repeatedly threatened to shoot law enforcement officers and solicited personal information about an officer that had recently arrested him. In his posts, he repeatedly declared that he was on a "manhunt" for police officers, repeatedly tried to ascertain where individual officers could be found, warned that "pigs" should stay away from his house, and openly admitted to owning a firearm that he previously had used to injure another person during a drug transaction.

Officers obtained a warrant to search his home for evidence of terrorist threats, in violation of W. Va. Code § 61-6-24. The affidavit contained evidence of eleven of the defendant's threatening online posts. The affidavit also stated that law enforcement surveillance confirmed that the address specified in the warrant application was the defendant's residence. Upon executing the warrant, officers found hundreds of rounds of ammunition and ammunition components.

The defendant moved to suppress the search. He contended that the search warrant was facially insufficient to establish probable cause for two reasons: (1) his statements did not qualify as terrorist threats under West Virginia law; and (2) the warrant affidavit failed to establish the required nexus between his residence and evidence of that crime. In a motion for a *Franks* hearing, the defendant complained that investigators did not include several posts that would have, when understood in context, demonstrated that he was contemplating suicide, not homicide, at the time he made the threatening statements. The trial court denied his motion.

Held: Affirmed. The Court first held that the warrant affidavit established a "fair probability" that evidence of the defendant's terrorist threats would be found at his residence. The Court pointed out that the defendant's threats indicated that he may have planned to carry out one or more of his threats from his home, and therefore provided some direct evidence linking his crime to his residence.

The Court then held that the affidavit provided the magistrate with a substantial basis to conclude that the defendant made terrorist threats within the meaning of W. Va. Code § 61-6-24, and that evidence of this crime would be found in his home.

The Court emphasized that an affidavit need not contain direct evidence to link the evidence sought with the place to be searched. Instead, the Court agreed that the magistrate reasonably could have inferred that the defendant had made his online threats from a computer located at his home. The Court also agreed that the magistrate was entitled to draw an inference that other relevant evidence, including the handgun that the defendant had referenced in one of his online statements, would be stored at his residence. The Court also noted that the affiant established through law enforcement surveillance that the address specified in the warrant application was the defendant's residence.

The Court also concluded that, even if the affidavit were revised to include the omitted statements, that revised affidavit would have established probable cause to search the defendant's residence. Accordingly, the Court held that the defendant failed to demonstrate that the omitted statements were material to the magistrate's probable cause determination and that, therefore, the district court did not err in denying the defendant's request for a *Franks* hearing.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184671.P.pdf

U.S. v. Scott: October 25, 2019
941 F. 3d 677 (2019)
E.D.N.C.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: The defendant, while on probation in North Carolina due to a sexual offense, possessed several handguns in his apartment and in his vehicle. Because of his sexual offense, the defendant's probation included a statutorily-required provision that any post-release supervision officer may conduct a warrantless search of the defendant and his property. Under North Carolina law, the condition requires that a supervision search be conducted "for purposes reasonably related to the post-release supervision."

The defendant's probation office and law enforcement conducted a warrantless search of the defendant's apartment and vehicle and found his guns. The search took place as part of "Operation Spring Sweep", in which the U.S. Marshals Service cooperated with North Carolina probation officers to conduct warrantless searches of probationers who were subject to a such searches under their probation. Probation officers supervised the search.

The defendant moved to suppress the search. The defendant's probation officer testified to two reasons for this search. First, she had suspicions regarding how he had obtained his "flashy" jewelry without a job. Second, the defendant was about forty-five days away from the deadline for a mandatory search pursuant to North Carolina probation policy. That policy requires that probation officers conduct searches of those on supervision for certain sexual offenses every 180 days. Probation officers have discretion to decide precisely when to conduct the mandatory search within each 180-day period.

Held: Affirmed. The Court held that the search complied with the statutory probation condition because it was reasonably related to the defendant's post-release supervision and, under *Midgette*, no individualized suspicion was required. The Court agreed that, despite law enforcement's participation, the warrantless search was not for the purpose of furthering general law enforcement goals. Rather, the Court concurred that the probation officers undertook the search to ensure the defendant's continued compliance with the terms of his supervision agreement.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184440.P.pdf

In Re Search Warrant of June 13, 2019: October 31, 2019
942 F.3d 159
Baltimore: Law Firm appeals the denial of an injunction regarding a Search Warrant for its records.

Facts: During an investigation into an attorney who allegedly assisted a drug and money laundering enterprise, DEA and IRS agents seized the computers and documents belonging to the attorney and his law firm. The magistrate judge who issued the search warrant also authorized a "filter team", which had been proposed to the judge *ex parte* by the prosecutors in connection with the search warrant application. The agents and prosecutors conducting the investigations of Lawyer A and Client A (the "Prosecution Team") were excluded from the Filter Team. The magistrate judge approved a "filter protocol" with explicit instructions on how to examine and handle the data seized.

The U.S. Attorney's Office asked the law firm to provide a client list so it could identify privileged materials, but the law firm refused. The Law Firm requested that the district court enjoin the Filter Team's review of the seized materials, invoking the attorney-client privilege and the work-product doctrine. The district court denied its request.

Held: Reversed. The Court found that the magistrate judge erred in assigning judicial functions to the Filter Team, approving the Filter Team and its Protocol in *ex parte* proceedings without first ascertaining what had been seized in the Law Firm search, and disregarding the attorney-client relationships protected in the records. In this case, the Court directed that the magistrate judge (or an appointed special master) — rather than the Filter Team — must perform the privilege review of the seized materials.

The Court ruled that the Filter Protocol improperly delegated judicial functions to the Filter Team. The Court criticized various provisions of the magistrate judge's order, whereby the Privilege Assessment Provision authorized paralegals and IRS and DEA agents to designate seized documents as nonprivileged, and allowed the Filter Team AUSAs to deliver such documents to the Prosecution Team without the approval of the Law Firm or a court order. In the Court's opinion, the magistrate judge failed to recognize and consider the significant problems with that delegation, which, the Court wrote: "left the government's fox in charge of guarding the Law Firm's henhouse."

The Court explained that the magistrate judge should have declined the government's *ex parte* invitation with respect to the Filter Team, and the judge should have conducted adversarial proceedings on whether to authorize the Filter Team and the Filter Protocol. In the Court's view, in failing to conduct

adversarial proceedings prior to authorizing the Filter Team and its Protocol — the magistrate judge prematurely granted the United States Attorney's *ex parte* request.

The Court also complained that the magistrate judge — like the district court in thereafter assessing the Injunction Requests — gave no indication that she had weighed the principles that protect attorney-client relationships. The Court wrote: "Put simply, the Filter Protocol authorized government agents and prosecutors to rummage through Lawyer A's email files….The court's authorization of such an extensive review of client communications and lawyer discussions by government agents and prosecutors was made in disregard of the attorney-client privilege, the work-product doctrine, and the Sixth Amendment."

By asking the Law Firm to furnish the Filter Team with a client list — which could be used by Filter Team members to directly contact clients and seek privilege waivers under the Filter Protocol — the Court wrote that: "the government demonstrated a lack of respect for the attorney- client privilege and the Firm's duty of confidentiality to its clients. In declining to reveal a client list to the Filter Team, the Law Firm relied on its ethical obligations to protect confidential and privileged information relating to its clients."

The Court also criticized the Filter Protocol for prospectively authorizing the Filter Team to contact the Law Firm's clients *ex parte* and seek waivers of their attorney-client privileges. The Court pointed to the Model Rules of Professional Conduct, which generally bar a lawyer from communicating with a represented party about the subject of the representation without the represented party's lawyer being present. Although an exception to that rule can — in the proper circumstances — be made by a court, the Court cautioned that any such court order should be predicated on an individualized assessment of the attorney-client relationship.

The Court emphasized that, unlike the Filter Team, a magistrate judge and a special master are judicial officers and neutral arbiters that have no stake in the outcome of the privilege decisions. The Court contrasted the district court's handling of this case to the New York district court's handling of the search warrant for Michael Cohen's law office.

In a footnote, the Court expressed concern that, even if the Filter Team AUSAs had been instructed to ignore information relating to possible criminal activity by other Law Firm clients in the seized materials, its plain view concerns would not be assuaged. "The review of such information by the Filter Team AUSAs cannot be undone. Additionally, the IRS and DEA agents on the Filter Team have their own superiors. It may well be difficult for those agents to withhold from their superiors information about possible crimes potentially identified in the seized materials."

Full Case At:
http://www.ca4.uscourts.gov/opinions/191730.P.pdf

U.S. v. Alston: October 25, 2019 (Unpublished)
941 F. 3d 132 (2019)
N.C.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, carried a gun hidden in his car. An officer saw the defendant run a red light and attempted to stop the defendant. The defendant refused to stop and instead began reaching deep beneath the passenger seat. The officer grew suspicious that the defendant was reaching for a weapon. The defendant then crashed into a parked car.

The officer asked the defendant what happened and the defendant claimed he was reaching for his cellphone, even though he was holding his phone and was clearly having a conversation on the phone at the time. The officer asked the defendant if he had "anything else in the vehicle that you shouldn't have?" The defendant replied that he had marijuana and handed over a black bag containing marijuana, a digital scale, and small plastic bags.

However, the officer was convinced the defendant had a firearm and announced that he "need[ed] to get the heater." The officer stated: "I need you to be honest with me and I will not take you to jail today." The defendant admitted that he had a gun underneath the passenger seat. The officer seized the gun, which was a stolen gun. Soon, Federal task force agents arrived at the scene. The officer told the agents that he had promised the defendant that he would not arrest him, but the agents responded that the defendant was on both state and federal probation and that the task force "would be taking over." Task force officers then arrested the defendant.

During the motion to suppress, the officer testified that his highest priority in conducting the traffic stop was to find the gun he believed to be in the car and to get it off the street. He explained that "getting the heater off the street [was] more pressing than taking [the defendant] to jail." Given the officer's assurances that he did not intend to arrest the defendant, the district court found that the defendant's subsequent admissions were involuntary. However, the district court refused to exclude the gun itself.

Held: Affirmed. The Court found that before the defendant made any involuntary admissions, the officer already believed that the defendant possessed a gun, had the probable cause necessary to search the car, and intended to find the gun. The Court thus concluded that the officer not only could have searched the car but also would have done so.

The Court first agreed that, by admitting to possessing marijuana and showing it to the officer — which the defendant did voluntarily, before the officer made any promises — the defendant gave the officer probable cause to search the car for further marijuana. The Court then reaffirmed that discovery is not inevitable unless the Government proves that police not only could have lawfully obtained the evidence but also would have done so. In this case, the Court wrote, "the evidence that the search was inevitable jumps off the pages of the record."

The Court also rejected the defendant's argument that the officer impermissibly prolonged their interaction by exceeding the scope of the stop, in violation of *Rodriguez*, finding that the defendant's admission to possessing the first bag of marijuana gave the officer the reasonable suspicion demanded to justify detaining the defendant and investigating further.

The Court did not address whether the defendant's statements were, in fact, involuntary. In a footnote, the Court acknowledged that in another case, there might be irreconcilable tension between an officer's determination to obtain a gun and his repeated assurances that he would not arrest the suspect. However, in this case the Court cited *Utah v.Strieff* and found that the task force's pursuit of

the defendant "is a critical intervening circumstance that is wholly independent" of the officer's promises not to arrest the defendant.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184524.P.pdf

U.S. v. Curry: September 5, 2019
937 F. 3d 363 (2019)
E.D.Va: The Government appeals the granting of a motion to suppress on Fourth Amendment grounds.

Facts: Four officers, who were patrolling a housing complex in response to public concerns about gun violence, including six recent shootings and two recent homicides, heard five or six gunshots coming from the direction of that housing complex. As they drove toward the shooting location, they learned of two 911 calls reporting gunfire at the complex, with one call confirming the shooting location. They arrived within 35 seconds of hearing the shots. Seconds before stopping, the officers observed a man they believed to be "favoring one of his arms," as if shot.

Using their flashlights, the officers "fanned out and began approaching different individuals," "illuminating the individuals . . . , their waistbands and hands, looking for any handguns or firearms." In doing so, the officers stopped the first men encountered leaving the scene, including the defendant. While the other individuals complied with the officers' directives to lift their shirts and submit to a visual inspection of their waistbands for concealed firearms, the defendant refused to fully comply. When officers sought to pat him down, he struggled with them. After the officers put the defendant on the ground and handcuffed him, they recovered a silver revolver from the defendant.

The district court granted the defendant's motion to suppress, finding that the surrounding "exigencies" of the situation could not excuse the prerequisite of individualized reasonable suspicion.

Held: Suppression Reversed. In this case, the Court found that, given the important public interests of citizen and police safety at issue, the limited stop and search that was narrowly circumscribed by the exigencies present was reasonable under the Fourth Amendment. The Court relied on the U.S. Supreme Court's decision in *Edmond*, which had suggested that roadway searches without reasonable suspicion could be justified by the important governmental interests presented by "an imminent terrorist attack" or "a dangerous criminal who is likely to flee by way of a particular route," unlike impermissible roadblocks whose primary purpose is general crime control.

The Court concluded that the exigent circumstances implicated important public concerns far beyond general crime control and that the officers' actions advanced those interests by ordering the men to stop and submit to an unobtrusive flashlight search of their waistbands to identify weapons. The Court also cited other Circuits who have held that the need to prevent terrorist attacks permits searches without individualized suspicion in subways and airports. The Court also relied on a finding that the officers' intrusion on the men's liberty was minimal in both scope and duration.

The Court cautioned that only "limited circumstances" can justify a search or seizure without reasonable suspicion. Instead, the interest at issue must go beyond "ordinary crime control" to qualify as a special need—as do, for instance, the government's interests in "thwarting an imminent terrorist

attack" and "catching a dangerous criminal." However, the Court found that the district court erred in requiring officers to be sure that one of those stopped was the shooter, writing "Requiring perfect confidence would ignore the exigent circumstances the officers faced: they were trying to prevent anyone from being shot."

In a footnote, the Court elucidated that mere "perception" of an exigency is not enough—instead, the perception must be objectively reasonable based on the particular facts at hand. In addition, the scope of any search or seizure must also be appropriately limited, meaning "police could not search multiple homes willy-nilly." Lastly, the severity of the intrusion must be justified by the nature and seriousness of the exigency.

In another footnote, the Court cautioned that its reasoning would not allow police, upon hearing actual (or perceived) gunshots, to stop and frisk anyone in the area without individualized suspicion. Instead, the Court emphasized that this case constituted the "confluence of several factors: the severity of the threat (the presence of multiple gunshots that were reasonably perceived as such); the tailored nature of the officers' response, which was limited both in time (seconds later) and space (right next to what the officers reasonably believed was the scene of the shooting); and the minimal severity of the intrusion (which did not involve even a frisk of each man, but simply a visual inspection of his waistband)."

The Court remanded the case to the district court to determine whether the totality of the circumstances, known before the initial stop and learned during the stop, supported reasonable suspicion that the defendant may have been armed as to justify the frisk.

Justice Floyd filed a dissent, agreeing with the district court.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184233.P.pdf

U.S. v. Thomas: August 15, 2019

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

Facts: The defendant carried drugs and a firearm in a car while wanted on a probation violation. Police located him in the vehicle and arrested him, finding a large amount of cash and a cell phone in his pockets. During the arrest, they also removed the passenger from the car and searched her as well. Officers found a baggie in her hair, which she admitted contained cocaine residue. Officers also saw more cash in plain view in the car as well as a small tied-up quarter baggie sitting behind the gear stick on the center console of the vehicle. An officer testified that, based on his training and experience, he believed the baggie contained contraband.

Officers searched the car and located illegal drugs and a firearm. The trial court denied the defendant's motion to suppress.

Held: Affirmed. The Court ruled that the officers' search was a valid search incident to arrest. The Court repeated that, under *Gant*, police may conduct a warrantless search of a vehicle incident to a

lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. The Court explained that, after finding the bag of white powder in the passenger's hair — which she admitted to the arresting officer was cocaine — and observing a suspicious baggie and a large amount of cash in plain view, the officers had a "reasonable basis" to believe they might find additional drugs in the vehicle.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184214.P.pdf

U.S. v. Bosyk: August 1, 2019
933 F. 3d 319 (2019)
E.D.Va: Defendant appeals his conviction for Possession of Child Pornography on Fourth Amendment grounds.

Facts: The defendant possessed child pornography on his computer, some of which he obtained using a "dark web" sharing site. This "dark web" forum was accessible only through an anonymous web browser that users must download. Law Enforcement discovered the site and began to monitor it. One day, a link appeared on the site; accompanying the link was a message describing its contents as child pornography, as well as numerous thumbnail images depicting sexual molestation of a toddler. The link led to multiple videos of child pornography. On that same day, an IP address associated with the defendant's house accessed the link.

Based on these facts, six months later the government obtained a warrant to search the defendant's home for evidence of child pornography. In the warrant, the agent described the tendency of individuals who possess or access with intent to view child pornography to collect such material and hoard it for a long time. Agents executed the warrant and found thousands of images and videos of child pornography on the defendant's computer.

The defendant challenged the warrant on Fourth Amendment grounds, but the trial court rejected his arguments. The defendant had complained that the warrant lacked probable cause, was stale, and contained false statements. He also complained that the government failed to note the absence of certain facts, such as the lack of any allegation that a user at his IP address was a member of the sharing site, accessed the link through that site, or entered the password displayed there.

Held: Affirmed. The Court found that the "critical fact" in this case was the timing. "On the very day that someone clicked the link, it appeared on a website whose purpose was to advertise and distribute child pornography to its limited membership. And it appeared in a post containing text and images that unequivocally identified its contents as child pornography."

The Court found that the affidavit was supported by probable cause based on the closeness of two events: first, the appearance on the sharing site of a post unambiguously promoting a link containing child pornography videos, and second, an attempt to access that link on the same day by someone at the defendant's address. The Court explained that the possibility that the user might have stumbled upon the link from another, perhaps innocent, source did not defeat probable cause because

"it's fairly probable, given the temporal proximity, that the person clicked on the link because he saw it on the site and wanted to view child pornography."

The Court distinguished many cases from other jurisdictions, such as *Falso* and *Reece*. For example, it pointed out that in *Raymonda*, the facts were "equally consistent with an innocent user inadvertently stumbling upon a child pornography website, being horrified at what he saw, and promptly closing the window." In this case, however, the Court agreed that it was possible to infer from the affidavit that whoever clicked on the link did so willfully and deliberately because he was interested in images of child pornography.

The Court also rejected the "staleness" argument, noting that probable cause "can't be determined by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit." The Court concluded that the facts in the affidavit supported the inference that somebody saw the description and video thumbnails on a website devoted to child pornography and then deliberately sought out the video by clicking the link. In the Court's view, the magistrate judge could therefore further infer that someone at the defendant's home likely downloaded, stored, and kept that content, since people "with an interest in child pornography tend to hoard their materials and retain them for a long time."

Regarding the alleged omissions, the Court pointed out that law enforcement need not include disclaimers specifically pointing out facts absent from the affidavit to obtain a warrant.

The Court also repeated that, under *Leon*, suppression is inappropriate when an affidavit produces "disagreement among thoughtful and competent judges as to the existence of probable cause." In this case, therefore, suppression would be inappropriate because the government obtained a warrant and reasonably relied on it to execute the search.

Judge Wynn wrote an extensive, 72-page dissent, adopting many of the arguments raised by the Electronic Frontier Foundation in their amicus brief. He expressed the view that the majority "displays a troubling incomprehension of the technology at issue in this matter."

Full Case At:
http://www.ca4.uscourts.gov/opinions/184302.P.pdf

U.S. v. Moody: July 29, 2019
931 F. 3d 366 (2019)
E.D.Va: Defendant appeals his convictions for Drug Distribution on Fourth Amendment grounds.

Facts: The defendant arranged a drug transaction from his house by phone and sent his runners from there to deliver the drugs to a police informant. The defendant arranged the transaction but was not physically present at the point of sale. After the controlled sale, an officer obtained a search warrant for the defendant's residence. In the affidavit, the officer stated: "During this controlled purchase, [the defendant] and other co-conspirators were observed leaving from [the defendant's house] and surveilled traveling to the pre-arranged location and selling the Informant heroin."

The defendant filed a motion for a *Franks* hearing, alleging that the affidavit falsely suggested that he was physically present for the controlled purchase. On appeal, the defendant also argued that there were three "material omissions" from the affidavit: (1) "the confidential informant had not been

to the address and had never purchased narcotics at the address," (2) the officer "knew from the confidential informant that the defendant was not present at a drug transaction on the same day as the execution of the affidavit," and (3) "the lack of reliability of the confidential informant."

Held: Affirmed. Although the Court agreed that the most natural reading of the affidavit does seem to say that the defendant was at the scene of the transaction with the informant, the Court found that, assuming that the affidavit was false, the defendant had failed to show intentional falsity or a reckless disregard for the truth.

Ultimately, the Court reasoned that the defendant's presence at the exchange was unnecessary to establishing probable cause. The fact that the affidavit explained that the defendant had organized the sale of heroin over the phone and that the runners delivering the heroin had left from his house established probable cause that instrumentalities or evidence of crime would be found in the house.

The Court also concluded that the precise location of the drug transfers was not important to a finding of probable cause necessary to search the house, because the defendant directed transfers and dispatched runners from there. The Court found that was enough to establish probable cause that evidence of the criminal conduct would be found in the house.

The Court explained that it was irrelevant whether the testifying informant had been inside the defendant's home or bought narcotics there, since both the affidavit and trial testimony point to the participation of other informants (one of whom was in his house during the raid). The Court complained that the defendant provided no basis for his claim that the officer's affidavit omitted anything about the testifying informant's reliability.

In a footnote, the Court also noted that the probable cause determination did not turn on whether the other purchases of drugs by informants from the defendant were controlled.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184213.P.pdf

Hupp v. Cook: July 25, 2019
931 F. 3d 307 (2019)
W.Va.: Plaintiffs appeal the dismissal of their lawsuit against the police for False Arrest and violation of their Fourth Amendment rights.

Facts: State troopers responded to the plaintiff's residence to investigate a complaint from a neighbor that a dog at the plaintiff's residence was "vicious and had killed several of their cats and had chased the children." When a trooper encountered the dog, the dog threatened the officer and the trooper drew his gun. The plaintiff then ran to the trooper, with her arms to her side and her hands empty, after he pulled his gun on the dog.

The parties dispute the facts of what happened next. In particular, they dispute to whether the plaintiff refused to comply with the trooper's orders for her to move or whether she was instead attempting to obey his order to control her dog. There is also a dispute as to whether the plaintiff was cursing at the trooper. The trooper maintains that the plaintiff refused to comply with his orders to "step aside," began cursing at him, "raised her hands towards" him before he grabbed her arm, and

then grabbed at him and "began cursing" after he grabbed her arm. The plaintiff and the trooper struggled until the trooper arrested the plaintiff.

The plaintiff's husband recorded the incident with his cell phone from inside the home. As the police arrested the plaintiff, she asked her husband, "Did you get that on video?" He answered, "Don't worry, babe. I've got that shit." The trooper later testified that he understood that statement to mean that the husband "was glad he had" the video and "wouldn't get rid of it for his—his possession of it."

After her husband video-recorded the incident, the state trooper entered the family's home, without consent and without a warrant, and seized several of the family's electronic devices. The trooper testified that his regular practice is to seize any video recording that he believes to contain evidence of a crime he is investigating.

At trial, a jury acquitted her of Obstruction of Justice. The plaintiff, her minor son, and her father-in-law filed suit against the state trooper, asserting various claims, including violations of the Fourth Amendment under 42 U.S.C. § 1983. The district court granted summary judgment to the state trooper and denied the plaintiff's motion for partial summary judgment. Regarding the Fourth Amendment claim, the district court concluded that exigent circumstances justified the search of the home and the seizure of the electronic devices because an objectively reasonable officer would have believed that the family members would destroy or conceal the video evidence before a warrant could be obtained.

Held: Affirmed in part, reversed in part. The Court ruled that the district court erred in granting summary judgment to the trooper on the false arrest, excessive force, malicious prosecution, and unlawful entry and seizure claims. However, the Court agreed that the district court properly denied the plaintiff's summary judgment on the unlawful entry and seizure-of-devices claims.

Regarding the False Arrest claim, the Court concluded that the district court erred in granting summary judgment to the trooper on qualified immunity grounds. The Court pointed out that the plaintiff did not appear to pose an immediate threat to the safety of the officer or others and that there was disputed evidence of the plaintiff's resistance to arrest. The Court also noted that it had already held that a reasonable officer could not believe that the "initial act of pulling [one's] arm away" when an officer grabs a person without warning or explanation justifies the officer's decision to throw the person to the ground.

Regarding the Malicious Prosecution claims, the Court found that questions of fact exist that must first be resolved before a court can determine that a reasonable officer believed that probable cause existed for the arrest and prosecution. Therefore, the Court ruled that the trooper was not entitled to immunity on the malicious prosecution claim and reversed the district court's grant of summary judgment.

Regarding the Fourth Amendment claim, which was based on the entry into the home and the seizure of devices, the Court expressed concern that the district court's reasoning "would convert exigency from an exception to the rule." Instead, the Court found that the question of whether the trooper's belief that the video was likely to be concealed before a warrant could issue was reasonable under the circumstances must be submitted to a factfinder.

The Court rejected a uniform exigent circumstances exception for all video evidence, writing: "Such a rule would allow officers to seize as a matter of course video-recording devices from not just

those involved in an incident, but also from neighbors and other curious bystanders who happen to record the events as they transpire. Under this view, police officers would lawfully be permitted to enter the home of every person living nearby who stands in her doorway or window recording an arrest, to seize her recording device, and to do so without a warrant or her consent—simply because video evidence, by its nature, can be easily deleted."

The Court explained that, while video evidence contained in a cell phone can be easily deleted or concealed, it is not merely the ease with which evidence may be destroyed or concealed that dictates exigency. Instead, an officer must also have reason to believe that the evidence will be destroyed or concealed. In this case, the Court pointed out that the evidence suggested that the level of urgency to obtain the video was not high and there did not appear to have been any danger to the troopers. The Court also complained that there was no evidence regarding the time needed to secure a warrant.

In particular, the Court emphasized that the trooper believed that the plaintiff's husband was glad to have the evidence and would not want to part with it. The Court wrote: "this case is unlike the 'vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, [where] the reason for the destruction is fear that the evidence will fall into the hands of law enforcement.'" Therefore, because the Court could not say as a matter of law that an officer would reasonably have believed that the video evidence would be concealed or destroyed before a warrant for the video's seizure could be obtained, the Court ruled that the trooper was not entitled to qualified immunity on the search and seizure claims.

However, the Court agreed that a jury could nonetheless find that the trooper reasonably believed that the video was at risk of being deleted or concealed. Therefore, the Court declined to find that the trooper's entry into the plaintiffs' home and his seizure of the electronic devices were unreasonable as a matter of law. Instead, the Court remanded the case for a trial to determine whether the trooper's actions were reasonable.

Full Case At:
http://www.ca4.uscourts.gov/opinions/181845.P.pdf

U.S. v. Wellbeloved-Stone: June 13, 2019 (Unpublished)

W.D.Va: Defendant appeals his conviction for Production of Child Pornography on Fourth Amendment grounds.

Facts: The defendant produced child pornography. During the investigation, investigators used summonses obtained pursuant to 19 U.S.C. § 1509 to obtain his Internet Protocol ("IP") address as well as Internet and email subscriber information. Investigators then obtained a search warrant for the defendant's home. The defendant moved to suppress the evidence obtained pursuant to the summonses, arguing that they were unlawful under *Carpenter v. U.S.*. The defendant also moved to suppress the search warrant, arguing that it lacked probable cause. The trial court denied those motions.

Held: Affirmed. The Court found that the defendant had no reasonable expectation of privacy in his subscriber information, and therefore the Government did not perform a Fourth Amendment search by obtaining that information. The Court pointed to the lack of authority extending *Carpenter's* rationale to IP addresses or subscriber information. The Court also noted that there is no exclusionary remedy in 19 U.S.C. § 1509 and therefore the defendant would not be entitled to suppression even if the summonses were invalid.

The Court then ruled that, even if the warrant was not supported by probable cause, the affidavit contained sufficient indicia of probable cause such that the officers' reliance on the warrant was objectively reasonable. Thus, the Court declined to apply the exclusionary rule to the fruits of the search.

Full Case At:
http://www.ca4.uscourts.gov/opinions/184573.U.pdf

U.S. v. Drummond: June 5, 2019
925 F. 3d 681 (2019)
South Carolina: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: An informant let police know that a man was armed and selling methamphetamine from a motel room. Police responded to the motel room. The man walked out of the specific room identified by the informant. The only car in the lot was parked directly in front of the room and had a fake paper tag. There were a large number of people, including the defendant, in the small motel room in the afternoon hours. When police asked for permission to enter the room, the man consented, but put his pit bull in the bathroom. The man then lied to the police about whether there was a person in the bathroom. After the man consented to the police request to check the bathroom, police found a woman sitting on the floor of the bathroom who could not be identified by the name given, and who had drug paraphernalia at her feet.

Based on those facts, police obtained a search warrant for the motel room. Police searched the room and found a loaded handgun in the defendant's bag near his feet. The defendant is a convicted felon. The defendant filed a motion to suppress the search warrant, arguing that the affidavit did not suffice to establish probable cause to search the motel room because the affidavit contained no information about the informant or the informant's credibility, and because nothing in the affidavit sufficiently corroborated the informant's tip.

Held: Affirmed. The Court found that the facts were sufficient to justify the magistrate's determination that there was a fair probability that evidence of methamphetamine distribution and additional drug paraphernalia would be found in the motel room. The Court explained that even though the police did not identify the informant or explain the basis for the informant's tip, the facts sufficiently corroborated the informant's tip and established probable cause to search the room.

Full Case At:

http://www.ca4.uscourts.gov/opinions/184197.P.pdf

Virginia Supreme Court

Wooten v. Commonwealth: May 14, 2020 (Unpublished)

Newport News: Defendant appeals his convictions for Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: An officer stopped the defendant for a traffic violation. While running the defendant's license and registration, the officer discovered that the defendant was driving on a suspended or revoked license. The officer returned to the car, saw that the defendant was holding a small pill bottle, and ordered the defendant, "really slowly with your right hand, hand me that pill bottle." The defendant complied, telling the officer "it's not mine" before placing the bottle in the officer's hand. The officer discovered the bottle contained Oxycodone, which led him to other drugs in the vehicle.

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

Held: Affirmed. The Court concluded that the defendant failed to satisfy his burden of proving an expectation of privacy in the bottle to challenge its search or its seizure. The Court explained that, when a suspect denies ownership of a container, courts do not "require law enforcement officials to make arcane inquiries into the possibility that he or she may have had an expectation of privacy in it. Instead, the Court found that officers may "justifiably rely on such statements to think they would not violate the suspect's rights." The Court cited a 1989 4th Circuit case called *Clark*, which had held that "denial of ownership" of a container precludes a defendant from arguing that he had a reasonable expectation of privacy in it that would give rise to Fourth Amendment protection.

Justice Powell dissented, opining that, when faced with a direct order from a police officer, the defendant did not voluntarily abandon the pill bottle and his expectation of privacy in the contents of that bottle.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/190805.pdf

Hill v. Commonwealth: August 30, 2019
297 Va. 804, 832 S.E.2d 33 (2019)
Aff'd Court of Appeals Ruling of April 24, 2018
Portsmouth: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: Defendant sat alone in a "high-crime" area in his car with drugs in the backseat. Detectives were patrolling the area in response to specific complaints of narcotics activity and had personal experience making drug arrests in the immediate vicinity. The detectives testified that drug dealers often wait for their clients in secluded locations, such as where the defendant was sitting.

Although the defendant was sitting motionless when the detectives first observed him, he changed his behavior significantly when he saw them approach in their unmarked car. He engaged in "a bunch of movements inside of his vehicle," looking "up and down" repeatedly. When the detectives parked and walked towards him, the defendant immediately turned away and began reaching repeatedly next to his seat, which prompted the detectives to demand that he show both hands. He "dug down into the seats," "tucking his right hand into the rear bottom of the driver's seat," and he refused to show his hands despite being told to do so "at least ten times."

Finally, the detectives grabbed the defendant, physically removed him from the vehicle, and placed him in handcuffs. Looking in the backseat of the car, the detectives found the defendant's cocaine. The trial court denied the defendant's motion to suppress and the Court of Appeals affirmed.

Held: Affirmed. Like the Court of Appeals, the Supreme Court started by noting that the officers' commands for the defendant to show his hands did not, by themselves, result in a seizure because the defendant never submitted to this assertion of authority. Thereafter, the Court noted that the defendant's physical response to the detectives' multiple commands that he show his hands — a clear and sustained expression of fear for their personal safety — showed why the seizure was justified; the defendant "turned his back to the obviously fearful detectives, started digging with his right hand and arm in an area not visible to them and in a manner that gave the detectives reasonable suspicion that he might be reaching for a weapon."

Like the Court of Appeals, the Supreme Court referred back to the facts and holding of *Terry.* The Court also cited roughly a dozen federal circuit court of appeals opinions that bore similarity to this case. The Court also critiqued the defendant for arguing that, under *Terry,* an officer must be investigating a crime already in progress; instead, the Court noted that *Terry* permitted investigation under reasonable suspicion that the defendant was preparing to commit a crime.

The Court cautioned that it was not suggesting that the detectives would have been justified in seizing the defendant if he had simply remained still and refused to show his hands when the officers commanded him to do so. However, the Court explained that it did not matter that, prior to the precise moment of the seizure, the detectives may have lacked grounds to seize the defendant on suspicion of a drug crime, writing "If [an] officer has commenced a nonseizure confrontation without a pre-existing reasonable suspicion supporting a frisk, but such suspicion suddenly appears (most likely because of the suspect's conduct), then the officer is entitled to frisk for his own protection."

Justices Millette and Mims dissented, arguing that the evidence was insufficient to establish objectively reasonable suspicion that the defendant was intending to assault officers with a weapon.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180681.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/0482171.pdf

Virginia Court of Appeals
Published

Joyce v. Commonwealth: April 14, 2020

Caroline: Defendant appeals his conviction for DUI on Fourth Amendment grounds.

Facts: The defendant, who already had one DUI conviction, drove intoxicated. Police received an anonymous tip to look out for the defendant's vehicle. An officer observed the defendant's vehicle, stopped at a traffic light. When the light turned green, the defendant remained stationary for approximately six or seven seconds with the turn signal on and did not move. The officer did not observe any vehicles in the intersection that would justify the defendant's prolonged stop. After the defendant finally made a turn, the officer initiated a traffic stop for failure to obey a green light. The officer arrested the defendant for DUI.

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

Held: Affirmed. The Court agreed that the officer had reasonable suspicion to believe that the defendant violated § 46.2-833. Thus, although a failure to proceed through a green light is not automatically a traffic violation, the Court found that a traffic stop was permissible to investigate whether the defendant had a legally supportable reason for his prolonged stop or whether he did in fact violate § 46.2-833. The Court repeated that the mere "possibility of an innocent explanation" does not necessarily negate a finding of reasonable suspicion.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0390192.pdf

Knight v. Commonwealth: April 7, 2020

Norfolk: The defendant appeals his conviction for Possession of a Firearm by Felon and related charges on Fourth Amendment grounds.

Facts: The defendant, a felon, carried a concealed firearm in his vehicle. Officers stopped the defendant's vehicle, which had no license plates, in the travel lane of a busy street. They learned that the defendant was wanted and arrested him. Officers searched the car and found the defendant's gun.

The police department's inventory policy requires a special inventory form and a particular procedure when doing an inventory. The officers did not follow that procedure or properly use that form. Both officers testified that when the driver of a car is arrested and the car is improperly parked, an officer has discretion to move the vehicle to a legal parking place. Under that policy, as well, the defendant had the option to arrange for his own towing, under which no inventory search would have been required by the officers. There was no record whether the defendant had been given that option.

Ultimately, the officers completed an inventory form. However, that form did not conform to department policy. For example, most of the items in the car were not listed on the inventory, including the defendant's backpack and gun. The vehicle owner's signature line and the check boxes on the back of the form were not completed as required by the instructions on the form.

The defendant moved to suppress, but the trial court denied the motion. The trial court agreed that the search was merely a pretext concealing an investigatory motive by the officers, who wanted to search the car for contraband. The trial court pointed to a body camera video that showed the officers discussing ways they could justify a search. The trial court found the "reaction of the officers to the news there was an outstanding warrant for Knight can best be described as joyful." However, the trial court ultimately found that the firearm would have been inevitably discovered when the car was inventoried subject to being towed.

Held: Reversed. Because the Commonwealth failed to prove the gun inevitably would have been discovered through a subsequent lawful inventory search, the Court found that it was error to deny the motion to suppress. The Court also rejected the Commonwealth's argument regarding the "community caretaker" exception to the warrant requirement, concluding that the car did not fall under the community caretaker inventory exception because regardless of whether it was lawfully impounded, the search was not "conducted pursuant to standard police procedures" and was a "pretextual surrogate for an improper investigatory motive."

The Court examined the officer's actions on video and found that the video of the search demonstrated the officer's investigative motive. The Court noted that the officer made no attempt to prepare a list of the contents of the car while he was searching, nor did he attempt to record the inventory. Thus, the places initially searched by the officer were indicative of "a pretextual surrogate for an improper investigatory motive."

Regarding the "inevitable discovery" exception to the search warrant requirement, the Court emphasized that the question is not whether an inventory search might have happened, but whether the finding of the gun was inevitable. The Court decline to address whether the car was lawfully impounded, because the Court found that this search was not an inventory search. The Court noted that the search was not "conducted pursuant to standard police procedures."

The Court found that the record did not show that the gun would have inevitably been inventoried pursuant to a tow of the vehicle if the officers had not had an improper motive to search the car. The Court explained that, although the gun could have been subsequently found, it would require speculation to conclude it inevitably would have been found. The Court noted that if the defendant had arranged his own towing, the firearm would not inevitably have been discovered. Also, the Court noted that it was not inevitable that the backpack would have remained in the car, even if police had towed the vehicle.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0323191.pdf

Williams v. Commonwealth: January 14, 2020
71 Va. App. 462, 837 S.E.2d 91 (2020)
Richmond: Defendant appeals his convictions for Receiving a Stolen Firearm and Possession of Marijuana on Fourth Amendment grounds and admission of a Field Test.

Facts: The defendant carried a stolen gun on his person while driving with marijuana in his car. An officer stopped him for a traffic violation at night and asked him whether he had any firearms in the vehicle. Although the defendant admitted that he did, he was evasive about where the firearm was located. The officer asked at least four times about the location of the gun. Each time, the defendant responded only that it was concealed.

The officer asked the defendant to step out of the vehicle, due to a dog in the passenger compartment and in order to observe the defendant's motor skills. The defendant initially refused to comply but eventually acquiesced. When the defendant got out of the car, the officer immediately saw the butt of the large revolver inside the defendant's open jacket. The officer seized the gun and ran the serial number. The officer learned that the gun was stolen.

Within moments of seizing the firearm, the officer noticed the odor of unburned marijuana coming from the defendant. The officer searched the defendant and found marijuana. He later field-tested it and it was positive.

The defendant would not identify the person from whom he received the gun, stating only that he bought it from "a person." Additionally, he told the officer that any charge "would get lost in court," and he added "that he had been stopped for a stolen firearm before and was not arrested at that time."

The defendant moved to suppress the seizure of the handgun and the search of its serial number, but the trial court denied the motion. At trial, the officer testified that the Richmond Police Department routinely used the marijuana field test in this case, the "NARK II #2005 Duquenois-Levine Reagent." The officer explained that he received training on the test "during basic school." The defendant objected to the admission of the field test results but the trial court overruled the objection.

Held: Affirmed regarding Receiving a Stolen Firearm, Reversed regarding Possession of Marijuana. Regarding the suppression motion, the Court first concluded that under these circumstances, once the officer saw the firearm in plain view protruding from the defendant's jacket, the objective circumstances provided him a reason to believe that his safety or that of another officer on the scene was in danger.

In a footnote, the Court explicitly dodged the broader question of whether a police officer may constitutionally seize a firearm during a traffic stop regardless of whether other factors support the inference that a driver or passenger is dangerous. However, the Court acknowledged the 4th Circuit's ruling in *Robinson* that the seizure of a gun was constitutional because the objective circumstances supported the conclusion that it posed a potential threat to officer safety.

The Court concluded that viewing and recording a serial number from a firearm lawfully seized by an officer does not violate the Fourth Amendment. The Court determined that, once the officer had lawfully seized the firearm to ensure safety during the stop, the defendant's expectation of privacy in its serial number was not objectively reasonable. Consequently, the officer was permitted to read the visible serial number and search for it in the firearms database. The Court cited numerous cases from other jurisdictions to support that conclusion.

The Court then found that the facts clearly supported a reasonable suspicion that the firearm was stolen. The Court observed that, when the defendant initially refused to comply with the officer's request to get out of the car, that supported the inference that he knew doing so would expose the gun to the officer's view. The Court also noted that, despite possessing a concealed handgun permit and

advising the officer of such, the defendant was not cooperative in either telling the officer where the gun was located or getting out of the car, risking exposure of the large revolver on his person. The Court also noted that the smell of unburned marijuana and a green leafy substance believed to be marijuana on the defendant gave the officer reasonable suspicion to detain the defendant to investigate further based on the suspicious circumstances surrounding the gun and the evidence of marijuana. Consequently, the Court concluded that the continued detention and running of the serial number were permitted under the circumstances to allow the officers to confirm or dispel the suspicion that the defendant was in possession of a stolen gun.

Regarding the marijuana field test, however, the Court found that the officer's testimony that he was trained on the standard test used by the Richmond Police Department by "department narcotic officers" did not establish that DFS had approved the test or that he was trained by DFS. The Court wrote: "This record simply does not support the admission of the field test result into evidence under Code § 19.2-188.1." The Court complained that the record contained no evidence pertaining to the reliability or accuracy of the specific field test, nor did it demonstrate that the test used has been approved by the DFS as required by Code § 19.2-188.1.

While the Court agreed that a trial court could take judicial notice under Va. R. Evid. 2:201(a), of a fact that it is either (1) common knowledge or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, the Court pointed out that, in this case, the trial court had not taken judicial notice, on the record, that DFS approved the test at issue.

The Attorney General had asked, on appeal, that the Court of Appeals take judicial notice that the DFS approved the field test used by the officer. However, the Court explained that it was not persuaded that the "NARK II #2005 Duquenois-Levine Reagent" field test used by the officer was, as a matter of law, the same as the "NARK II" "05 - Duquenois - Levine Reagent" test approved by the DFS. The Court stated that it is not a matter of common knowledge that the tests are identical and that the description of the test in the record did not exactly match the description of the approved test in the Virginia Register of Regulations. The Court wrote: "On this record, to conclude that they reference the same test requires technical knowledge. This is not a readily ascertainable fact such as one of geography, and the source relied on now does not match the test referenced in the record."

Note: For the DFS regulation regarding field tests, click the link below and go to page 2057.
http://register.dls.virginia.gov/vol32/iss13/v32i13.pdf
Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0603182.pdf

Jones v. Commonwealth: December 31, 2019
71 Va. App. 375, 836 S.E.2d 710 (2019)
Hampton: Defendant appeals his conviction for Possession of Cocaine on Fourth Amendment grounds.

Facts: The defendant carried cocaine while driving in his vehicle. As he approached an intersection, the defendant activated his turn signal and changed lanes, crossing over a single, solid white line immediately before the intersection. A police officer, believing that the defendant violated § 46.2-804, stopped the defendant. The officer located the defendant's cocaine.

The defendant moved to suppress the stop. The Commonwealth acknowledged that the officer had mis-interpreted § 46.2-804 and agreed that the defendant did not violate that section. However, the trial court refused to apply the exclusionary rule, applying the U.S. Supreme Court's ruling in *Heien v. N.C.*.

Held: Reversed. The Court held that, because the officer's mistake of law was not objectively reasonable and his conduct was sufficiently culpable to justify application of the exclusionary rule, the evidence should have been suppressed.

The Court applied the U.S. Supreme Court's ruling in *Heien.* The Court observed that the statute pertaining to the lane markings clearly and unambiguously did not prohibit crossing a single, solid white line. The Court pointed out that the statute was not new or recently amended. Thus, the Court found that there was no explanation for the officer's mistake other than inadequate study of the laws. The Court concluded that "a reasonably well-trained officer" would have known that the seizure was illegal.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0315191.pdf

Reed v. Commonwealth: October 16, 2018
71 Va. App. 164, 834 S.E.2d 505 (2019)
Aff'd Court of Appeals Ruling of August 30, 2016
Alexandria: Defendant appeals his conviction for Distribution of Drugs on issuance of a Subpoena Duces Tecum for phone records.

Facts: Defendant sold illegal drugs. Police obtained an ex parte court order for the defendant's cellphone records under Va. Code § 19.2-70.3 and 18 U.S.C. §2703(d) and obtained roughly five months of records, including historical cell-site location information (CSLI) for the phone.

The Commonwealth indicted and arrested the defendant for distribution. Prior to trial, the Commonwealth requested the same cell site data, text message data, and incoming and outgoing detail records that it already had, this time using a subpoena duces tecum. The defendant moved to quash the subpoena duces tecum. The trial court granted the motion, in part, limiting the scope to two days before and two days after the offense, but otherwise rejected the defendant's argument that the court order and subpoena duces tecum violated his Constitutional rights.

The Court of Appeals affirmed, but in June 2018, the U.S. Supreme Court ruled in Carpenter v. U.S. that the government may not obtain large amounts of historical CLSI without a search warrant supported by probable cause. The Supreme Court remanded this case to Virginia to reconsider in light of its ruling.

The Court of Appeals, on remand, ruled that, by complying with existing law at the time, the officers acted in good faith when they obtained the historical CLSI using a court order, rather than a search warrant. Thus, as there was no police or governmental conduct that needed to be deterred at the time it occurred, the Court did not apply the Exclusionary Rule. The defendant had objected to the application of the "good faith" exception, though, because the Commonwealth had not raised it at trial, but the Court of Appeals rejected his argument.

The Virginia Supreme Court granted the defendant an appeal, vacated the Court of Appeals' order, and remanded the case back to the Court of Appeals to allow the defendant "the opportunity to be heard on the good faith question."

Held: Affirmed. The Court concluded that the Commonwealth was permitted to argue that the government acted in good faith, even if it did not raise that issue before the case was remanded from the United States Supreme Court after the Court's 2018 decision in *Carpenter*. The Court also concluded that the good-faith exception to the exclusionary rule applies here because the government actors – both the police officers and the prosecutor – were acting in good-faith reliance on the SCA and Virginia Code § 19.2-70.3(B), which were certainly not "clearly unconstitutional" at the time.

The Court rejected the argument that the Commonwealth should not be permitted to argue "good faith" in this case, noting that if it accepted the defendant's argument, in every case where a search took place in reliance on a statute, the Commonwealth would need to argue good faith to the trial court in the suppression hearing at the trial level and on appeal in the event that the statute was later found to be unconstitutional on appeal.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1305154.pdf

Virginia Court of Appeals
Unpublished

Holmes v. Commonwealth: May 12, 2020

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

Facts: The defendant, a felon, carried a handgun while a passenger in a car. An officer stopped the car for running a red light. The traffic stop occurred in a "high crime, high drug" area with dim lighting, and there were multiple vehicle occupants. The officer smelled the odor of marijuana and a "masking agent" when he approached the vehicle. The officer patted the defendant down and discovered his firearm.

The defendant moved to suppress. At the motion to suppress, the officer testified that he was concerned that "one or both" of the vehicle's occupants was armed because he knew from his "training and personal experience that firearms are commonly present where narcotics are present." The officer testified that "three or four" times during the past year, he recovered weapons in cases involving simple possession of marijuana. The trial court denied the motion.

Held: Affirmed. The Court observed that the odor of marijuana and a "masking agent" when he approached the vehicle gave the officer probable cause to believe that the vehicle's occupants were engaged in drug activity. Based on the officer's experience finding guns with marijuana and the high

level of criminal and drug activity in the area, the Court concluded that the objective facts and circumstances created a reasonable suspicion that the defendant was armed and dangerous.

The Court rejected the defendant's argument that the "mere faint odor of marijuana along with a traffic stop in a high crime area at night" was insufficient to justify the pat down for weapons. The Court also rejected the defendant's argument that the nexus between drugs and guns only arises in situations involving drug distribution, not merely drug possession.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1161191.pdf

Fultz v. Commonwealth: April 28, 2020

Montgomery: Defendant appeals his conviction for Possession of Marijuana on Fourth Amendment grounds.

Facts: The defendant and several companions possessed marijuana in their dorm room. An officer noticed the odor from the hallway and knocked on the dorm room door, which was closed. The officer covered the "peephole" on the door so that the people inside the room could not see who it was. The occupants opened the door, revealing evidence of their marijuana. The officer obtained consent to enter and seized the marijuana.

The defendant moved to suppress, arguing that the officer's placement of his hand over the peephole violated the Fourth Amendment. The trial court denied the defendant's motion.

Held: Affirmed. The Court concluded that the officer's placement of his hand over the peephole was not a "search" because, not only was there no physical intrusion, but the officer also did not obtain any information as a result of the challenged action. The Court observed that covering the peephole gave him no information about what was going on behind the door; instead, it solely served to prevent his being identified as a police officer before the door was opened.

The Court also noted that the information that the officer obtained prior to entering the room, while lawfully present in the public hallway (namely, his smelling burnt marijuana), was not a search for Fourth Amendment purposes. In a footnote, the Court pointed out that the officer was acting within his statutory authority as a campus police officer by patrolling the hallway under § 23.1-815(B).

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0365193.pdf

Commonwealth v. Johnson: April 28, 2020

Richmond: The Commonwealth appeals the granting of a motion to suppress on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, carried a handgun concealed on his person. An officer saw the defendant in a housing complex with posted "no trespassing" signs, where anyone on the property who is not a leaseholder or accompanied by a leaseholder is trespassing. He did not recognize the defendant. The officer called out to the defendant, but the defendant ignored him and walked away. While five to ten feet away and walking toward the defendant, the officer called out, "Yo, turn around, you live here?" as three uniformed police officers exited their marked police vehicle and walked toward him.

The officer noticed that the defendant had an "L-shaped" bulge in his waistband and suspected that the bulge was a concealed firearm. The officer lifted the defendant's shirt, revealing the firearm. The officer seized the firearm, detained the defendant, and learned that the defendant was a convicted felon. The trial court suppressed the evidence, finding that the officer seized the defendant without reasonable articulable suspicion that criminal activity was afoot either because of a trespassing violation or a weapon.

The Commonwealth appealed the trial court's suppression of the evidence from the officer's search, although the Commonwealth did not appeal the trial court's ruling that the officer did not have reasonable suspicion or probable cause to detain the defendant based on trespassing.

Held: Suppression affirmed. The Court first held that the officers seized the defendant for the purposes of the application of the Fourth Amendment when the defendant complied after the officer called out, "Yo, turn around, you live here?" as three uniformed police officers exited their marked police vehicle and walked toward him.

In the Court's view, the officer had nothing more than a belief, however reasonable based on the circumstances, that the defendant was carrying a concealed firearm, without any indication as to whether his doing so was illegal. The Court complained that there were no indicia of criminality (nervous behavior, furtive movements, high-crime area, etc.) besides a suspicion that the defendant was armed. Thus, without more, there was no probable cause to believe that contraband or evidence of a crime would be uncovered by the search of the defendant's person.

The Court explained that "An individual's choice to exercise his fundamental right to bear arms cannot, standing alone, serve as the basis for reasonable suspicion or probable cause that in doing so, he is committing a crime. Thus, we do not presume that an individual carrying a concealed firearm must be in violation of the law in doing so." The Court further wrote: "officers may not seize and search an individual based solely on the presence of what appears to be a concealed firearm without establishing first that it is concealed in violation of the law. Accordingly, the mere presence of a bulge that is consistent with the concealed carry of a firearm, without more, does not create probable cause that a crime is being committed."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1799192.pdf

Williams v. Commonwealth: April 14, 2020

Southhampton: Defendant appeals his conviction for Possession of Cocaine on Fourth Amendment grounds.

Facts: Officers believed that they witnessed a hand-to-hand drug transaction between two men in the defendant's presence. After officers approached, the defendant complied with their commands to stay and submit to a frisk. After finding nothing, the officers released the defendant. However, at the same time, other officers arrested another individual and recovered cocaine. That individual exclaimed immediately after being arrested that he wasn't the drug dealer, but that the defendant was the "real dealer." Officers stopped the defendant again and patted him down again. This time, they discovered a razor blade and cocaine in his pocket.

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

Held: Reversed. The Court concluded that the officers lacked a reasonable, articulable suspicion to conduct a successive traffic stop of his vehicle because it followed an initial stop-and-frisk of appellant that discovered no contraband. The Court explained that an initial search that finds no contraband necessarily diminishes the suspicion which justified it. Therefore, law enforcement must discover some new information to justify a second stop or search. Here, the Court observed that the only new information was an unreliable, bare accusation that an individual levied only after being arrested.

Regarding the tip from the other arrestee, the Court complained that the officers provided no testimony regarding the arrestee's candor, veracity, or trustworthiness, nor did the officers provide any specific information about their interactions with the arrestee. Without such testimony, the Court found no basis to find the arrestee's tip any more reliable than any other criminal informant. Accordingly, the Court determined that the arrestee's self-serving statement that the defendant was the "real drug dealer" lacked any indicia of reliability.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1972181.pdf

Commonwealth v. Eutsler: March 3, 2020

Augusta: The Commonwealth appeals the granting of a motion to suppress on Fourth Amendment grounds.

Facts: The defendant kept tens of thousands of images of child pornography on a portable hard drive. Police traced his downloads to his workplace. There, police interviewed him and he admitted to using the file-sharing software to download child pornography. Police arrested him and his workplace issued a "No Trespass" notice against him. However, the defendant had left his portable hard drive at his office and, because he had been banned, could not return to retrieve it.

The defendant asked a co-worker to go to the office and retrieve the drive for him. The co-worker went to the office, retrieved the drive, but then opened the contents and began looking at the files. After discovering child pornography, the co-worker notified management, who notified the police. Police responded and took custody of the hard drive.

Forty-three days later, police obtained a search warrant for the drive, executing the warrant the same day. At a motion to suppress, the police stated that the delay in obtaining the warrant was due to "two murder investigations; One of those was actively being investigated, the other was a cold case that was "heating up."" Police examined the drive and found the defendant's child pornography.

The defendant moved to suppress the search. The trial court granted the motion, concluding that the police department's continued possession of the hard drive was unreasonable under the Fourth Amendment due to the lack of diligence in obtaining a search warrant. The trial court rejected the Commonwealth's argument that the defendant lacked standing to object to the search.

Held: Suppression reversed. The Court affirmed the trial court's judgment that the defendant did not abandon the hard drive, but reversed the trial court's judgment that the delay in seeking a search warrant converted the police department's lawful acquisition of the hard drive to an unreasonable seizure requiring suppression of the hard drive and the evidence contained thereon.

The Court first ruled that the defendant did not abandon the hard drive. The Court pointed out that the defendant enlisted a third party to attempt to regain possession of the hard drive. The Court explained that the mere act of leaving something at one's workplace temporarily does not necessarily evince an intent to abandon that item.

The Court refused to address the Commonwealth's argument that the defendant forfeited his Fourth Amendment interest in the hard drive when he enlisted a third party to retrieve it. The Commonwealth had argued that the Fourth Amendment does not protect a "wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."

Regarding the police diligence in obtaining the warrant, the Court explained that the defendant's possessory interest in the hard drive was greatly diminished and law enforcement's interest was at its apex. The Court concluded that the Department's continued possession of the hard drive ultimately was reasonable for Fourth Amendment purposes. The Court noted that when authorities know that a container contains contraband, that fact reduces a person's Fourth Amendment interests in that container. "Simply put, the Department could not return the hard drive containing contraband to [the defendant]. If deputies had done so, they would have known that they were witnessing his possession of child pornography, one of the very crimes for which he is now charged."

The Court repeated that a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on unreasonable seizures. Just as in the Fourth Circuit's February 2019 ruling in *Pratt,* the Court agreed that, because a person generally retains at least some possessory interest in items seized by authorities, a lack of diligence by authorities that unnecessarily lengthens the time period in which a person is denied his possessory interest in an object lawfully seized can convert that lawful seizure into an unreasonable one.

The Court complained that the nothing in the record indicated that the computer crimes unit was suffering from any manpower issues, and that the record reflected that the unit was able to take possession and begin its analysis of the hard drive within twenty-four hours of the warrant being obtained. The Court found that the trial court reasonably rejected the Department's manpower excuse as a reasonable explanation for the more than forty-day delay.

However, the Court noted several factors that reduced the defendant's interests in the drive. First, the Court explained that the defendant's possessory interest was diminished because he was not certain where the hard drive was, stating it was either in his company vehicle or in his company office. The Court also stated that the defendant's arrest and incarceration further reduced his possessory interest in the hard drive. The Court also relied on the fact that the defendant had to enlist a third-party to try to retrieve it. Thus, by definition, he was unable to exercise exclusive possession over his property, the high-water mark of any incident of possession.

The Court also relied on the trial court's un-appealed, factual finding that the Department knew the hard drive contained child pornography when they came into possession of the hard drive. The Court distinguished this case from situations where police merely suspect that a cell phone, computer, or container contains contraband, describing those cases using the analogy of "Schrödinger's cat."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1515193.pdf

Holly v. Commonwealth: December 27, 2019

Newport News: Defendant appeals his conviction for Possession of Cocaine on Fourth Amendment grounds.

Facts: The defendant possessed cocaine in his hotel room. A woman reported to police that the defendant had just robbed her. The victim told the officers that the defendant had put her in a headlock and stolen money from her person while she had been in the room. When officers arrived, a witness, who was waiting outside, told them she had not seen the defendant leave the room since the alleged robbery. Though the door was open and officers could not see anyone inside, there were still places in the room where a person could hide.

Officers entered and located the defendant. They also saw potential drug paraphernalia in plain view. The officers concluded that no robbery had occurred, but discovered the drugs. The defendant made incriminating statements regarding the drugs.

The defendant moved to suppress, arguing that the initial warrantless entry into his hotel room was unlawful, but the trial court denied the motion.

Held: Affirmed. The Court held that, because probable cause and exigent circumstances existed, the initial entry did not violate the Fourth Amendment. Reviewing the *Verez* factors, the Court agreed that the officers had a strong reason to believe that the defendant was still inside the room. The Court agreed that, under *Hargraves* and *Washington*, after being notified of a violent crime and told that the suspect may be on the scene, police were authorized to "make a prompt warrantless search of the area to see if a criminal is still on the premises."

The Court also found it significant that the officers limited the search to those places where a person could hide before immediately leaving the room and securing the premises.

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/1791181.pdf

Warner v. Commonwealth: November 26, 2019

Fairfax: Defendant appeals his conviction for Drug Possession on Fourth Amendment and Chain of Custody grounds.

Facts: Officers observed the defendant weaving and making an un-signaled lane change. Based on his driving behavior, they stopped his vehicle. Upon arriving at the defendant's window to request his driver's license and conduct his investigation regarding a possibly DWI charge, an officer smelled air freshener, which, in his experience, often is used to attempt to mask the smell of illegal drugs. Then, when the officer returned to his cruiser to conduct the type of license and warrant checks, another officer detected the smell of unburnt marijuana.

The officers searched the defendant's car and found drugs. Prior to trial, the defendant moved to suppress the stop. The video of the traffic stop did not record any of the improper driving. During the hearing, the officers admitted that their stop was "pretextual," that is, that they were looking for a reason to stop the defendant in order to investigate possible drug activity. The defendant argued that the scope of the initial stop exceeded what was permissible under *Rodriguez*, and that, since his behavior was not visible on video, the trial court should not believe the officers. The trial court denied the motion.

At trial, the officer who discovered the suspected drugs testified that he handed the drugs to another officer, who placed the case inside a plastic bag and locked the bag inside the police car. Upon returning to the station, the officer unlocked the police car, retrieved the suspected drugs, and delivered them to a third officer, who packaged them in plastic evidence bags, sealed them with tape, initialed the tape, and filled out a state laboratory sheet.

At trial, the property officer identified the drugs and indicated that he did not alter or tamper with the evidence in any way. After he packaged the evidence, he gave it back to the original officer. Later, an evidence technician retrieved the drugs, stored them in a secured evidence locker within the property evidence room. At trial, he testified that he did not tamper with or alter the evidence in any way.

Finally, a narcotics officer transported the items to the DFS lab in Northern Virginia and delivered the items to a receiving technician there. However, the lab ultimately analyzed the drugs in Richmond. At trial, the DFS expert testified that she personally received the evidence bags from an evidence technician in Richmond and identified the drugs at trial. No one testified about the transfer of drugs from Northern Virginia to Richmond.

At trial, the defendant challenged the admission into evidence of the exhibits related to the drugs recovered from his van and the chemical analysis of those drugs. Specifically, the defendant argued that there was no evidence about how the narcotics were transported from the Northern Virginia lab to the Richmond lab where the DFS expert tested the evidence.

Held: Affirmed. The Court first ruled that the length of the stop did not violate the Fourth Amendment. The Court noted that the *Rodriguez* approves of license and wanted checks, and the odor

of marijuana gave the officer probable cause independent of the traffic stop to detain the defendant and search both him and his van for marijuana.

Regarding the lack of video evidence, although the Court agreed that the absence of video evidence should be considered by a factfinder and could lead a reasonable factfinder to conclude that the events testified to by the officers did not occur, the Court did not find it dispositive.

Regarding chain of custody, based on the witness testimony and the evidence being in signed and sealed evidence bags at the critical points in the chain, the Court agreed that the trial court reasonably concluded that the Commonwealth had made the necessary showing for the drugs to be admitted into evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0871184.pdf

Dukes v. Commonwealth: November 19, 2019

Lynchburg: Defendant appeals his conviction for Robbery on Fourth Amendment grounds.

Facts: The defendant and two confederates attempted to rob a bank after stealing the keys from an employee at gunpoint. Several days later, they robbed a convenience store at gunpoint. A surveillance video captured the incident, which helped police identify the getaway car. Officers located the car the next day, parked in a fire lane, and conducted a "felony traffic stop," wherein they officers held the car at gunpoint while taking cover behind their vehicles and called the occupants to exit the car one at a time, starting with the driver. The defendant was a passenger in the car.

The driver revealed that the car contained marijuana. Officers searched the car and found several items connected to the robberies, including disposable vinyl gloves, the bank keys, and a firearm. The defendant moved to suppress the evidence on Fourth Amendment grounds, arguing that the detention was excessive and unlawful, but the trial court denied his motion.

Held: Affirmed. The Court first noted that the defendant had no personal possessions in the vehicle and failed to demonstrate that he either exercised control over the vehicle or had the right to exclude others from it. Therefore, the Court concluded that he lacked standing to challenge the search of the vehicle.

However, the Court acknowledged that the defendant was entitled to contest the stop of the vehicle based on the seizure of his person. Nevertheless, the Court rejected the defendant's complaint regarding the methods used to detain each of the vehicle's occupants. The defendant had argued that the "felony vehicle stop" was a "full-blown seizure requiring a warrant or probable cause" because a reasonable person would have believed he was under arrest. However, the Court noted that the Fourth Amendment permits the police to order the passengers to get out of the car pending the completion of a traffic stop. Further, the Court agreed that the officers had reason to believe that the occupants in the vehicle were armed and dangerous when he conducted the traffic stop. Therefore, the Court concluded that the officers' actions in drawing their guns and ordering the vehicle's occupants out individually

were "neither unreasonable nor conducted under circumstances that constituted the functional equivalent of an arrest."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1716183.pdf

Commonwealth v. Stanley: November 13, 2019

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

Facts: While arresting the defendant on an open warrant, officers noticed a large amount of drugs and drug paraphernalia in the defendant's hotel room in plain view. They also saw "dolls and little girls' stuff everywhere in the room," along with several electronic devices. The officers first obtained a search warrant to search the electronic devices for "pictures, stored data, to include video of drug transactions, names and addresses of customers, contacts and data related to children - nude, seminude or engaging in sexual acts."

The defendant moved to suppress the results of the search warrants, arguing that the search warrant for data related to child pornography substantially lacked probable cause. Regarding the drug portion of the search warrant, the defendant argued that, if officers executing a search warrant related to drug crimes encounter child pornography they must "stop [the investigation] and . . . go get another search warrant." The trial court agreed that there was probable cause to search for evidence of drug offenses but disagreed that there was probable cause for evidence of child pornography. The trial court granted the defendant's motion to suppress.

The Commonwealth timely filed an appeal. The Commonwealth requested that the trial court order the court reporter to transcribe for both parties the suppression hearing. The trial court granted the motion and, in a June 12, 2019 order, ordered the court reporter to transcribe the suppression hearing for the parties. The defendant was aware of both the Commonwealth's request and of the order, endorsing it "seen." The court reporter complied with the order, filing with the circuit court clerk the transcripts of the suppression hearing that same day.

However, the Commonwealth did not file the transcripts of the proceedings with the trial court, as required by the statute. Instead, it filed the transcripts directly with the Court of Appeals on June 14, 2019, mailing copies of the transcripts to the Clerk of the Court of Appeals, copying defense counsel regarding the transmission and enclosing the transcripts. In the Court of Appeals, the defendant requested that the Court dismiss the appeal for failure to comply with Rule 5A:8(b)(1)

Held: Suppression Reversed. The Court concluded the trial court erred in suppressing the evidence of child pornography viewed and seized as a result of the execution of the search warrants. The Court ruled that the officers were not required to cease their search of the electronic devices when they discovered clear evidence of criminal activity that was non-drug related. Rather, they were able to continue the search and seize any such evidence of unrelated crimes under the "plain view" doctrine.

The Court found that the officers were authorized by the warrants to search all of the photographic files on the electronic devices wholly independent of a search for child pornography. Thus, they did not violate the Fourth Amendment by accessing the photographic files on the electronic devices. The Court concluded that the "incriminating character" of the images depicting child pornography was readily apparent and that there is no question that, having discovered them, the officers had a right to seize them.

In a footnote, the Court explained that the only limitation on the officers' warrant-authorized search of the electronic devices was that the search be no more "extensive as reasonably required to locate the items described in the warrant." Because the warrants authorized officers to search for photographs related to potential drug crimes, the officers necessarily were authorized to search all photographic files contained on the electronic devices.

The Court also ruled that, under § 19.2-405 and *Hackett*, the Commonwealth's failure regarding the notice of filing transcripts in this case did not deprive the Court of Appeals of jurisdiction over the appeal. The Court also found that the defendant had not suffered material prejudice under Rule 5A:8(b)(4) because there is no question that he both had a copy of the relevant transcripts and was aware that the Commonwealth intended to use them.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0962193.pdf

Commonwealth v. Ray: November 6, 2019

Grayson: The Commonwealth appeals the granting of a motion to suppress on Fourth Amendment grounds.

Facts: The defendant conspired to send drugs into a prison. After learning of her scheme, officers confronted the defendant in the driveway of her home while wearing police vests. Standing in uniform five feet away, an officer addressed the defendant by name and asked to speak to her without her children present. Then, on the porch to the home, the officer asserted that he knew "about the package that's supposed to go into the jail." He told the defendant "either I could come inside with her to get the package or I can go get a search warrant for" the residence. The defendant responded with "No, don't get the warrant," and allowed the officer inside the home.

The trial court granted the defendant's motion to suppress. The trial court found that the officer used the threat of a warrant as a "cudgel to gain the consent" to enter the defendant's home and obtain the package.

Held: Suppression Affirmed. The Court quoted *Deer's* warning that, "where police use coercion under the color of lawful authority, the consent will most likely be invalid… A suspect does not consent to a search by acquiescing to a claim of lawful authority." The Court expressed that, even if it were to disagree with the trial court's conclusion, it would still be unable to reverse it because it is within the "bell-shaped curve of reasonability governing our appellate review."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0975193.pdf

Commonwealth v. Williams: October 29, 2019
(Two cases)
New Kent: The Commonwealth appeals the granting of a motion to suppress and motion to dismiss on Fourth Amendment grounds.

Facts: After listening to and observing nearly an hour of loud noise coming from the defendants' residence, noise that appeared to be deliberate, officers decided to issue a summons for violation of a county noise ordinance. The officers, who had been standing on a neighbor's property, walked through the trees that separated the properties and walked towards the defendants' garage.

As the officers approached, the defendant husband "made several threats towards" the officers, including saying, "Come get some, bitches" as the officers were arriving. When an officer he placed his hands on the defendant husband in order to arrest him, the defendant wife intervened between the officers and began saying that they "weren't going to take him anywhere." She started pushing and shoving an officer, leading to a scuffle involving her, several officers, and the defendant husband.

The trial court granted the defendants' motions to suppress regarding the defendants' actions toward law enforcement officers based on a finding that the defendants' arrest violated the Fourth Amendment when they entered the property. Subsequent to granting the motions to suppress, the trial court – over the objections of the Commonwealth – dismissed the indictments against the defendants.

Held: Suppression and Dismissal reversed. The Court ruled that, even assuming without deciding that the officers' way of entering onto the defendants' property violated the Fourth Amendment, the trial court erred in suppressing the evidence concerning the illegal actions then taken by the defendants that led to their arrests. The Court found that the husband's belligerence and threats toward the officers from the moment of their arrival on the property, as well as the wife's pushing, shoving, and subsequent scuffle with the officers, were independent intervening criminal acts that should not have been excluded from evidence under the exclusionary rule.

Citing the *Brown* case, the Court wrote that the defendant did "not then have carte blanche to do anything they wish to the officers such that evidence or testimony of those unlawful actions against the officers would then be suppressed and excluded from evidence under the exclusionary rule."

The Court also held that the trial court erred in dismissing the indictments when the Commonwealth had the statutory right, pursuant to § 19.2-398, to seek a pretrial appeal. In a footnote, the Court also pointed out that, after the motion to suppress was granted by the trial court, the Commonwealth also should have been permitted to decide whether to proceed to trial, writing: "Given the separation of powers doctrine… the judicial branch should not infringe upon the executive branch's decision (exercised by the Commonwealth's Attorney) of whether even to take a prosecution to trial."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0850192.pdf
and

http://www.courts.state.va.us/opinions/opncavwp/0849192.pdf

Hyman v. Commonwealth: October 22, 2019

Virginia Beach: Defendant appeals his convictions for Possession with Intent, DUI, and Driving Revoked on Fourth Amendment grounds.

Facts: The defendant drove intoxicated on a revoked license while carrying drugs with the intent to distribute them. Police discovered his offenses when they received a dispatch for a "fight call for service," directing the police to the vicinity of a country club. The caller was a security guard at the country club and described the suspects were described as "three black males, two with dreadlocks, acting disorderly." The citizen informant identified himself, not by name, but by his position as a security guard at an identified country club.

Upon arriving at the country club, the officers received an updated dispatch that the suspects were leaving in a SUV headed toward another area. Dispatch also relayed the SUV's license plates and that the vehicle was a gray Mercury Mountaineer. An officer responded and saw a gray Mercury SUV, occupied by two black males with dreadlocks. He stopped the vehicle and discovered the defendant's offenses. The trial court denied the defendant's motion to suppress the stop.

Held: Affirmed. The Court held that the totality of the circumstances established that the 911 caller was not an anonymous informant but, instead, was a citizen informant whose reliability was evidenced by his being accountable to the police if his report was erroneous. The Court further found that, because the officer could verify the reported descriptions, the officer had reason to believe the other information regarding the disorderly conduct also was accurate and thus, he had reasonable suspicion to stop the vehicle

The Court explained that it is reasonable to infer that a security guard stationed at a country club is there to protect the safety of its members and guests and to prevent any criminal activity. Therefore, the Court found that the trial court reasonably inferred that the security guard was performing those functions when he saw the incident and reported the disorderly conduct to the dispatcher. The Court also noted that the guard accurately described the perpetrators, the vehicle they were driving, the license plate number, and the direction the SUV was traveling, information that the officers immediately corroborated when they saw two men with dreadlocks in a gray SUV on a nearby street.

The Court found that the fact that the security guard did not give his name did not detract from his reliability, since the police knew where to reach him and did so after the defendant's arrest. The information was not less reliable simply because the officers did not speak face-to-face with the guard. The Court also explained that, by providing additional information, the informant indicated that he was observing the activity in real time, thus lending significant support to the tip's reliability.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0519181.pdf

Porter v. Commonwealth: July 30, 2019

Portsmouth: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: Officers responded to a complaint about individuals loitering near a convenience store and spreading trash in the area. When they responded, two officers spoke with the defendant. Multiple officers were present in the area, with at least two directly interacting with the defendant and a total of six officers within a one-block radius.

An officer asked the defendant for his name and social security number. The defendant provided a name and a partial number, but then started to walk away. The officer told him to "hang tight for a minute." The officer told the defendant that he would walk back to his car to run the defendant's information and that if the defendant "ha[d] no warrants, you're on your way, awesome, no harm, no foul."

When he returned to speak to the defendant, the defendant made a gesture that inadvertently revealed he was holding a large amount of heroin. Police seized the heroin. The trial court denied the defendant's motion to suppress on Fourth Amendment grounds.

Held: Reversed. The Court observed that the words that the officer used — "hang tight" — are a command. Thus, any reasonable person in the defendant's position would have taken this to mean that he was expected to remain on the scene and therefore, at that point, the interaction was no longer consensual and the police had seized the defendant for Fourth Amendment purposes. Because the officer did not possess reasonable suspicion or probable cause that the defendant was engaged in criminal activity at the time that he commanded the defendant to "hang tight," the Court concluded that the seizure was unlawful.

The Court distinguished this case from the *Baldwin* case on the facts.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0189181.pdf

Muwakkil v. Commonwealth: July 16, 2019

Richmond: Defendant appeals his convictions for Drug Possession on Fourth Amendment grounds.

Facts: The defendant, who was wanted on a warrant, drove with illegal drugs and digital scale in his car. A police officer noticed that a child was standing in the back seat and clearly not secured in a seat belt or car seat. The officer described the child as "likely between seven and ten years of age." The officer stopped the defendant and located his drugs. The trial court denied the defendant's motion to suppress the stop on Fourth Amendment grounds.

Held: Affirmed. The Court held that the trial court correctly denied the motion to suppress the evidence because the officer had reasonable suspicion to stop the vehicle based on seeing a child

standing up in the back seat. The Court found that, at the very least, the officer had reasonable suspicion to stop the car to determine whether to issue the defendant a traffic citation based on the fact that a small child was standing up in the back seat.

The Court agreed that, when the officer saw the child standing up in the back seat of the moving vehicle, it was objectively reasonable for him to believe that the defendant was violating either subsection (A) or (B) of § 46.2-1095. In a footnote, the Court explained that, while the officer was faced with two different potential traffic offenses based on his uncertainty regarding the child's age, he was entitled to stop the vehicle in order to confirm her age to determine which offense to charge.

[*Note:* The Court remanded the case to the trial court for the sole purpose of correcting several clerical errors – *EJC*].

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0976182.pdf

Johnson v. Commonwealth: June 11, 2019

Chesapeake: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth and Fifth Amendment grounds as well as sufficiency of the evidence.

Facts: The defendant possessed MDMA and LSD for distribution. While the defendant was driving, an officer stopped the defendant for an equipment violation and smelled burnt marijuana emanating from the car. The defendant was the only person in the car. The officer searched the car and found marijuana. The officer then searched the defendant's pockets and found MDMA and LSD, which were divided into small amounts and separately packaged.

For about 30 seconds after the officer had asked a question, the defendant rambled about how his life was over and he had tried to do better. The defendant then spontaneously stated: "I have to try to sell some drugs and make a $%*ing living and not die."

Prior to trial, the trial court denied the defendant's motions to suppress the search of his pockets, which the defendant argued lacked probable cause, and to suppress his statement to the officer, which he argued was inadmissible without a *Miranda* warning.

At trial, the defendant provided his own expert. The defendant's expert stated that the evidence "teeter[ed] on the line" between distribution and personal use based on the weight of the MDA alone, although other factors were consistent with distribution. The expert testified that the packaging of the drugs was consistent with distribution. However, when the expert heard the defendant's statement, he ultimately concluded that the facts "would be consistent with distribution."

Held: Affirmed. The Court rejected the argument that the officer's search was invalid because she did not originally intend to arrest the defendant. Instead, the Court explained that, because the objective facts establish that the officer had probable cause to arrest the defendant for possession of marijuana, she had the authority to search him incident to arrest, regardless of whether she actually intended to arrest him.

Regarding the defendant's spontaneous statement, the Court ruled that, because the statement was voluntary, it did not fall within the purview of *Miranda*, and the trial court did not err in denying the motion to suppress. The Court found that the defendant's statement was not a foreseeable result of any question or action by the officer, nor could it be considered responsive to the last question asked.

Regarding sufficiency, the Court ruled that the defendant's admission and the circumstantial evidence of the packaging was sufficient to establish that the defendant intended to distribute the drugs.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0899181.pdf

Joinder & Severance

Virginia Court of Appeals
Published

Cousett v. Commonwealth: November 6, 2019
71 Va. App. 49, 833 S.E.2d 908 (2019)
Virginia Beach: The defendant appeals his convictions for Rape, Burglary, and related charges on Joinder issues.

Facts: The defendant entered a woman's apartment through an unlocked front door and raped her. Within two hours, the defendant attempted to enter a second woman's unlocked apartment a short distance away, again through an unlocked front door, but fled during the attempt. Both victims and several witnesses provided nearly the identical description of the assailant, including a description of his clothing and a bag that he was carrying. Over the defendant's objection, the trial court joined both cases for trial.

Held: Affirmed. The Court held that, although the trial court erred in refusing the motion to sever, the resulting error was harmless under the facts of this case. The Court pointed out that the time, location, and description and other details provided by the second victim regarding her assault and assailant were relevant and admissible under Virginia Rule of Evidence 2:404(b) to corroborate the identity of the first victim's rapist.

Addressing joinder, the Court concluded that, while connected in time and place, there were insufficient commonalities in the "means of commission" to support a common plan. The Court found that the methods employed in each offense were not unusual, and the transactions were not "connected" within the meaning of Rule 3A:6(b). The Court wrote: "The purpose of a joint trial is not to bypass the requirement of presenting evidence establishing the identity of the perpetrator for each offense as may be done with other crimes evidence under Virginia Rule of Evidence 2:404(b)."

However, the Court emphasized that an erroneous refusal to sever is harmless unless there is clear evidence on the record that the trial court either considered inadmissible evidence from one case in convicting the defendant in the other case.

In this case, the Court explained that, while the method of entering the two apartments was insufficient to warrant joinder of the offenses as a common scheme, the facts of each case would have been admissible as "other crimes" evidence of identity had there been separate trials. In an extensive footnote, the Court complained that the Supreme Court Rule regarding joinder and the caselaw are in inherent conflict, writing:

"We recognize that there appears to be an anomalous inconsistency between the Supreme Court's Rule 3A:10(c) that limits the consideration of other crimes evidence for the purpose of joinder and that Court's precedent permitting the admission of other crimes evidence to establish various facts in issue that necessarily renders harmless any error in a judgment permitting joinder where the evidence would be admissible in any event in a separate trial…. Though the purpose of judicial economy without a risk of unfair prejudice would undoubtedly be served by a joint trial whenever the evidence would be admissible in separate trials in any event, the plain language of the Rule does not currently allow it."

Nevertheless, the Court explained, "absent affirmative evidence rebutting the presumption of regularity that trial judges and juries follow the law regarding how "other crimes" evidence may be properly considered, there is no unfair prejudice if evidence would have otherwise been admissible and thus any error in joinder is rendered harmless."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0967181.pdf

Castillo v. Commonwealth: June 4, 2019
70 Va. App. 394, 827 S.E.2d 790 (2019)
Loudoun: Defendant appeals his convictions for Murder, Burglary, and Violation of a Protective Order on grounds including: Joinder/Severance, Refusal to Strike Jurors for Cause, Admission of Cadaver Dog Evidence, Denial of a Mistrial, Closed-Circuit Testimony by a Child, Denial of Cross-Examination, *Brady* and discovery grounds.

Facts: The defendant murdered his wife after she sought a divorce from him and had obtained a protective order. The defendant suffocated her and then set up her body to make it appear that she had killed herself. The protective order had granted the victim the exclusive possession of the marital residence and ordered the defendant to "stay away" from the property. Eight days after the victim's death, the defendant filed a motion to dissolve the divorce. Having survived the victim, the defendant became sole owner of the marital estate, the value of which was estimated at between $2.6 and $3.6 million.

Prior to her death, the victim had plans to travel and to engage in athletic activities. Two of the defendant's friends and his adult son identified the defendant from security footage where he approached the victim's home on the night of her death. Another of the defendant's sons testified that he had seen the defendant in the victim's home the night of the killing. Additionally, the defendant's

DNA was identified from bloodstains found in the victim's bedroom and on the victim's sweatshirt after the defendant had been barred from the residence pursuant to a protective order for over a year. The medical examiner opined that the victim was strangled and suffocated and that her death was inconsistent with suicide.

Two weeks after police discovered the victim's body, police used a "cadaver dog" to examine the victim's residence. The cadaver dog, trained to alert to the odor of human decomposition and dried blood, alerted to an area in the victim's bedroom, as well to the bathroom where her body was found. An expert testified that the odor of human decomposition is "very persistent" over time. At trial, the handler testified to the dog's training and experience and his own training and experience working with the dog. He opined that "to a reasonable degree of scientific certainty" that his dog alerted to human decomposition.

Prior to trial, the Court joined the three offenses of Murder, Burglary, and Violation of a Protective Order over the defendant's objection. The Court refused the defendant's motion to sever the Protective Order Violation.

During jury selection, one juror revealed that his neighbor had committed suicide in a manner similar to how the defense alleged the victim had killed herself. That juror affirmed that he would be able to separate his past experience from the current case, stating: "I think I can listen fairly and make a judgment based on what was presented." The trial court denied the defendant's motion to strike the juror for cause.

During the trial, after the jury heard testimony from one of the defendant's children, a juror began "crying to the extent of howling" outside the courtroom and the sheriff had to separate her from other jurors. However, on examination by the trial court, the juror unequivocally stated that she could wait to form an opinion until all the evidence was presented.

Prior to trial, the trial court granted the Commonwealth's motion prohibiting any questioning regarding an investigating deputy's work history. The defendant had sought to cross-examine the deputy on his employment performance history based on the fact that he had not been re-sworn by the sheriff. However, the evidence was that the sheriff had no issues with respect to the deputy's truthfulness, veracity, or integrity; instead, the new sheriff did not re-swear in the deputy due to the deputy's support for another candidate during the primary campaign for sheriff.

Prior to trial, the trial court granted the Commonwealth's motion to permit one of the children to testify by closed-circuit testimony. The Court rejected the defendant's arguments that § 18.2-67.9 is unconstitutional and that it is limited to child abuse cases only. Based on testimony by the child's clinician, the trial court made specific findings pursuant to § 18.2-67.9. The trial court found that the child would be traumatized, not by the courtroom generally, but by the presence of the defendant and that his emotional distress would be more than mere nervousness or excitement or reluctance to testify.

Prior to trial, the Commonwealth informed the defense of several inconsistent statements that the children made during pre-trial meetings. During the meetings, the Commonwealth had met with the children, along with a Doctor, who took notes and then turned the notes over the Commonwealth. The Commonwealth indicated that the meeting was for witness preparation, not for investigation. The defense moved to examine the notes, but the Commonwealth asserted that the notes were attorney-work product. The trial court denied the defendant's request.

During the trial, the defendant claimed that one of the children made a statement that he had not been aware of. The defendant again demanded to compel the Commonwealth to turn the notes over to counsel. The Commonwealth responded that child's statements were a result of new questions and were not inconsistent with his prior statements. The trial court refused to review the notes *in camera* and refused to order their production.

During the trial, the defendant made two motions for a mistrial, but the trial court denied both. In the first, he complained that during closing argument, the Commonwealth commented that the "greatest part" of the judicial system was the jury's ability to decide the case according to the law, "no matter how many lawyers you have, no matter how many lawyers you pay to sit . . . ," In the second motion for a mistrial, the defendant complained after the Commonwealth's mentioned to the jury that the defendant's alibi notice "gives notice that he 'may' introduce evidence of an alibi, and said: "'May?' Or may not?" The court promptly instructed the jury to disregard the Commonwealth's statement.

The defendant also complained that, during closing argument, the Commonwealth referred to the fact that he had paid his "high-priced" experts. On cross-examination, the Commonwealth had elicited testimony from the defendant's experts on how much they had been paid for their involvement in the case. The trial court found that the statement regarding the experts was "fair argument."

After trial, the defendant moved to set aside the verdict and to dismiss due to government misconduct. He claimed that the Commonwealth had failed to disclose the fact that, in an unrelated case, the deputy who testified in this case wrote an incorrect statement in a report about the other case that he had met with an ACA and she declined prosecution. The defendant argued that the evidence that the deputy had made a false statement on a police report would have damaged his credibility in his trial and thus could have been used as impeachment evidence under Rule 2:607(a)(viii).

Held: Affirmed. In a highly detailed, 66-page opinion, the Court of Appeals examined and rejected each of the defendant's grounds for appeal.

Regarding the issues of joinder and severance, the Court ruled that the charged offenses met the requirement of Rule 3A:6(b) and justice did not require separate trials, and that the joinder requirements of Rule 3A:10(c) were met. Regarding joinder, the Court ruled that the case met Rule 3A:6(b)'s requirements for joinder because all three offenses were clearly "based on the same act or transaction." The Court pointed out that the defendant broke into the victim's house in violation of the protective order with the intent to murder her, he did not leave the residence until he had committed the murder, and each offense took place at the same location and at the same time.

Regarding the defendant's motion to sever the Protective Order Violation, the Court agreed that the protective order would have been admissible in both the Murder and Burglary trials as it was relevant to an issue or element in each of those cases. In the Burglary case, the Court explained that the protective order demonstrated that the defendant acted without authority in entering the home. Thus, the protective order was relevant "to establish guilty knowledge or to negate good faith."

In the Murder case, the Court reasoned that the protective order was admissible to prove the defendant's opportunity to commit the murder. The Court noted that the protective order showed that it was unlikely he had entered the residence prior to the night of the murder, and thus tended to prove that his DNA found in the bedroom was a result of his presence in the victim's bedroom the night of her death. Because the protective order was relevant to show that there was no reasonable explanation for

the presence of the defendant's DNA on the victim's clothing and bedding other than his presence in her bedroom on the night of the murder, it served a purpose "other than to show a mere propensity or disposition on the part of the defendant to commit the crime."

Regarding the "cadaver dog" testimony, the Court held that expert testimony relating to a dog's reaction to the odor of human decomposition is admissible after a proper foundation has been laid to show that the handler was qualified to work with the dog and to interpret its responses, that the dog was sufficiently trained in the detection of human decomposition odor, and that the circumstances surrounding the identification were conducive to a dependable scent identification by the animal.

The Court explained that cadaver dog evidence does not require a scientific foundation for its admission; rather, the cadaver dog evidence must be shown to be reliable from experience, which can be met through the testimony of the cadaver dog handler. The Court concluded that it did not need to consider whether the science underlying the expert testimony concerning the cadaver dog evidence was reliable. Instead, it explained that it only needed to determine whether a proper foundation was laid for the admission of the evidence. Thus, as with dog trailing evidence in *Pelletier*, the Court agreed that a trial court may admit cadaver dog evidence without a showing of its precise scientific basis.

In this case, the Court held that the court did not err in admitting the expert testimony regarding the cadaver dog evidence. The Court found that the record contains evidence that the handler was qualified to work with the dog and to interpret his responses. The Court then concluded that the evidence demonstrated that the dog was sufficiently trained in detecting the odor of human decomposition. Finally, the Court agreed that there was evidence showing that the circumstances surrounding the identification were conducive to dependable scent identification by the dog.

Regarding the "cadaver dog" testimony, the also Court observed in a footnote that the handler's opinion was derived from his personal observation of the dog the day of the search and from his prior training with the dog. Thus, the Court concluded that the Commonwealth had provided a proper foundation for the expert testimony and that the evidence did not violate Rule 2:703(b). The Court explained that the arguments relating to the likelihood that the dog falsely alerted or alerted to a presence other than the victim's body went only to the weight of the evidence, not its admissibility.

Regarding the juror issues, the Court agreed that the trial court properly refused to strike the juror who had given the "I think" statement, finding that the statement was not too equivocal to ensure his impartiality. The Court also agreed that the juror who had become emotional could impartially continue her service on the jury.

Regarding the child's closed-circuit testimony, the Court found that the record supported the trial court's findings. The Court also rejected the argument that § 18.2-67.9 is unconstitutional and found that the trial court complied with *Craig*. The Court specifically rejected the argument the language of *Craig* is limited to child abuse cases.

Regarding the defendant's motions for mistrial, the Court found that the challenged statements in both mistrial motions did not create indelible prejudice against the defendant as to require a new trial. The Court also agreed that the fact that the experts that testified for the defense were paid was a fact in evidence and constituted a proper subject for closing argument.

Regarding the defendant's cross-examination of the deputy, the Court ruled that the trial court did not abuse its discretion by denying the defendant the opportunity to cross-examine the deputy

about his employment history because there was no evidence before it that his employment history, or the fact that he was not re-sworn, was relevant to a material issue at trial.

Regarding the deputy's allegedly false statement, the Court ruled that the defendant failed to satisfy the first prong of *Brady* because he did not establish that the evidence would have been favorable to him. Therefore, the Court concluded that no *Brady* violation occurred by virtue of the Commonwealth's failure to disclose the deputy's alleged false statement on the report prior to trial. The Court noted that the defendant attempted to attack the deputy's credibility based upon one specific act of conduct; However, Rule 2:608(b) explicitly limits the application of Rule 2:607(a)(i) by providing that "specific instances of the conduct of a witness" may neither be "used to attack or support credibility" nor "proved by extrinsic evidence," and here the Court pointed out that the alleged false statement in the police report was inadmissible to prove the deputy's general untruthfulness, because even if his statement that he had consulted with the ACA was untrue, it was only a specific act of untruthfulness regarding an extrinsic matter.

Regarding the Doctor's notes on the prosecutor's interviews with the children, the Court ruled that the trial court properly exercised its discretion in declining to review the Dr.'s notes *in camera*. The Court repeated that the mere possibility or speculation that the evidence sought "might contain 'potentially exculpatory evidence' imposes neither a duty of disclosure upon the Commonwealth, nor a duty of inspection in camera by the court.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0140174.pdf

Jury Selection

U.S. Supreme Court

Flowers v. Mississippi.: June 21, 2019
588 U.S. ___, 139 S. Ct. 2228; 204 L. Ed. 2d 638 (2019)
Certiorari to the Supreme Court of Mississippi: Defendant appeals his conviction for Capital Murder on Sixth Amendment *Batson* grounds.

Facts: The defendant brutally murdered four employees at a store that had recently fired him. The state tried the defendant five times for capital murder, but never secured a conviction that survived appeal. The same prosecutor prosecuted the case all six times. In one of those trials, the Mississippi Supreme Court reversed the conviction on *Batson* grounds, writing: "The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a Batson challenge." In total, during the five previous trials, the State employed its peremptory challenges to strike 36 black prospective jurors.

At the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. Two of these prospective jurors knew the defendant's family and had been sued by the family business of one of the victims and also of one of the trial witnesses. One refused to consider the death

penalty and apparently lied about working side-by-side with the defendant's sister. One was related to the defendant and lied about her opinion of the death penalty to try to get out of jury duty. One said that because she worked with two of the defendant's family members, she might favor him and would not consider only the evidence presented.

During voir dire, the State asked the five black prospective jurors who were struck a total of 145 questions. The State asked the 11 seated white jurors a total of 12 questions. The jury convicted the defendant. The defendant appealed, again on *Batson* grounds. The Mississippi Supreme Court affirmed the conviction.

Held: Reversed. In a 7-2 ruling, the Court ruled that, in light of all of the relevant facts and circumstances, the trial court committed clear error in concluding that the State's peremptory strike of one particular black prospective juror was not "motivated in substantial part by discriminatory intent." The Court focused on four factors: (1) the history from the defendant's six trials, (2) the prosecutor's striking of five of six black prospective jurors at the sixth trial, (3) the prosecutor's "dramatically disparate" questioning of black and white prospective jurors at the sixth trial, and (4) the prosecutor's proffered reasons for striking the one black juror while allowing other similarly situated white jurors to serve on the jury at the sixth trial.

The Court examined the record and found that the State engaged in dramatically disparate questioning of black and white prospective jurors. The Court also argued that several white jurors were similarly-situated to the black jurors whom the State struck. The Court noted that the State did not extensively question or investigate white prospective jurors who were acquainted with the defendant's family or defense witnesses. Writing for the majority, Justice Kavanaugh wrote: "The lopsidedness of the prosecutor's questioning and inquiry can itself be evidence of the prosecutor's objective as much as it is of the actual qualifications of the black and white prospective jurors who are struck or seated."

In his concurrence, Justice Alito described this case as "likely one of a kind." The Court cautioned that it was not deciding that any one of the four facts in this case, taken alone, would require reversal. However, the Court adopted the statement of the Mississippi Supreme Court that, the "numbers described above are too disparate to be explained away or categorized as mere happenstance."

Justice Thomas, in dissent, wrote: "The majority's opinion is so manifestly incorrect that I must proceed to the merits. Flowers presented no evidence whatsoever of purposeful race discrimination by the State in selecting the jury during the trial below." Justice Thomas concluded his dissenting opinion: "If the Court's opinion today has a redeeming quality, it is this: The State is perfectly free to convict Curtis Flowers again. Otherwise, the opinion distorts our legal standards, ignores the record, and reflects utter disrespect for the careful analysis of the Mississippi courts. Any competent prosecutor would have exercised the same strikes as the State did in this trial. And although the Court's opinion might boost its self-esteem, it also needlessly prolongs the suffering of four victims' families. I respectfully dissent."

Full Case At:
https://www.supremecourt.gov/opinions/18pdf/17-9572_k536.pdf

Fourth Circuit Court of Appeals

U.S. v. Johnson: March 25, 2020

Baltimore: Defendants appeal their convictions for RICO, Drug Distribution, Conspiracy and Murder, on Juror Impartiality.

Facts: The defendants ran an extensive criminal conspiracy, selling drugs and committing acts of violence including murder. At trial, after hearing testimony recounting the police department's frantic but ultimately fruitless efforts to prevent the murder of a witness, members of the jury contacted the courtroom deputy clerk. The jurors expressed concern that the defendants had been exchanging notes with their attorneys and paralegal, and then had "looked up" at the jury.

Later the same day, "one or more" jurors approached the courtroom clerk with concerns that the defendants had received access to the jurors' personal information during the *voir dire* process. After court adjourned for the day, the jurors gave a note to the courtroom clerk, stating that they were "concerned about info the defendants may have about us from a personal safety perspective." The district court denied the defendants' requests for a mistrial or to conduct a *voir dire* of the jury members.

Later during the trial, a court security officer revealed that a juror had told him "in front of all the rest of the jurors" that some of the defendants' associates had attempted to take photographs of the jurors as they entered the public hallway from the jury room. The defendants again moved for a mistrial, arguing that the jury could not fairly evaluate the testimony of these defense witnesses after the jurors had expressed concern that the witnesses were dangerous. Again, the trial court denied the motion.

Held: Reversed and Remanded. The Court held that conclude that the district court abused its discretion in failing to hold a "*Remmer*" hearing, pursuant to *Remmer v. United States*, 347 U.S. 227 (1954), to determine whether the reported incident prejudiced the jurors and affected their ability to impartially consider the evidence. The Court found that the trial court's management of this incident was flawed both procedurally and substantively and, thus, failed to comply with the requirements of *Remmer*.

Repeating the *Remmer* rule, the Court reviewed the procedures that a district court must follow when there has been a direct or indirect private communication, contact, or tampering with a juror during a trial about the matter pending before the jury: A defendant seeking a *Remmer* hearing must present a "credible allegation" that "an unauthorized contact was made," and that the contact "was of such a character as to reasonably draw into question the integrity" of the trial proceedings, constituting "more than an innocuous intervention." Once the defendant makes this threshold showing, he is entitled under *Remmer*:

(1) to a rebuttable presumption that the external influence prejudiced the jury's ability to remain impartial; and

(2) to an evidentiary hearing to determine "what actually transpired" and whether the challenged contact was harmless.

At such evidentiary hearing, the government bears the burden of rebutting the presumption of prejudice by showing that there was "no reasonable possibility" that the jury "was influenced by an improper communication."

The Court wrote: "it is beyond dispute that a juror's report of jury members being photographed by the defendants' associates during a trial involving murdered witnesses, and that juror's act of conveying this information to other jurors, were "more than innocuous interventions," and constituted conduct "of such a character as to reasonably draw into question" the ability of the jurors to remain impartial."

The Court criticized the trial court for failing to consider the effect on the jurors of the perceived external contact. In the Court's view, given the plainly prejudicial nature of the juror's allegation and the court's response reflecting its assessment that the report was credible, the criteria for a *Remmer* hearing were met. Procedurally, the Court concluded that the trial court erred in delegating to its staff members the responsibility of questioning the jurors. "A court confronted with a credible allegation of an improper external contact may not rely on *ex parte*, third-party information. Instead, a judge must determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate."

Judge Motz filed a dissent, disagreeing with the majority's factual findings and writing: "the majority's holding unfortunately provides defendants a valuable tool to disrupt their trials."

Full Case At:
http://www.ca4.uscourts.gov/opinions_todayNEW.htm

Virginia Supreme Court

Bethea v. Commonwealth: August 28, 2019
831 S.E.2d 670 (2019)
Aff'd Court of Appeals Ruling of February 20, 2018
Prince William: Defendant appeals his conviction for First Degree Murder on *Batson* grounds.

Facts: The defendant murdered a man. At trial, during jury selection, the Commonwealth struck an African-American juror. The defendant objected on *Batson* grounds and indicated that the Commonwealth had a racial motive to strike the juror, citing a conversation where the prosecutor reportedly relayed to defense counsel's law partner that, in the previous trial, "the jury was nine-to-three to convict, and the three people who voted to acquit were black" and then "something about the Black Lives movement."

The Commonwealth explained that the juror seemed very emotional, did not answer all the questions, and did not raise her hand when asked if she would consider all the evidence as all the other jurors had. The Judge indicated that he had watched all the jurors to see if they raised their hands to the question and had not noticed anyone fail to do so, but nevertheless found that the Commonwealth's proffered reasons were race-neutral.

After trial, the defendant examined the transcript, which indicated that the prosecutor's voir dire question did not call for the jurors to raise their hands and did not reflect whether they did or not. The Commonwealth responded that the jurors repeatedly responded with raised hands to a number of questions, but that the transcript failed to note that. The trial court denied the defendant's motion to set aside the verdict on *Batson* grounds. The Court of Appeals affirmed.

Held: Affirmed. The Court agreed that the defendant had not carried his burden of proving purposeful racial discrimination. Like the Court of Appeals, the Court pointed out that a mere mistake, in and of itself, is not a pretext. Instead, the Court explained that *Batson* focuses on the genuineness of the motive, not on the reasonableness of the asserted nonracial motive. In a footnote, the Court noted that the defendant had conceded that the prosecutor did not deliberately misrepresent her reasons for the strike; instead, the prosecutor truly believed her reasons, and thus, they were not pretextual.

Regarding the prosecutor's alleged racial motive, the Court wrote that "the only suggestion of such a motive was counsel's initial proffer about an alleged remark made by the prosecutor to defense counsel's law partner, which, at a minimum, was double-tiered hearsay." Instead, the Court noted that the prosecutor's race-neutral reason cannot at the same time be both an unintentional mistake and a pretextual, purposeful misrepresentation; in this case, the Court found that because the defendant conceded the former and disclaimed the latter in his post-trial argument, the *Batson* analysis in this case "can and should stop there."

The Court warned that to allow the rejection of the prosecutor's explanation and thus "render invincible" the defendant's prima facie inference of racial motive "violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." The Court noted that under step one of *Batson*, a prima facie case need not "show that it is more likely than not" that the basis of the strike was purposeful racial discrimination. Thus, the Court found that, if the trial judge is unpersuaded by the prosecutor's race-neutral explanation, that does not mean that the trial judge has no choice but to hold that the allegation of discrimination in step one has been proved by a preponderance of the evidence.

In this case, the Court complained that "If Bethea had made a specific and contemporaneous objection to the prosecutor's mistake, the trial court could have asked the court reporter to read back the real-time transcription to determine whether, if at all, the reporter had recorded the relevant non-verbal hand gestures and to clarify which, if any, of the questions linked up with the prosecutor's recollection of the juror's failure to raise her hand. The trial court also could have called the juror out for additional voir dire questioning to determine whether she had understood the previous questions and had accurately communicated her responses. Any of these actions by the trial court — if it had known that they were necessary — could have completely defeated or, for that matter, conclusively proved, Bethea's Batson challenge."

However, the Court also cautioned that a prosecutor's mistaken explanations may still sometime be challenged as pretextual, as in the U.S. Supreme Court's recent *Flowers* case.

Justices Powell and Mims dissented, arguing that once the Commonwealth's explanations became invalid, the Court should have relied solely on the defendant's assertion by proffer that striking the minority panel members was racially motivated. The Court wrote: "it appears that, having

experienced a hung jury in the previous trial, where all three jurors who voted to acquit were African American, the prosecutor was attempting to avoid the possibility of another hung jury."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180527.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/2014164.pdf

Virginia Court of Appeals
Published

Keepers v. Commonwealth: April 14, 2020

Montgomery: Defendant appeals her conviction for Accessory Before the Fact to Murder on Fifth Amendment and Jury Selection issues.

Facts: The defendant and her co-conspirator planned a murder of a 13-year-old girl. Her co-conspirator murdered the child, and afterwards the defendant assisted the defendant in moving the victim's body and discarding evidence.

The defendant's co-conspirator told police that the defendant could provide an alibi for him. Police invited the defendant to the police department to talk about the case. She agreed. The questioning, which was initially "conversational" and non-confrontational, occurred in a room with the door closed, but not locked. The investigators consistently advised the defendant that she was "not in trouble." Although the officers did not specifically tell the defendant that she could leave at any time, she never asked to go. Officers provided her with food and water and allowed to keep her purse, backpack, and cell phone, which were not searched.

Initially, the detectives did not believe that the defendant was a suspect. Rather, they were interviewing her to gain more information about her co-conspirator. However, soon, the defendant confessed that she had assisted in the murder plot. The officers advised of her *Miranda* rights, specifically telling her that she was free to refuse to answer any questions and could stop talking any time she chose. Several times during the interview, the detectives indicated that the defendant's honesty would benefit her. They told the defendant that her cooperation would "go a long way" with their superiors and the prosecutor. The defendant confessed to her role in the murder.

The defendant moved to suppress her statement, arguing that the officers had failed to read her *Miranda* warnings even though she was in custody from the beginning. However, the trial court found that interview was non-custodial until after she had confessed and that police treated her as a potential witness, not a suspect, prior to that time. The trial court also rejected the argument that her statement was involuntary, which was based on officers' remarks that their duty to advise her of her rights was a "procedural issue" that "really doesn't change anything." The defendant claimed that these statements, along with psychological pressure, vitiated her waiver and rendered her statements inadmissible.

At trial, the defendant challenged two jurors, requesting strikes for cause. The defendant had examined the first juror's Facebook page and discovered that she had "liked" a story where the defendant had been denied bond, commenting "Great. Now give her the needle." The first juror, however, explained that she and her husband share the same Facebook account. She stated that did not "like" the news story about the defendant being denied bond, and she was not the one who posted the comment about the defendant receiving capital punishment. She unequivocally stated that she could be fair and impartial. The trial court made a factual determination that the first juror was being honest that she did not engage in the activity on Facebook and did not hold any preconceived beliefs about the defendant's guilt.

A second juror's response to the question of whether she could be fair and impartial was: "I think I can." She acknowledged that "I . . . cannot sit here and honestly say that what I heard is not going to bias me." The second juror expressed an understanding that murder was a separate and distinct crime from concealing a dead body. She stated that she was not "just going to stick with [her] opinion" but would wait to hear the evidence and learn "what . . . the law is."

The trial court denied the defendant's motions to strike these jurors for cause.

Held: Affirmed. The Court first rejected the defendant's argument that the defendant was in "custody" for *Miranda* purposes when she first confessed. Instead, the Court agreed that that a reasonable person would have felt free to leave under the circumstances of the defendant's interview.

Regarding voluntariness, the Court concluded that the officers' implications regarding potential leniency did not amount to actual promises of leniency. Therefore, based on the totality of circumstances, the Court found the court did not err in finding that the defendant's statements to the police were voluntary.

Regarding the two jurors, the Court refused to gainsay the trial court's conclusion that they could be fair and impartial. The Court repeated that, when jurors make potentially equivocal statements, it will defer to the trial court because of its opportunity to observe the juror's tone and demeanor.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0279193.pdf

Goodwin v. Commonwealth: November 12, 2019
71 Va. App. 125, 834 S.E.2d 487 (2019)
Charlottesville: Defendant appeals his conviction for Malicious Wounding on Refusal to Strike a Juror for Cause and sufficiency of the evidence.

Facts: During the August 12 "Unite the Right" rally in Charlottesville, the defendant and several other men brutally attacked a man. The defendant, who had been carrying a large shield, approached the victim, kicked him once and struck him with his shield, knocking the victim to the ground. The defendant then kicked the victim at least three times while he was on the ground. Other men began to join the assault. The victim suffered a large laceration to his head and a fracture to his left arm during the attack.

[*Note: The defendant is a co-defendant with a man named Ramos*. *The Court issued an opinion in that case today as well – EJC*].

During jury selection, several jurors revealed that they were personally opposed to the "Unite the Right" rally and were part of organizations that actively participated in counter-protests at the rally. However, a number of those jurors stated that their personal beliefs would not affect their ability to be impartial. For example, one juror indicated that he had protested alongside Antifa in the past, although he clarified that he did not consider himself a member of the group. When asked whether his personal beliefs would affect his ability to be impartial, stated "I don't believe so, no." Another juror had seen many social media posts but said she "thought, yes, [she] could" be fair and impartial.

One juror participated in the rally but stated that she could give the defendant a fair trial based only on the evidence in the case, uninfluenced by her support of Black Lives Matter and an organization called "Showing Up for Racial Justice." Another juror stated that she had attended Black Lives Matter rallies in the past and that she had "strong beliefs about those matters." However, when asked whether she could set those beliefs aside and give the Commonwealth and the defendant a fair trial, she unequivocally stated "absolutely" and nodded her head for the duration of the question and answer. The trial court refused the defense motions to strike those jurors for cause.

At trial, the defendant argued that the evidence failed to prove that he personally caused any significant injury to the victim.

Held: Affirmed. The Court found that the trial court acted with due diligence in reviewing all of the answers that the potential jurors provided during the voir dire process and thoroughly analyzed their demeanor before rendering a decision. The Court concluded, therefore, that the trial court did not abuse its discretion by refusing to strike the jurors for cause. The Court rejected the argument that, by saying words such as "think" and "believe," the jurors were stating that they were not sure if they could be impartial.

The Court also ruled that the evidence was sufficient to support the conviction for the malicious wounding. The Court agreed that the defendant appeared to cause the injuries and noted that the victim's injuries clearly fit into the category of bodily injuries contemplated in the statute.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1595182.pdf

Ramos v. Commonwealth: November 12, 2019
71 Va. App. 150, 834 S.E.2d 499 (2019)
Charlottesville: Defendant appeals his conviction for Malicious Wounding on Refusal to Strike a Juror for Cause, Refusal to Change Venue, and sufficiency of the evidence.

Facts: During the August 12 "Unite the Right" rally in Charlottesville, the defendant joined a mob that had been beating a man. After the victim had already been kicked multiple times and beaten with poles, a board, and a shield, and was already on the ground and had stumbled trying to rise at least once, the defendant used a large wind-up to deliver a significant punch to the victim.

Prior to trial, the defendant moved to change venue, but the trial court took the motion under advisement until jury selection. The defendant did not renew his motion for a change of venue, or insist on a ruling, before the jury was empaneled. Although the Commonwealth eventually requested a ruling on the motion, it was not until after the jury was sworn, the first witness had testified, and jeopardy had attached.

The defendant is a co-defendant with a man named Goodwin. [*The Court issued an opinion in that case today as well – EJC*]. Two days prior to trial in this case, a jury convicted the co-defendant of malicious wounding and recommended ten years to serve. During jury selection, several jurors revealed that they were aware of the co-defendant's case and the outcome of that trial. Citing *Farar,* the defendant moved to strike all the jurors who know about the previous verdict in the co-defendant's case. The trial court refused to strike them based on the defendant's blanket objection.

At trial, the defendant argued that the evidence showed that at most he struck the victim once and that a single blow cannot demonstrate sufficient malice to support a malicious wounding conviction.

Held: Affirmed. The Court first ruled that knowledge of a separately tried co-defendant's earlier conviction does not create a *per se* bar to jury service. The Court explained that a prospective juror who vaguely knows that another person was convicted of some crime will not need to be excluded on that basis, but a prospective juror who knows the details of the other case and how it is connected to the case for which he is being considered might warrant further individual questioning about potential bias.

The Court also pointed out that, in this case, the prospective jurors' knowledge of the previous case, and its connection to this case, varied greatly, and the source of that knowledge was the media, not the court itself.

The Court then ruled that the defendant argued his motion to change venue too late. The Court repeated that, when a trial court takes a change of venue motion under advisement, it is incumbent upon the defendant to renew the motion before the jury was empaneled and sworn, or at least remind the court that it was still pending and that he wanted the court to rule on it.

The Court also ruled that the evidence was sufficient to prove malice, because a single punch can be malicious when delivered at the tail end of a beating by a mob.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1595182.pdf

Castillo v. Commonwealth: June 4, 2019
70 Va. App. 394, 827 S.E.2d 790 (2019)
Loudoun: Defendant appeals his convictions for Murder, Burglary, and Violation of a Protective Order on grounds including: Joinder/Severance, Refusal to Strike Jurors for Cause, Admission of Cadaver Dog Evidence, Denial of a Mistrial, Closed-Circuit Testimony by a Child, Denial of Cross-Examination, *Brady* and discovery grounds.

Facts: The defendant murdered his wife after she sought a divorce from him and had obtained a protective order. The defendant suffocated her and then set up her body to make it appear that she had killed herself. The protective order had granted the victim the exclusive possession of the marital

residence and ordered the defendant to "stay away" from the property. Eight days after the victim's death, the defendant filed a motion to dissolve the divorce. Having survived the victim, the defendant became sole owner of the marital estate, the value of which was estimated at between $2.6 and $3.6 million.

Prior to her death, the victim had plans to travel and to engage in athletic activities. Two of the defendant's friends and his adult son identified the defendant from security footage where he approached the victim's home on the night of her death. Another of the defendant's sons testified that he had seen the defendant in the victim's home the night of the killing. Additionally, the defendant's DNA was identified from bloodstains found in the victim's bedroom and on the victim's sweatshirt after the defendant had been barred from the residence pursuant to a protective order for over a year. The medical examiner opined that the victim was strangled and suffocated and that her death was inconsistent with suicide.

Two weeks after police discovered the victim's body, police used a "cadaver dog" to examine the victim's residence. The cadaver dog, trained to alert to the odor of human decomposition and dried blood, alerted to an area in the victim's bedroom, as well to the bathroom where her body was found. An expert testified that the odor of human decomposition is "very persistent" over time. At trial, the handler testified to the dog's training and experience and his own training and experience working with the dog. He opined that "to a reasonable degree of scientific certainty" that his dog alerted to human decomposition.

Prior to trial, the Court joined the three offenses of Murder, Burglary, and Violation of a Protective Order over the defendant's objection. The Court refused the defendant's motion to sever the Protective Order Violation.

During jury selection, one juror revealed that his neighbor had committed suicide in a manner similar to how the defense alleged the victim had killed herself. That juror affirmed that he would be able to separate his past experience from the current case, stating: "I think I can listen fairly and make a judgment based on what was presented." The trial court denied the defendant's motion to strike the juror for cause.

During the trial, after the jury heard testimony from one of the defendant's children, a juror began "crying to the extent of howling" outside the courtroom and the sheriff had to separate her from other jurors. However, on examination by the trial court, the juror unequivocally stated that she could wait to form an opinion until all the evidence was presented.

Prior to trial, the trial court granted the Commonwealth's motion prohibiting any questioning regarding an investigating deputy's work history. The defendant had sought to cross-examine the deputy on his employment performance history based on the fact that he had not been re-sworn by the sheriff. However, the evidence was that the sheriff had no issues with respect to the deputy's truthfulness, veracity, or integrity; instead, the new sheriff did not re-swear in the deputy due to the deputy's support for another candidate during the primary campaign for sheriff.

Prior to trial, the trial court granted the Commonwealth's motion to permit one of the children to testify by closed-circuit testimony. The Court rejected the defendant's arguments that § 18.2-67.9 is unconstitutional and that it is limited to child abuse cases only. Based on testimony by the child's clinician, the trial court made specific findings pursuant to § 18.2-67.9. The trial court found that the

child would be traumatized, not by the courtroom generally, but by the presence of the defendant and that his emotional distress would be more than mere nervousness or excitement or reluctance to testify.

Prior to trial, the Commonwealth informed the defense of several inconsistent statements that the children made during pre-trial meetings. During the meetings, the Commonwealth had met with the children, along with a Doctor, who took notes and then turned the notes over the Commonwealth. The Commonwealth indicated that the meeting was for witness preparation, not for investigation. The defense moved to examine the notes, but the Commonwealth asserted that the notes were attorney-work product. The trial court denied the defendant's request.

During the trial, the defendant claimed that one of the children made a statement that he had not been aware of. The defendant again demanded to compel the Commonwealth to turn the notes over to counsel. The Commonwealth responded that child's statements were a result of new questions and were not inconsistent with his prior statements. The trial court refused to review the notes *in camera* and refused to order their production.

During the trial, the defendant made two motions for a mistrial, but the trial court denied both. In the first, he complained that during closing argument, the Commonwealth commented that the "greatest part" of the judicial system was the jury's ability to decide the case according to the law, "no matter how many lawyers you have, no matter how many lawyers you pay to sit . . . ," In the second motion for a mistrial, the defendant complained after the Commonwealth's mentioned to the jury that the defendant's alibi notice "gives notice that he 'may' introduce evidence of an alibi, and said: "'May?' Or may not?" The court promptly instructed the jury to disregard the Commonwealth's statement.

The defendant also complained that, during closing argument, the Commonwealth referred to the fact that he had paid his "high-priced" experts. On cross-examination, the Commonwealth had elicited testimony from the defendant's experts on how much they had been paid for their involvement in the case. The trial court found that the statement regarding the experts was "fair argument."

After trial, the defendant moved to set aside the verdict and to dismiss due to government misconduct. He claimed that the Commonwealth had failed to disclose the fact that, in an unrelated case, the deputy who testified in this case wrote an incorrect statement in a report about the other case that he had met with an ACA and she declined prosecution. The defendant argued that the evidence that the deputy had made a false statement on a police report would have damaged his credibility in his trial and thus could have been used as impeachment evidence under Rule 2:607(a)(viii).

Held: Affirmed. In a highly detailed, 66-page opinion, the Court of Appeals examined and rejected each of the defendant's grounds for appeal.

Regarding the issues of joinder and severance, the Court ruled that the charged offenses met the requirement of Rule 3A:6(b) and justice did not require separate trials, and that the joinder requirements of Rule 3A:10(c) were met. Regarding joinder, the Court ruled that the case met Rule 3A:6(b)'s requirements for joinder because all three offenses were clearly "based on the same act or transaction." The Court pointed out that the defendant broke into the victim's house in violation of the protective order with the intent to murder her, he did not leave the residence until he had committed the murder, and each offense took place at the same location and at the same time.

Regarding the defendant's motion to sever the Protective Order Violation, the Court agreed that the protective order would have been admissible in both the Murder and Burglary trials as it was

relevant to an issue or element in each of those cases. In the Burglary case, the Court explained that the protective order demonstrated that the defendant acted without authority in entering the home. Thus, the protective order was relevant "to establish guilty knowledge or to negate good faith."

In the Murder case, the Court reasoned that the protective order was admissible to prove the defendant's opportunity to commit the murder. The Court noted that the protective order showed that it was unlikely he had entered the residence prior to the night of the murder, and thus tended to prove that his DNA found in the bedroom was a result of his presence in the victim's bedroom the night of her death. Because the protective order was relevant to show that there was no reasonable explanation for the presence of the defendant's DNA on the victim's clothing and bedding other than his presence in her bedroom on the night of the murder, it served a purpose "other than to show a mere propensity or disposition on the part of the defendant to commit the crime."

Regarding the "cadaver dog" testimony, the Court held that expert testimony relating to a dog's reaction to the odor of human decomposition is admissible after a proper foundation has been laid to show that the handler was qualified to work with the dog and to interpret its responses, that the dog was sufficiently trained in the detection of human decomposition odor, and that the circumstances surrounding the identification were conducive to a dependable scent identification by the animal.

The Court explained that cadaver dog evidence does not require a scientific foundation for its admission; rather, the cadaver dog evidence must be shown to be reliable from experience, which can be met through the testimony of the cadaver dog handler. The Court concluded that it did not need to consider whether the science underlying the expert testimony concerning the cadaver dog evidence was reliable. Instead, it explained that it only needed to determine whether a proper foundation was laid for the admission of the evidence. Thus, as with dog trailing evidence in *Pelletier*, the Court agreed that a trial court may admit cadaver dog evidence without a showing of its precise scientific basis.

In this case, the Court held that the court did not err in admitting the expert testimony regarding the cadaver dog evidence. The Court found that the record contains evidence that the handler was qualified to work with the dog and to interpret his responses. The Court then concluded that the evidence demonstrated that the dog was sufficiently trained in detecting the odor of human decomposition. Finally, the Court agreed that there was evidence showing that the circumstances surrounding the identification were conducive to dependable scent identification by the dog.

Regarding the "cadaver dog" testimony, the also Court observed in a footnote that the handler's opinion was derived from his personal observation of the dog the day of the search and from his prior training with the dog. Thus, the Court concluded that the Commonwealth had provided a proper foundation for the expert testimony and that the evidence did not violate Rule 2:703(b). The Court explained that the arguments relating to the likelihood that the dog falsely alerted or alerted to a presence other than the victim's body went only to the weight of the evidence, not its admissibility.

Regarding the juror issues, the Court agreed that the trial court properly refused to strike the juror who had given the "I think" statement, finding that the statement was not too equivocal to ensure his impartiality. The Court also agreed that the juror who had become emotional could impartially continue her service on the jury.

Regarding the child's closed-circuit testimony, the Court found that the record supported the trial court's findings. The Court also rejected the argument that § 18.2-67.9 is unconstitutional and

found that the trial court complied with *Craig*. The Court specifically rejected the argument the language of *Craig* is limited to child abuse cases.

Regarding the defendant's motions for mistrial, the Court found that the challenged statements in both mistrial motions did not create indelible prejudice against the defendant as to require a new trial. The Court also agreed that the fact that the experts that testified for the defense were paid was a fact in evidence and constituted a proper subject for closing argument.

Regarding the defendant's cross-examination of the deputy, the Court ruled that the trial court did not abuse its discretion by denying the defendant the opportunity to cross-examine the deputy about his employment history because there was no evidence before it that his employment history, or the fact that he was not re-sworn, was relevant to a material issue at trial.

Regarding the deputy's allegedly false statement, the Court ruled that the defendant failed to satisfy the first prong of *Brady* because he did not establish that the evidence would have been favorable to him. Therefore, the Court concluded that no *Brady* violation occurred by virtue of the Commonwealth's failure to disclose the deputy's alleged false statement on the report prior to trial. The Court noted that the defendant attempted to attack the deputy's credibility based upon one specific act of conduct; However, Rule 2:608(b) explicitly limits the application of Rule 2:607(a)(i) by providing that "specific instances of the conduct of a witness" may neither be "used to attack or support credibility" nor "proved by extrinsic evidence," and here the Court pointed out that the alleged false statement in the police report was inadmissible to prove the deputy's general untruthfulness, because even if his statement that he had consulted with the ACA was untrue, it was only a specific act of untruthfulness regarding an extrinsic matter.

Regarding the Doctor's notes on the prosecutor's interviews with the children, the Court ruled that the trial court properly exercised its discretion in declining to review the Dr.'s notes *in camera*. The Court repeated that the mere possibility or speculation that the evidence sought "might contain 'potentially exculpatory evidence' imposes neither a duty of disclosure upon the Commonwealth, nor a duty of inspection in camera by the court.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0140174.pdf

Virginia Court of Appeals
Unpublished

Bustos v. Commonwealth: December 27, 2019

Fairfax: Defendant appeals his convictions for sexual assault on Refusal to Strike a Juror and Jury Instruction issues.

Facts: The defendant sexually assaulted the victim. During voir dire, one potential juror was equivocal about whether the defendant was guilty. The juror admitted that she did not think a person would be charged unless there is some evidence to charge him. She followed that up by saying

"[w]hether that means he's guilty or not, I don't know." However, the juror refused to say that she thought that the defendant was guilty and reiterated that she would have to wait to hear the whole story and hear the evidence.

Regarding the defendant's right not to testify, the juror stated that she would "[n]ot necessarily" think that the defendant was guilty if he chose not to testify. She explained she "know[s] there's reasons why people are not advised to testify" and that she "would hear the other evidence that was presented." The defendant moved to strike the juror for cause, but the trial court denied his motion.

At trial, the defendant objected to granting Instruction 12, the geriatric parole instruction, during sentencing. The defendant argued in the alternative that the trial court should have granted an amended instruction, which included a statistic relating to geriatric parole, stating that only 0.1% of eligible offenders actually receive geriatric parole. The trial court refused that instruction.

Held: Affirmed. The Court agreed that, based on her responses, the record failed to indicate that the juror could not have served as a fair and impartial juror. The Court found that her explanations were not indicative of a "fixed and abiding conviction" that would disqualify her. The Court pointed out that, not only did she disclaim a belief that a person charged is likely guilty, but her statement was, in fact, an accurate statement of how the criminal justice system functions.

Regarding the jury instruction, the Court noted that, as the defendant's age and sentence made geriatric release a possibility under § 53.1-40.01, the trial court was required under *Fishback* to instruct the jury accordingly. Furthermore, the Court emphasized that jury instructions are intended to clearly state the law, and while the eligibility requirements for geriatric parole are statements of law, the statistical probability that someone will be granted geriatric release is a statement of fact.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1880184.pdf

Cipolla v. Commonwealth: June 18, 2019

Chesterfield: Defendant appeals his convictions for Child Sexual Assault on jury selection and expert testimony issues.

Facts: The defendant sexually assaulted a child for five years, until the child reached the sixth grade. During voir dire, the defendant asked the venire whether any of their family members, their friends, or colleagues had been affected by unwanted sexual contact. One juror stated that, about fifty years ago, her two sisters had experienced unwanted sexual contact from their foster parents and their father. In answer to a question from the defendant, the juror expressed that she could not be certain that hearing similar evidence would not cause her to "relive her sisters' experiences."

Another juror stated that his sister's daughter had been abused and that the matter was still pending in a court in North Carolina. The defendant then asked, "Do you think hearing something like this will make you relive the events that your niece might be talking about, or experiencing?" The juror said, "Potentially." The defendant did not ask the jurors whether the experiences of their family members would affect their ability to be fair and impartial in the case.

The defendant moved to strike the two jurors for cause, arguing that their voir dire responses established that they could not serve as impartial jurors who were indifferent to the cause. The trial court denied the motions.

During the guilt phase, the defendant offered an expert witness, who had conducted psychosexual tests on the defendant, to testify that the defendant did not show "any paraphilic tendencies" and did not fit the profile of individuals who engaged in "abhorrent sexual behavior." The defendant contends that the proffered evidence would tend to establish the improbability that he sexually abused the victim but would leave to the jury's determination whether, in fact, he committed the abuse. The trial court sustained the Commonwealth's objection to that testimony.

Held: Affirmed. Regarding the jurors, the Court observed that nothing in the jurors' responses indicated that they would be unable to hear the case impartially or that they would have a bias toward one side or the other.

Regarding the proffered expert testimony, the Court noted that evidence that the defendant did not exhibit "paraphilic tendencies" was not relevant to show that he lacked the requisite state of mind to commit the offenses because evidence of a defendant's mental state is irrelevant to the issue of guilt unless an insanity defense is raised or such evidence is permitted by statute. In addition, the Court found that the expert's testimony was not admissible because it concerned the ultimate issue in this case—whether the defendant committed the charged offenses against the victim. Therefore, the expert's opinion would have invaded the province of the jury in determining the defendant's guilt or innocence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1976172.pdf

Juror Misconduct

Fourth Circuit Court of Appeals

Barnes v. Thomas: September 13, 2019
938 F. 3d 526 (2019)
M.D.N.C.: Defendant appeals his death sentence on Juror Misconduct issues.

Facts: In 1992, the defendant and two other men murdered two people during a robbery. At sentencing, the defendant's attorney argued that the jurors would be "violating a law of God" by imposing the death penalty. During jury deliberations, troubled by the attorney's remarks, one juror visited her pastor and sought counsel from him during the first night of sentencing deliberations. After speaking with her pastor, the juror returned to deliberations and brought a Bible. The juror discussed her pastor's counsel with the entire jury and reading several Bible verses that he had suggested out loud, suggesting that the jurors "had to live by the laws of the land.". The jury returned a death sentence.

Years later, the defendant learned about the pastor's influence and sought *habeas* relief. The state court and a federal district court denied relief.

Held: Reversed. The Court found that the pastor's thoughts on whether the Bible condones the death penalty—when, in urging jurors to vote against that punishment, an attorney had just insisted that it does not—constituted an outside influence on the jury's partiality. The Court also held that the juror's external communication was not harmless. The Court noted that a prejudicial influence need not take the form of a third party directly telling jurors how they should vote or introducing new facts or law for their consideration.

Full Case At:
http://www.ca4.uscourts.gov/opinions/185.P.pdf

Virginia Court of Appeals
Unpublished

Stevens v. Commonwealth: April 7, 2020

Richmond: Defendant appeals his conviction for Possession of a Firearm by Felon on Jury Selection Issues.

Facts: The defendant, a felon, possessed a firearm. At jury selection, two jurors stated that they thought the fact that the defendant had a prior felony conviction made it more likely that he had committed this offense. However, on further examination, the first juror agreed that he would hold the Commonwealth to proof beyond a reasonable doubt.

The second juror and the Court had the following colloquy:

Court: Can you apply the facts to this case fairly knowing that he's presumed to be innocent and not have that prior conviction sway you one way or the other?

Juror: I think I can. I think that the fact that he's been convicted before increases the odds that he might be convicted again.

The juror, however, then affirmed that he would apply the presumption of innocence.

The defendant moved to strike both jurors, but the trial court observed "I feel that they were very sincere about their efforts to be fair…. these people went out of their way to say, no, I am going to be fair. I'm going to hold the Commonwealth to their burden. I will apply the presumption of innocence. And I think with that, I'm not going to strike them for cause."

Held: Affirmed. The Court ruled that the trial court did not err in denying the defendant's motions to strike the two jurors for cause. The Court agreed that the record demonstrated that they could and would lay aside their preconceived notions. The Court noted that the trial court found that they both demonstrated the ability and willingness to weigh this case fairly and apply the presumption of innocence.

The Court repeated that the mere fact that a juror uses phrases like "I think I can" does not automatically make that juror unqualified to sit.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1275182.pdf

Dosky v. Commonwealth: August 13, 2019

Fairfax: Defendant appeals his conviction for Murder on juror misconduct issues and refusal to grant a mistrial.

Facts: The defendant murdered a man. In the middle of trial, a juror showed up at the Commonwealth's Attorney's office, approached an ACA in the office, and started to ask questions about the office and the legal system in general. The juror stated that he was "impressed with the whole process, the whole structure," and as a taxpayer was interested in the size of the county court system and Commonwealth's Attorney's Office. The ACA characterized the juror's questioning as "saying he is happy with our legal system . . . he was interested in the legal system, not happy one way or the other." The juror did not comment on the defendant or the evidence; rather, he asked general questions related to the functioning of the Commonwealth's Attorney's Office. The ACA told him that he could not speak to anyone in the office until his jury service was completed, but that he could come back another time to talk about the office after the conclusion of the trial.

During jury deliberations, a juror asked a court deputy if he carried a pocketknife and then questioned him about the knife in this case. He specifically asked the deputy, "Does this knife open with one hand or two?" At that point the deputy told the juror to stop asking questions.

A day after the trial, a juror sent a LinkedIn message to the prosecuting attorney, stating, "I was a juror on the Dosky trial and just want you to know how much we all admired your work. We are all proud to have you working 'on our side.'"

The defendant moved to set aside the verdict and declare a mistrial. The defendant argued that the juror contacts with third parties demonstrated an "underlying bias in favor of the Commonwealth held by multiple members of this jury." However, the trial court denied the motion.

Held: Affirmed. The Court concluded that the jurors in question neither expressed any animus toward the defendant or toward criminal defendants in general, nor stated whether they had concluded that the defendant was guilty or innocent. The Court further concluded that the two jurors' interactions with third parties did not indicate that they no longer remained impartial as established by their answers to the inquiries made during voir dire.

Regarding the juror who spoke with the detective during trial, the Court reasoned that the juror's statement to the detective that he was "pleased with his service" could be viewed as expressing favorability toward the Commonwealth, but likewise could be viewed as an expression of gratitude for the detective's professionality on the witness stand. Further, the Court found that the statement did not explicitly or implicitly demonstrate a negative bias against the defendant.

Regarding the juror who sent a message to the Commonwealth's attorney, the Court explained that the message did not demonstrate bias on the part of the juror. The Court focused on the timing of the juror's message, which was a day after the trial concluded, and concluded that his statement cannot be viewed as an expression of his bias during the period when he was deliberating over the defendant's guilt or sentence.

Regarding the juror who asked the deputy about the knife, the Court found that the juror's question "shows his curiosity about how the knife would have been used against the victim, which, although an improper question for the deputy, was not a demonstration of bias."

Regarding the juror who visited the CA's office, the Court agreed that the conversation the juror had with the Commonwealth's attorney was "innocuous" and that the juror's visit to the Commonwealth's Attorney's Office did not demonstrate bias against the defendant. In a footnote, the Court noted that this visit was not technically in violation of the court's preliminary instructions to the jury, as it does not appear that the juror discussed the case with the ACA or attempted to make any independent investigation at the office.

The Court also examined other alleged errors but found that any other error would have been harmless.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1771174.pdf

Jury Verdicts

U.S. Supreme Court

Ramos v. Louisiana: April 20, 2020

Certiorari to the Louisiana Court of Appeal: Defendant appeals his conviction for murder on Sixth Amendment grounds, contesting his non-unanimous jury verdict.

Facts: The defendant repeatedly stabbed and murdered a woman and left her body in a trash can. At trial, the jury convicted the defendant in a 10-2 vote. Louisiana, like Oregon, permits convictions even when two jurors dissent. In *Apodaca v. Oregon*, the U.S. Supreme Court had held that state juries need not be unanimous in order to convict a criminal defendant. The lower courts sustained the defendant's conviction based on that ruling.

The U.S. Supreme Court took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense.

Held: Conviction reversed. In a highly-fractured ruling, the Court ruled 6-3 to reverse the judgment, but only five judges were able to join an opinion doing so. Justice Gorsuch wrote the opinion

for the majority, but as in the original *Apodaca* ruling, the Court was divided. Only four other justices joined part of Justice Gorsuch's opinion; the remainder of his opinion swayed only a minority of justices.

The Court's ruling explained that, historically, the term "trial by an impartial jury" carried with it a requirement of unanimity since the 14th century. The Court reviewed the history of the Sixth Amendment and wrote: "There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally."

Justices Sotomayor, Kavanaugh and Thomas filed concurring opinions. Justices Alito, Roberts, and Kagan dissented.

Full Case At:
https://www.supremecourt.gov/opinions/19pdf/18-5924_n6io.pdf

Virginia Supreme Court

McQuinn v. Commonwealth: April 2, 2020

Richmond: Defendant appeals his convictions for Use of a Firearm on Inconsistent Verdicts.

Facts: The defendant and another man beat, abducted, and robbed a man and a woman. The man escaped, but as he did, the defendant shot and wounded the man. The defendant was charged with two counts of abduction for pecuniary benefit, two counts of robbery, malicious wounding of the man, and using a firearm in the commission of each of these felonies.

At trial, the jury found the defendant guilty of abducting the woman, of using a firearm in the abduction of the man, and of using a firearm in the malicious wounding of the man. The jury found the defendant not guilty of abducting the man and was deadlocked on the charge of malicious wounding of the man. The jury also found the defendant not guilty of using a firearm in the abduction of the woman and not guilty on both counts of robbery and their attendant firearm charges.

The defendant argued that his convictions for use of a firearm must be overturned because the jury did not find him guilty of the predicate offenses of abduction and malicious wounding. The Court of Appeals refused to vacate the defendant's convictions.

Held: Affirmed. The Court expounded that there are three possible reasons for the inconsistent verdicts:

(i) The jury may have erred in failing to convict the defendant of the predicate offense while finding him guilty of the compound offense, or

(ii) The jury may have made a mistake in finding the defendant guilty of the compound offense while finding him not guilty of the predicate offense, or

(iii) The jury may have "simply decided to be lenient with the defendant" by convicting him only of the compound offense. In that case, the Court wrote: "A defendant legally secure in his presumption of innocence needs neither grace nor leniency."

The Court observed that inconsistent verdicts therefore present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but "it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Commonwealth is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course."

The Court pointed out that Virginia is more careful than most states to protect the inviolability and secrecy of jurors' deliberations, and thus a court, in a case like this, is unlikely to discover what motivated the jury. The Court quoted Akhil Amar, writing: "We do not view that deliberative safe space with skepticism. To the contrary, we believe that preserving the secrecy of jury verdicts honors the jury's role "as 'the democratical balance in the Judiciary power, and secures to the citizenry a share of Judicature which they have reserved for themselves." The Court then quoted Blackstone, writing: "This reservation of power presupposes that, while engaged in the task of sorting out disputed facts, citizen juries are "the best investigators of truth, and the surest guardians of public justice."

Tags: Verdict – Juries - Inconsistent Verdicts

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1190266.pdf

Juveniles

Virginia Supreme Court

Ross v. Commonwealth: January 16, 2020 (Unpublished)
Aff'd Court of Appeals ruling of October 30, 2018
Bedford: Defendant appeals his sentence for Capital Murder and related offenses on Eighth Amendment grounds

Facts: The defendant murdered one of his classmates while he was a juvenile. In 1999, the defendant pled guilty to capital murder, robbery, and using a firearm to commit murder and robbery and received two life terms plus eight years. In 2016, a federal district court granted the defendant's *Habeas* writ in light of *Graham v. Florida* and *Miller v. Alabama* and ordered resentencing, finding that the original case was settled via a plea agreement and there was no evidence in the record that the trial judge "considered any factors relating to youthful immaturity or incorrigibility."

The trial court held a re-sentencing and imposed a total active sentence of ninety-nine years, including life, suspended after 91 years, for the murder conviction and another 91 years for the robbery conviction. The defendant appealed on the grounds that his sentences for robbery and murder were inconsistent with the Eighth Amendment. The Court of Appeals affirmed.

Held: Affirmed. Regarding the robbery sentence, the Court assumed without deciding that the 91-year sentence for robbery was the functional equivalent to life without parole. However, the Court

re-affirmed its ruling in *Angel* that the defendant' opportunity for geriatric release under § 53.1-40.01 provided a "meaningful opportunity."

Regarding the life sentence for murder, the Court held that the circuit court in the instant case did not need to make an express finding on the record regarding the defendant's "incorrigibility" under *Miller* and *Montgomery*. The Court observed that there was nothing in the record to suggest that the circuit court abused its discretion in evaluating the mitigating evidence at the resentencing hearing and sentencing the defendant to life, suspended after 91 years.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/181530.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1190173.pdf

Virginia Court of Appeals
Published

Bardales v. Commonwealth: April 7, 2020

Fairfax: Defendant appeals his sentence, alleging violation of a Plea Agreement

Facts: The defendant committed a robbery at the age of 17. His plea agreement explicitly provided that the defendant was to receive "a blended sentence that would allow him to serve the portion of any active sentence in the custody of the Department of Juvenile Justice to the extent that he is eligible for such placement… ." The plea agreement also explicitly stated that "such an agreement does not limit this court's ability to sentence the defendant within the full range of punishment." The trial court sentenced him to DJJ as a serious juvenile offender, followed by five years of incarceration in DOC.

After receiving a request from DJJ to review the defendant's placement there because of the defendant's actions and behavior while in DJJ, the trial court held hearings and ultimately determined that the defendant should be removed from DJJ and placed in the DOC Youthful Offender Program. The trial court suspended the five years of the sentence to DOC imposed on June 9, 2017, conditioned upon the defendant's remand to the custody of DOC "for an indeterminate period of time not to exceed four years" for his successful completion of DOC's Youthful Offender Program, pursuant to § 19.2-311.

The defendant argued that the trial court violated his plea agreement. He argued that, once he turns twenty-one (and thus has aged out of DJJ) he could be placed on probation, but he could not be committed to active incarceration in DOC or even its Youthful Offender Program.

Held: Affirmed. The Court found that the trial court did not err in its interpretation of the plea agreement. The Court reasoned that, because the plea agreement did not limit the trial court's ability to sentence the defendant for up to a confinement for life, the court logically must be able to place him in

confinement somewhere other than DJJ, which is limited by statute to confining juveniles only until they turn twenty-one years of age, citing § 16.1-285.1(C).

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0455194.pdf

Virginia Court of Appeals
Unpublished

Tucker v. Commonwealth: April 21, 2020

Henrico: The Defendant, a juvenile, appeals his convictions for First-Degree Murder and related offenses on denial of a Preliminary Hearing.

Facts: The defendant, at the age of seventeen, robbed and shot a man in the back of the head, killing him. The Commonwealth moved to certify him as an adult for the charges of second-degree murder, conspiracy to commit robbery, and the related firearm charges. After the preliminary hearing, held pursuant to § 16.1-269.1(B), the JDR court granted the Commonwealth's motion and sent the cases to the grand jury. The Commonwealth subsequently directly indicted the defendant for first-degree murder and moved the circuit court to nolle prosequi the second-degree murder charge.

The defendant argued that the Commonwealth was precluded from directly indicting him for first-degree murder in circuit court because his preliminary hearing in the JDR court was for second-degree murder, not first-degree murder.

Held: Affirmed. The Court ruled that, because the defendant had a preliminary hearing in the JDR court for second-degree murder charged under § 18.2-32, the court did not err in denying his motion to quash a subsequent indictment for first-degree murder charged under the same statute and arising from the same facts. The Court observed that, upon certification of this and other charges to the circuit court, the JDR court was divested of jurisdiction over any ancillary charges and only retained jurisdiction over "unrelated" matters under § 16.1-269.1(D).

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0301192.pdf

Grand Jury & Indictment

Virginia Court of Appeals
Unpublished

Whitaker v. Commonwealth: December 10, 2019

Portsmouth: Defendant appeals his convictions for Forgery, objecting to Special Grand Jury proceedings and on Closing Argument.

Facts: The defendant, the CEO of a credit union, forged loan documents in someone else's name without that person's permission. The Commonwealth investigated using a special grand jury; the order convening the special grand jury also appointed three law enforcement officers to assist the grand jury. The grand jury returned an indictment against the defendant. It did not issue any written report.

The defendant moved to quash the indictments, arguing that the Commonwealth improperly arranged the appointment of the investigators, instead of permitting the special grand jury to select its own investigators. The defendant also moved to quash on the grounds that the special grand jury failed to issue a written report pursuant to § 19.2-213. The trial court denied the motions.

At trial, the defendant's brother testified. He identified letters were that were signed by the board of the credit union. The defendant was a board member of the credit union as well as its CEO. The letters were addressed to the defendant as Chairperson of the credit union board, and his signature was written above the line designated for the "Board Chairperson." The defendant's brother testified that he was present when the defendant had personally signed loan documents in this case that the Commonwealth admitted into evidence.

In closing argument, the Commonwealth told the jury that it could compare the signature on the defendant's loan documents, a forged signature card, and the letters with the signatures on the forged loan applications. The defendant objected that there was no evidence in the record to establish that any of the documents contained the defendant's genuine signature, but the trial court overruled the objection.

Held: Affirmed. Regarding the special grand jury, assuming without deciding that the trial court erred in granting the special prosecutor's request to appoint the special personnel (thereby allegedly tainting the grand jury's finding of probable cause), the Court concluded that any possible error was cured by the defendant's later trial and the return of that different jury's verdict that the defendant was guilty beyond a reasonable doubt. Regarding the lack of a report, the Court found that the plain language of § 19.2-213 does not contain a requirement that a report be prepared when the special grand jury is impaneled at the request of the Attorney for the Commonwealth.

Regarding the closing argument, the Court ruled that the trial court did not err in allowing the Commonwealth to argue in its closing statement that the jury should compare the defendant's actual signature on his loan documents with the signatures on the documents at issue. The Court found that the defendant's brother's testimony was sufficient to establish that the signature on those documents was actually the defendant's signature. The Court explained that the jury was permitted to compare the handwritten signature on the defendant's loan documents with the handwritten purported signature of the victim on the fraudulently signed documents. Therefore, the Court concluded that the Commonwealth did not argue facts that were not already in evidence.

In a footnote, the Court also rejected the argument that the forged loans were not "to the prejudice" of the victim. The Court noted that the relevant question is whether the forged document *could have* prejudiced the victim at the time it was made. Although the loan ultimately was paid off by

individuals and entities other than the victim, the Court pointed out that the loans and membership with the credit union could have negatively impacted the victim's financial welfare at the time they were created and while the loans were still outstanding.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1686181.pdf

Recusal

Virginia Court of Appeals
Published

Davis v. Commonwealth: October 8, 2019
70 Va. App. 722, 833 S.E.2d 87 (2019)
Sussex: Defendant appeals the revocation of his suspended sentence, alleging the revocation was untimely and on recusal grounds.

Facts: In 1995, the defendant was convicted of malicious wounding and robbery and received consecutive terms of twenty years' imprisonment on each charge, with fourteen years suspended on each charge. In 2006, the defendant murdered a woman; in 2017, the same trial judge convicted him of that offense. A year later, the same trial judge revoked the suspension of the defendant's sentences and imposed the entirety of the remaining twenty-eight years' imprisonment.

The defendant objected to the revocation of the sentence for malicious wounding, arguing it was untimely. The trial court had originally issued two separate sentencing orders in 1995 for the robbery and malicious wounding. Both orders provided that the suspended portion was suspended "for the maximum period required by law." The defendant argued that the default suspension provision applies and a proceeding to revoke the suspension could only be initiated within one year after the maximum potential sentence for malicious wounding, which is twenty years. However, the trial court concluded that—although it issued two sentencing orders—it intended to suspend the execution of both sentences for the maximum time permitted by law, which in this case was life.

The defendant also argued that the trial judge's familiarity with the evidence to be presented allowed his impartiality to "reasonably be questioned."

Held: Affirmed. The Court ruled that the trial court reasonably interpreted its own sentencing order to suspend the defendant's sentence for his entire life. Therefore, the trial court had authority to revoke the suspension of the defendant's sentence for the malicious wounding conviction.

The Court rejected the defendant's argument that the judge should have recused himself, noting that controlling precedent permits a judge to preside over a case despite having knowledge from other judicial proceedings of the defendant and his legal problems.

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/1193182.pdf

Restitution

Virginia Court of Appeals
Unpublished

Baugh v. Commonwealth: December 10, 2019

Charlottesville: Defendant appeals his sentencing on Attempted Malicious Wounding on the Restitution award

Facts: The defendant smashed his car into his wife's car repeatedly, destroying it. At sentencing, the Commonwealth requested restitution for the victim, consisting of the balance of a loan owed by the victim on her destroyed car and the sum of the victim's medical bills incurred as a consequence of the offense. The Commonwealth proffered a credit union account statement indicating a current balance of $3,289.23 owed on the car. The impact statement further indicated that the car's total cost was $25,401.34.

The defendant argued that the trial court was only permitted to order restitution in the amount of the "fair market value" of the victim's car, which was established by and paid to the victim in a $15,000 insurance settlement. The trial court overruled his argument and awarded restitution of $3,289.23 in restitution for the car.

Held: Affirmed. The Court agreed it was proper to include in restitution the amount of the outstanding loan on the victim's car, which the defendant destroyed. The Court found that a trial court, in determining restitution, may include an amount still owed on a loan for property damaged or destroyed through a defendant's criminal acts.

The Court noted that "nothing in the relevant provisions of Chapter 18 of Title 19.2 of the Code establishes fair market value as the measure of value which a trial court must use in determining the amount of restitution." Thus, even where the Code establishes the relative value which a trial court may use to determine restitution in certain circumstances, it does not prescribe a basis for computing that value.

The Court also rejected the argument that insurance payments and deductibles, where proven before a trial court, are always the full measure of loss for determining restitution. The Court explained that "neither the Code nor *Alger* mandates the conclusion that a trial court has abused its discretion when it orders restitution in excess of the amount paid to a victim in an insurance settlement."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0347182.pdf

Sanity

U.S. Supreme Court
589 U.S. ___
Kahler v. Kansas: March 23, 2020

Certiorari to the Supreme Court of Kansas: Defendant appeals his conviction for Capital Murder on denial of his Insanity Defense.

Facts: After his wife tried to leave him, the defendant murdered his wife, his two daughters, and his wife's grandmother. Kansas' insanity defense provides that it is only "a defense to a prosecution" that "the defendant, as a result of mental disease or defect, lacked the culpable mental state required" for a crime.

However, in Kansas, unlike most states, if a mentally ill defendant had enough cognitive function to form the intent to kill, Kansas law directs a conviction even if he believed the murder morally justified. Under Kansas law, that delusion does not make an intentional killer entirely blameless. Instead, Kansas permits a defendant to offer whatever mental health evidence he deems relevant at sentencing. At sentencing, a judge has the option to order commitment to a mental health facility in lieu of a prison sentence.

At trial, the defendant tried to argue that Kansas had "unconstitutionally abolished the insanity defense" by allowing the conviction of a mentally ill person "who cannot tell the difference between right and wrong." The trial court rejected his argument.

Held: Affirmed. In a 6-3 ruling, the Court declined to require that Kansas adopt an insanity test turning on a defendant's ability to recognize that his crime was morally wrong. The Court pointed out that Kansas takes account of mental health at both trial and sentencing; "It has just not adopted the particular insanity defense Kahler would like." The Court explained: "That choice is for Kansas to make—and, if it wishes, to remake and remake again as the future unfolds. No insanity rule in this country's heritage or history was ever so settled as to tie a State's hands centuries later."

The Court examined the long history of the insanity defense, going back to the 13th century. After reviewing the history of the defense, the Court concluded that defining the precise relationship between criminal culpability and mental illness is a project for state governance, not constitutional law. The Court noted that "sentencing is the appropriate place to consider mitigation: The decisionmaker there can make a nuanced evaluation of blame, rather than choose, as a trial jury must, between all and nothing."

Justices Breyer, Ginsburg, and Sotomayor dissented.

Full Case At:
https://www.supremecourt.gov/opinions/19pdf/18-6135_j4ek.pdf

Sixth Amendment: Double Jeopardy

U.S. Supreme Court

Gamble v. U.S.: June 11, 2019
587 U.S. ___, 139 S. Ct. 1960, 204 L. Ed. 2d 322 (2019)
Certiorari to the 11th Circuit: Defendant appeals his conviction for Possession of a Firearm by Felon on Double Jeopardy grounds.

Facts: The defendant, a convicted felon, carried a loaded handgun in his car. An officer stopped the defendant's car for an equipment violation and discovered the gun. The State of Alabama convicted the defendant for possession of a firearm after having been convicted of a felony crime of violence. The federal government then convicted the defendant for possession of a firearm after having been convicted of a felony in federal court. The federal district court rejected the defendant's Double Jeopardy claim. The 11th Circuit affirmed.

The U.S. Supreme Court accepted the case to consider whether to overrule the "separate sovereigns" doctrine regarding the Double Jeopardy Clause of the Fifth Amendment.

Held: Affirmed. In a 7-2 ruling, the Court explained that, although the dual-sovereignty rule is often dubbed an "exception" to the double jeopardy right, it is not an exception at all.

The Court assumed, without deciding, that the state and federal offenses at issue here satisfied the other criteria for being the "same offence" under double jeopardy. However, the Court repeated that an "offence" is defined by a law, and each law is defined by a sovereign. Therefore, the Court explained, where there are two sovereigns, there are two laws, and thus two "offences." For that reason, under the "separate sovereigns" rule, a single act may be an offence or transgression of the laws of two sovereigns, and hence punishable by both.

The Court surveyed pre-Fifth Amendment cases and writings, as well as materials from the 19th century. Emphasizing the role of *stare decisis*, the Court wrote: "this evidence does not establish that those who ratified the Fifth Amendment took it to bar successive prosecutions under different sovereigns' laws— much less do so with enough force to break a chain of precedent linking dozens of cases over 170 years."

Justices Ginsburg and Gorsuch filed dissents.

Full Case At:
https://www.supremecourt.gov/opinions/18pdf/17-646_d18e.pdf

Fourth Circuit Court of Appeals

Seay v. Cannon: June 21, 2019
927 F. 3d 776 (2019)

South Carolina: Defendant seeks *habeas* relief from retrial for murder charges on Double Jeopardy grounds.

Facts: At the beginning of a murder trial, the state's principal witness failed to appear. The witness continued to fail to appear for two more days of jury selection. On the third day, the court seated the jury and began hearing evidence, but the witness still did not appear. The trial court issued a warrant for her arrest, but the next day, the state announced that law enforcement could not locate the missing witness. The state requested a mistrial and the trial court granted it, based on the failure of the government's critical witness to appear at the trial. The state then sought to retry the defendant for the murder offense.

The defendant filed a writ of habeas corpus in federal court, seeking to dismiss the case on Double Jeopardy grounds. The district court denied habeas relief, deferring to the state trial court's finding of manifest necessity.

Held: Reversed. The Court held that the government "failed to satisfy its high burden of showing manifest necessity for a mistrial." The Court examined the record and noted that the government allowed the jury to be empaneled knowing that the crucial witness might not appear to testify. Additionally, the Court complained that the state trial court failed to consider possible alternatives, such as giving law enforcement authorities additional time to locate the missing witness, to the "drastic" step of declaring a mistrial.

The Court repeated that, when the basis for the mistrial is the unavailability of critical prosecution evidence, the Court will apply the strictest scrutiny to the question of manifest necessity. The Court explained that all alternative options must be evaluated, and all reasonable choices exhausted, "before the government may reap the benefit of a second opportunity to prove a defendant's guilt."

The Court quoted the U.S. Supreme Court's ruling in *Downum* that "when a prosecutor empanels a jury without first ascertaining that his witnesses are present and available to testify, the prosecutor takes a chance." Thus, the Court explained that when a prosecutor agrees to the empaneling of a jury, gambling that his missing witness will appear in time to testify, the prosecutor subjects his case to a defendant's later plea of double jeopardy. The Court concluded: "this case sharply illustrates the consequences of the government's too ready reliance on the short-term solution of a mistrial to solve a common trial predicament."

Full Case At:
http://www.ca4.uscourts.gov/opinions/187242.P.pdf

Sixth Amendment: Right to Counsel

Virginia Supreme Court

Weatherholt v. Commonwealth: March 19, 2020

Aff'd Unpublished Ct. Appl Ruling of December 26, 2018

Frederick: Defendant appeals his convictions for Conspiracy and Distribution of Drugs, 3rd Offense, on Right to Counsel Issues.

Facts: While pending trial for Conspiracy and Distribution of Drugs, 3rd Offense, the State Bar suspended the defendant's attorney. The two suspensions were based solely on his attorney's failure to comply with a subpoena duces tecum issued by the Bar. The Court held a status hearing. After being informed that his counsel's license had been suspended temporarily, the defendant appeared *pro se* and specifically chose to proceed with his trial as scheduled if his counsel's suspension was lifted as expected. The Bar lifted both suspensions upon her compliance with the subpoenas.

After trial, the defendant alleged that the trial court violated his Sixth and Fourteenth Amendment right to counsel and due process by failing to appoint standby counsel, requiring he appear without counsel during the pendency of the instant charges, and by failing to set aside the verdicts rendered against him due to the multiple suspensions of trial counsel's law license.

The Court of Appeals affirmed the conviction in an unpublished opinion. The Supreme Court agreed to consider whether the trial court violated the defendant's right to counsel by having him appear without counsel during the pendency of his criminal charges and failing to advise the defendant as to the nature of his counsel's failure to appear.

[Note: The State Bar later revoked the defendant's counsel's license until at least 2023 – EJC]

Held: Affirmed. The Court held that the Court's hearing regarding the status of the case did not require the defendant to have the assistance of counsel to formulate his response and, thus, it was not a critical stage of the criminal proceedings that would give rise to a presumption of prejudice as a result of his not having counsel at that time. The Court explained that in essence the hearing was to advise the defendant of the status of his case and to ascertain what his wishes were with respect to having counsel of his choice. The Court agreed that the temporary unavailability of counsel during the course of criminal proceedings is not an unusual occurrence. "Counsel may fall ill, have a family emergency, be stranded because of adverse weather, or be unexpectedly away from one jurisdiction because of the pressing nature of a different matter in another."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1190206.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/1797174.pdf

Virginia Court of Appeals

Walker v. Commonwealth: March 24, 2020

Hampton: Defendant appeals his convictions for sexual assault on Sixth Amendment grounds.

Facts: The defendant, who committed a number of sexual assault offenses, repeatedly developed conflicts with his court-appointed attorneys, ultimately going through eight different attorneys in total. His first few attorneys withdrew after "conflicts" arose. On three occasions, the trial court found that the defendant had waived his right to counsel. On two of those occasions, it relented and appointed new lawyers despite the previous findings of waiver, once after the defendant went on a profane tirade against his then-attorney in an attempt to force the trial court to grant his request.

However, after the defendant's final conflict, the trial court found that the defendant had waived his right to counsel. The trial court appointed the defendant standby counsel, but the defendant did not take advantage of that attorney and represented himself at trial. On appeal, he argued that 1) he never waived his right to an attorney; 2) he did not ask to represent himself; 3) he clearly asserted his desire for an attorney; and 4) he was constitutionally entitled to the assistance of counsel at trial.

Held: Affirmed. The Court reaffirmed the standard applicable to waivers of counsel by conduct: The record in each such case must establish that, by his voluntary and intentional conduct, a defendant knowingly and intelligently waives his right to counsel. In this case, the Court agreed that the record amply demonstrated that the defendant's conflicts with counsel were the result of voluntary and intentional conduct designed to delay and obstruct the proceedings and that the defendant knew of the potential consequences of engaging in that conduct.

The Court observed that the defendant's conduct left no doubt that the development of the conflicts was part of a dilatory strategy and "represented an abuse, not an assertion, of the Sixth Amendment guarantee."

The Court concluded that the defendant engaged in "obstructionist behavior, dilatory conduct, or bad faith" that constituted a "de facto waiver of counsel,"

The Court also emphasized that the defendant knew that his conduct jeopardized his right to continued counsel and engaged in that conduct anyway, pointing out that, between the second finding of waiver and the final finding of waiver, the trial court made certain that the defendant was aware that "further shenanigans" could forfeit his right to counsel.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1945181.pdf

Sentencing

Virginia Supreme Court

Akers v. Commonwealth: March 26, 2020

Roanoke: Defendant appeals the Revocation of his Probation on Jurisdictional grounds.

Facts: The defendant was convicted in 2014 of possession of methamphetamine by a prisoner. In 2017, after the defendant incurred new convictions for new felonies, following a hearing, the circuit

court revoked his entire suspended sentence. Four months later, the defendant filed a "Motion for Modification of Sentence Pursuant to § 19.2-303 of the Code of Virginia and New Hearing" asking the court to reconsider its order revoking his entire suspended sentence. The Commonwealth agreed to a hearing, but did not agree to a modification of the defendant's sentence. That same day, the circuit court granted the defendant a hearing on the motion. However, the defendant did not ask the trial court to order that he remain at the jail or otherwise prohibit his transfer to the Department of Corrections.

Five days before the scheduled hearing on the motion to reconsider, counsel and the court learned that DOC had taken the defendant into the custody. At a later hearing, the trial court rejected the defendant's arguments that it still had jurisdiction to hear his motion. The Court of Appeals denied the defendant's appeal.

Held: Affirmed. The Court explained that Rule 1:1 protects the finality of judgments, writing: "Litigation, and its attendant expense and uncertainty, must end sometime." In this case, although the Court explained that a trial court can, in its discretion, order the DOC to refrain from taking the defendant into custody as a means of protecting its jurisdiction to hear a pending motion for modification, it is the responsibility of the defendant to ensure that the DOC is aware of such an order.

In a footnote, the Court explained that this case does not address the question of whether a trial court retains jurisdiction to consider the merits of a motion to modify a sentence when the trial court has entered such an order, but the defendant was nevertheless taken into the DOC custody.

The Court also rejected the defendant's Eighth Amendment and Due Process challenges.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1190094.pdf

Virginia Court of Appeals
Published

Meekins v. Commonwealth: April 28, 2020

Richmond: Defendant appeals his sentence for Manslaughter on refusal to admit victim character testimony.

Facts: The defendant shot, killed, and robbed a man, taking his credit card and drugs. She initially denied having killed him, but ultimately confessed. The defendant pled guilty to Voluntary Manslaughter. At her sentencing hearing, the defendant attempted to introduce evidence of the victim's character, seeking to lend credibility to her version of events, where she claimed self-defense.

In her victim impact statement, the victim's wife had referred to him as a "very loving person" and described the grief she endured as a result of his death and her difficulty in explaining his absence to her young grandson. The defendant argued that, because the victim's wife described him as a "very loving person," she commented on the victim's general character and thereby put his reputation at

issue. However, the trial court ruled that the victim impact statement did not place the victim's character at issue and refused to admit the defendant's evidence.

Held: Affirmed. The Court agreed that the defendant's evidence was irrelevant to the issues at sentencing. The Court observed that the defendant was seeking to admit the evidence to excuse her criminal act, not to explain it. The Court noted that, because the defendant entered a no contest plea, the self-defense exception to Rule 2:404(a) is inapplicable in this case. The Court explained that, while a court may permit a defendant to present evidence in mitigation of the offense, such evidence may only pertain to "extenuating circumstances tending to explain, but not excuse, the commission of a noncapital crime."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0459192.pdf

Martinez v. Commonwealth: December 10, 2019
71 Va. App. 318, 836 S.E.2d 1 (2019)
Augusta: Defendant appeals his sentence revocation on a Nunc Pro Tunc order and Transfer from DJJ to the Department of Corrections

Facts: The defendant, a juvenile certified as an adult pursuant to § 16.1-269.1(C), sexually assaulted a child. At sentencing for Aggravated Sexual Battery, the trial court imposed a sentence of twenty years in DOC and suspended the sentence on the condition that the defendant remain in DJJ until age twenty-one as a requirement for suspension of the DOC sentence. However, the defendant failed to progress in DJJ sex offender treatment and committed numerous institutional infractions. The defendant requested an immediate transfer to DOC so that he would be eligible for the SVP program.

At the second statutory review hearing, the trial court found that the defendant would "not further benefit from continued commitment to DJJ" and ordered, over the defendant's objection, that he begin serving the balance of the previously imposed sentence in DOC with all but five years of the sentence suspended. However, DOC interpreted the trial court's order to mean that the defendant would serve the balance of a five-year sentence, after he received credit for the time served in DJJ dating back to his initial commitment.

The trial court held another hearing at which the court explained that DOC had "misconstrued" the order and entered an "Order of Clarification and to Correct a Ministerial Error," over the defendant's objection. The trial court reiterated the ruling that the defendant was sentenced to serve five years of active time with DOC and the balance of the twenty-year sentence was suspended. The new order also clarified that the defendant did not qualify under § 53.1-202(B) to receive credit for time served in DJJ.

Held: Affirmed. The Court held that the trial court did not err in revoking the defendant's suspended sentence and transferring him to DOC custody. Additionally, the court did not err in entering the order clarifying the revocation and transfer order.

The Court noted that, when a court sentences a juvenile convicted of a non-violent juvenile felony to a suspended adult term pursuant to § 16.1-272(A)(2), the court may condition that suspension

on successful completion of a commitment to DJJ under § 16.1-285.1. Here, the Court found that the trial court had authority to revoke the defendant's suspended sentence and transfer him to DOC under Code §§ 19.2-303 and 19.2-306(A).

Regarding the nunc pro tunc order, the Court explained that the trial court's "Order of Clarification and to Correct a Ministerial Error" accurately reflects the court's disposition from the review hearing. The order does not modify or change the court's ruling, but rather "speaks the truth about what transpired" and therefore was a proper order.

The Court agreed that the trial court erroneously cited § 16.1-285.2(E)(i) as authority for revoking the defendant's previously suspended sentence of incarceration in DOC. However, the Court repeated that an order is not rendered void just because the court cited the incorrect statute.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1199183.pdf

Fazili v. Commonwealth: December 3, 2019
71 Va. App. 239, 835 S.E.2d 87 (2019)
Fairfax: Defendant appeals his sentence for Child Sexual Assault on imposition of an Internet Restriction.

Facts: The defendant raped and sexually assaulted a five-year-old child. The trial court convicted and sentenced the defendant. As a condition of probation, the court ordered that the defendant "have no use of any device that can access internet unless approved by his Probation Officer." The trial court explained "if he is undergoing some legitimate use of the internet the probation office may permit that. But he is not to have unfettered use of the internet." The defendant objected to the scope of the restriction and argued that it improperly delegated authority to the probation officer.

Held: Reversed. The Court held that the probation condition barring the defendant's access to the Internet was not narrowly tailored. The Court remanded the case for resentencing with the instruction that if the circuit court elects to again place the defendant on probation with a condition limiting Internet access, that it either clarify the specific reasons that would justify a general ban on internet usage or that it more narrowly tailor any internet-use restrictions to effectuate specific purposes of probation.

The Court explained that, although the circuit court erred in failing to narrowly tailor this condition of probation by providing both a rationale and guidance or parameters to the probation officer, in the abstract, the trial court's delegation to the probation officer the authority to supervise the defendant's internet usage was not an improper delegation of authority. The Court did not foreclose the possibility that such a broad restriction on access to the internet could be justified in a particular case. The Court held only that there was nothing in the record showing why the broad restriction was warranted in this case.

For example, the Court explained that there was no evidence on the record that computers or the Internet played any role in the defendant's offense. The Court complained that the circuit court articulated no justification for how imposing this restriction on the defendant's fundamental right to

free speech, established by the U.S. Supreme Court in *Packingham,* would serve any rehabilitative or public safety purpose.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1379184.pdf

Garibaldi v. Commonwealth: November 5, 2019
71 Va. App. 64, 833 S.E.2d 915 (2019)
Virginia Beach: The defendant appeals his sentence for Felony DUI and driving revoked on the conditions of probation.

Facts: The defendant drove intoxicated on a suspended license after having multiple convictions for DUI. The trial court sentenced the defendant to five years' incarceration for DUI and twelve months in jail for driving on a suspended license. The trial court then suspended all but one year and ten days of these sentences on the condition that the defendant not operate a motor vehicle under any circumstances at any time during the ten-year period of good behavior, even if eligible to be licensed.

The defendant argued that the terms of his probation conflict with § 18.2-271(C), § 46.2-391, and § 46.2-301(D) by banning him from driving for a period longer than the relevant statutory penalties allow.

Held: Affirmed. The Court concluded that that there is no statutory conflict between the defendant's status as a licensed driver and a condition of probation that prohibits him from actually driving. The Court noted that the penalty imposed did not exceed statutory bounds. The Court wrote: "Of course, the alternative to probation is incarceration, and in fashioning conditions of probation, the courts must balance the rehabilitative and behavior modification goals that probation may facilitate with the safety of the community."

The Court distinguished the Code sections the code sections referenced by the defendant, noting that they deal with the revocation of a license as part of a sentence, rather than as part of probation. The Court wrote: "A license to operate a motor vehicle is not a right to do so."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0858181.pdf

Virginia Court of Appeals
Unpublished

Smallwood v. Commonwealth: 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 the court costs had not yet been paid 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.

Held: Affirmed. The Court concluded that, because 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," the trial court did not abuse its discretion. The Court rejected the defendant's argument that, once the court deferred adjudication, he could remain in a perpetual state of deferral while the costs were unpaid as "absurd." Instead, the Court found that the rehabilitative requirements included that the defendant "show financial and civic responsibility by paying the court costs associated with his crime."

The Court noted that the defendant had never argued he was unable to pay. The defendant had assured the court he had a full-time job and would pay the costs prior to the review hearing. Even at his final hearing, the defendant had argued he was indigent but never argued he had the inability to pay court costs.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0844194.pdf

Palmer v. Commonwealth: April 7, 2020

Northhampton: The defendant appeals the denial of his petition to correct a sentencing error.

Facts: In 2003, the trial court sentenced the defendant for burglary and malicious wounding and also revoked his previously suspended sentence for involuntary manslaughter, imposing a total of 45 years. In 2018, the defendant filed, *pro se*, a motion for a *nunc pro tunc* order "to amend or correct sentences, or vague language in the sentencing order(s)." The defendant argued that § 8.01-428(B) provides an exception to Rule 1:1(a) that allowed the court to consider his motion. The defendant claimed that "somewhere in the circuit court's order . . . is causing [sic] a nine-year disparity which exceeds the honorable court's sentencing order [and] must be corrected by *nunc pro tunc* order."

The trial court determined that it no longer had jurisdiction over the case and denied the motion.

Held: Affirmed. While the Court agreed that the trial court had authority to correct clerical errors in the sentencing order even though more than twenty-one days had passed since the entry of the order, the Court concluded that the defendant had identified no error, ambiguity, or omission in the

2003 order, nor could the Court find any lack of clarity. Thus, Code § 8.01-428(B) did not apply. Absent any evidence of mistake, or vague or ambiguous language in the 2003 sentencing order, the Court concluded that the trial court had no basis on which to grant the defendant's motion to amend the order.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1109191.pdf

Green v. Commonwealth: March 10, 2020

Virginia Beach: Defendant appeals his sentencing for Assault and Battery and Assault and Battery on Police on Cross-Examination at Sentencing.

Facts: The defendant, while an inmate at a correctional facility, threw a cup of what appeared to be fecal matter at three sheriff's deputies and a nurse. During the sentencing phase of the trial, the Commonwealth presented no evidence. The defendant testified on his own behalf, giving the jury the impression that he was a hard-working family man and suggesting that his prior offenses were minor. He claimed that he was a law-abiding person, that he turned himself in for his prior offense, had college degrees, was working, and "wasn't just doing anything on the street."

In response, the Commonwealth asked the defendant about each of his many prior convictions. The defendant objected, but the trial court overruled the objection. The trial court did not permit the Commonwealth to enter the actual convictions into evidence.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in allowing the Commonwealth to cross-examine the defendant about his prior offenses during the sentencing phase of trial. The Court explained that, because the defendant introduced evidence of his good character through testimony that gave the impression that he was a hard-working, law-abiding citizen, the Commonwealth was entitled to cross-examine him about specific acts, in this case his prior offenses, in order to rebut his testimony.

http://www.courts.state.va.us/opinions/opncavwp/0373191.pdf

Edwards v. Commonwealth: January 15, 2020

Fairfax: Defendant appeals the refusal of a Deferred Disposition.

Facts: The trial court found the defendant guilty of grand larceny and possession of burglary tools. The trial court memorialized its finding of guilt in a written conviction order and later sentenced the defendant for those offenses. Thereafter, the defendant filed a motion for a deferred disposition pursuant to *Starrs v. Commonwealth*, but the trial court denied the motion.

Held: Affirmed. The Court repeated that the authority of a trial court to issue a deferred disposition under *Starrs* "evaporates upon a formal finding of guilt on the record, because trial courts lack any authority to free guilty defendants following a lawful trial."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1541184.pdf

Baughman v. Commonwealth: December 17, 2019

Arlington: Defendant appeals the Revocation of his Probation on the imposition of Lifetime Supervision.

Facts: In 2003, the defendant was sentenced for child sexual assault. The defendant's conditions of supervised release prohibited him from having unsupervised contact with any children under the age of 18, unless approved by his probation officer. The term of probation was ten years from release.

While on probation, the defendant met another 16-year-old child at a child's funeral in Minnesota. Soon thereafter, the defendant began communicating with the new child in violation of his probation conditions. When the child's parents discovered the communications, they notified law enforcement. The Commonwealth moved to revoke the defendant's suspended sentence.

At the violation hearing, the Commonwealth's expert testified text messages between the defendant and the child demonstrated that the defendant was "grooming" the child. Although the defendant's expert opined that the defendant was not grooming the child, he agreed that the defendant's conduct could have been the first step and that at least some of the defendant's text messages to the child were inappropriate.

The trial court found the defendant in violation, revoked a portion of his suspended sentence, and re-imposed the balance on the condition of indefinite probation. The defendant objected that the trial court improperly extended his probation and that his conduct did not call for lifetime probation.

Held: Affirmed. The Court first held that the trial court had the authority to place the defendant on probation for the rest of his life. The Court ruled that a re-suspension of a sentence after the revocation of a previous suspension is a new suspension, and the period of the new suspension is not restricted by the period of a previous suspension.

The Court ruled that, in a new suspension after the revocation of the suspension of a sentence, § 19.2-303.1 still applies to allow the trial court to again set the length of the suspension. The Court explained that the suspension of a sentence is never "extended" because a re-suspension with a new expiration is, by definition, a new sentencing event and a new suspension. The Court rejected the defendant's reliance on *Reinke*, finding that *Reinke's* language that the trial court could not extend "the length of the period of suspension," was dicta and not relevant to the decision.

Secondly, the Court held that the trial court's decision to place the defendant on probation for life was justified when the trial court found, with sufficient support in the record, that the defendant had been grooming another minor for sexual activity.

The Court rejected the defendant's argument that, because the child was sixteen years old and therefore above the age of consent in Minnesota where he lives, even if the "grooming" led to sexual

activity, it would not have been the "new offense" the trial court was concerned about. Regardless of whether the child was above the age of consent in Minnesota, the Court agreed that the grooming was inappropriate and justified further monitoring through probation. In addition, if the defendant's grooming led him to sexual activity in Virginia, it would be criminal.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0346184.pdf

Duhart v. Commonwealth: November 12, 2019

Fairfax: Defendant appeals his sentence for Hit & Run and related offenses on Refusal to Reconsider his Sentence.

Facts: In 2017, the trial court convicted the defendant of multiple felony offenses. The trial court sentenced the defendant but continued the issue of restitution. Thereafter, the defendant moved to reconsider his sentence and the trial court ordered that the defendant remain at Fairfax County Adult Detention Center.

However, in January 2018, the defendant was transferred from the Fairfax County Adult Detention Center to Nottoway Correctional Center, despite the circuit court's prior order. In March 2018, DOC cancelled the defendant's initial assignments and scheduled him to be returned to jail after the defendant's counsel provided notice of the pending case review. DOC transferred the defendant back to the Fairfax County Adult Detention Center in March 2018.

Nevertheless, the trial court ruled, pursuant to *Stokes,* that it lost jurisdiction to reconsider the defendant's sentence after DOC took custody of the defendant.

Held: Affirmed. The Court held that the circuit court lost jurisdiction and therefore that the court properly refused to rule on the merits of the motion for reconsideration. The Court explained that once the defendant was transferred into DOC custody, by transfer to Nottoway Correctional Center, the circuit court lost jurisdiction absolutely. The Court warned that any subsequent temporary transfer back to Fairfax County Adult Detention Center did not to reinstate the circuit court's jurisdiction. Therefore, because more than twenty-one days from the circuit court's entry of judgment had elapsed, and the transfer to DOC custody defeated exercise of the circuit court's jurisdiction under the statutory exception found in § 19.2-303, the circuit court did not err in holding that it lacked jurisdiction to consider the motion to reconsider.

The Court also found that Nottoway Correctional Center is clearly a "receiving unit" as contemplated by the statute. The Court explained that under § 53.1-20(E), when read in conjunction with § 19.2-303, a "receiving unit" is merely a generic term for the facility where a person is first "received" into DOC custody.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1672184.pdf

Kelly v. Commonwealth: September 24, 2019

Accomack: Defendant appeals his sentence on the imposition of a lifetime Good Behavior condition

Facts: The defendant has a lengthy criminal record extending back to the 1980s. The defendant has been on probation numerous times, but never successfully completed probation, and all of his prior probations had been revoked because he re-offended and/or absconded. In this case, the defendant committed offenses while he was on bond for another offense. Additionally, while awaiting trial, he sent letters to the victims asking them to drop the charges.

The trial court convicted the defendant of receiving stolen property and sentenced him to five years in prison, with two years and seven months suspended, and placed him on supervised probation for five years. The Court also convicted the defendant of threatening to burn a building and imposed a sentence of five years, with four years suspended, to run concurrently with the other sentence. The Court ordered that the defendant "shall be of good behavior for [the] REST OF HIS LIFE" following his "release from confinement."

[*Note: This case consists of two different cases, but the core issue is the same. See below for a third, related case with the same defendant, issued the same day*].

Held: Affirmed. The Court agreed that the condition was reasonable in light of his criminal history and the fact that he had interfered with the orderly administration of justice. The Court wrote: "Appellant's history of ignoring court orders and disobeying probation officers indicated continuing criminal wrongdoing and no amenability to rehabilitation. Based on his history and attitude, it was not unreasonable for the trial court to impose a lifetime requirement of good behavior."

Full Cases At:
http://www.courts.state.va.us/opinions/opncavwp/1075181.pdf
http://www.courts.state.va.us/opinions/opncavwp/0620181.pdf

Speedy Trial

Virginia Supreme Court

Young v. Commonwealth: July 3, 2019
829 S.E.2d 548 (2019)
Aff'd Court of Appeals Ruling of March 20, 2018
Loudoun: Defendant appeals his conviction for Grand Larceny on Speedy Trial grounds.

Facts: The defendant robbed a juvenile of property, including a phone. Police recovered the phone. When defense counsel asked for evidence regarding the phone in discovery, the Commonwealth informed the defendant that the phone could not be analyzed and that therefore law enforcement had returned it to the victim. However, two weeks before trial, the Commonwealth discovered that law

enforcement had obtained a fingerprint analysis on the phone that was "inconclusive" about whether the defendant's fingerprints were on the phone. The Commonwealth had also recently produced approximately 1,000 phone calls by the defendant from the jail and a recorded proffer session with a co-defendant that contained inconsistent statements.

The defendant moved to dismiss the indictments, arguing that he was "forced . . . to choose between his right to a speedy trial and his right to the effective assistance of counsel" due to the Commonwealth's discovery failures. The Commonwealth offered to release the defendant on bond and offered to stipulate to the admissibility of the certificate of analysis. The trial court found that the Commonwealth did not act in bad faith. The trial court denied the motion to dismiss but sanctioned the Commonwealth for its discovery violations by ordering that the Commonwealth was prohibited from using the jail calls for any purpose and ordering that it was bound by its stipulation offer regarding the certificate of analysis. The trial court continued the trial over the defendant's objection. After the speedy trial deadline passed, the defendant moved to dismiss on speedy trial grounds, but the trial court denied the motion.

The Court of Appeals affirmed. The Court agreed that the continuance was court-ordered and that the defendant sufficiently noted his objection to it. The Court ruled that: "even though the Commonwealth's discovery failures necessitated the court-ordered continuance, because the trial court ruled that the Commonwealth did not act in bad faith, we cannot impute the continuance to the Commonwealth."

Held: Affirmed. Unlike the Court of Appeals, the Virginia Supreme Court did not agree that the defendant sufficiently noted his objection to the continuance. The Court complained that defense counsel never used the word "object" during the discussion regarding the continuance of trial. Instead, the Court wrote that the defendant's "opposition to the resulting delay being attributable to him, while simultaneously reiterating that he could not be ready for trial and suggesting a control date outside the speedy trial window is not the same as affirmatively objecting to a continuance." The Court therefore affirmed the judgment of the Court of Appeals, finding that the continuance was court-ordered, an implied exception to Code § 19.2-243 to which no affirmative objection was made.

Two justices concurred in the judgment but dissented from the holding, complaining that the Court drew too fine a distinction between objecting to a continuance *tout court* and objecting to the continuance counting against the defendant for purposes of speedy trial. The two justices instead agreed with the Court of Appeals that the trial court found that there was no bad faith by the Commonwealth, and, therefore, the delay caused by the court-ordered continuance was not attributable to the Commonwealth.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180515.pdf

Virginia Court of Appeals
Unpublished

Commonwealth v. Suluki: August 27, 2019

Richmond: The Commonwealth appeals a dismissal on Speedy Trial grounds.

Facts: The defendant robbed a convenience store at gunpoint. The trial court granted the defendant's motion to suppress. The Commonwealth appealed. On December 21, 2017, the Commonwealth noted its first interlocutory appeal in this case. The Court of Appeals reversed the trial court's ruling and issued a mandate on June 5, 2018. Under § 19.2-409, the sixty-day tolling period from this mandate expired on August 4, 2018. On July 2, 2018, the case was continued to November 29, 2018 for trial, without objection. The case suffered several more continuances.

The defendant moved to dismiss on speedy trial grounds. The defendant argued that he was not required to object to the continuance on July 2, 2018, because that date fell within the interlocutory appeal mandate period and therefore, speedy trial was already tolled pursuant to § 19.2-409. He contended that because § 19.2-409 specifies that the provisions of § 19.2-243 do not apply while time is tolled under Code § 19.2-409, the requirement in § 19.2-243(4) that he object to any continuances also does not apply. The trial court agreed and dismissed the case on speedy trial grounds.

Held: Reversed, case reinstated. The Court held that, because the defendant did not object on July 2, 2018 to continuing the trial date, the trial court erred in charging the time between August 4, 2018 and November 20, 2018 to the Commonwealth and dismissing the charges.

Regarding the alleged conflict in the Code, the Court explained that §§ 19.2-243 and 19.2-409 can be construed harmoniously. The Court contended that § 19.2-409 only tolls the speedy trial time period from the date the Commonwealth files notice of an interlocutory appeal until sixty days after the mandate is issued. After the sixty-day period expires, the Court concluded that § 19.2-243 controls the speedy trial clock and dictates whether other exceptions toll the time. While the mandate period is in effect, however, the Court found that a defendant is not relieved of his burden to object if his trial is scheduled after expiration of the sixty-day period.

In this case, because the trial was set for a date after the sixty-day mandate period expired, the Court decided that § 19.2-243 applies, and the defendant was required to object to the November 29, 2018 trial date. Thus, his failure to object amounted to acquiescence that the delay in commencing trial would be charged against him.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0540192.pdf
2018 Reversal on Fourth Amendment Issue At:
http://www.courts.state.va.us/opinions/opncavwp/2068172.pdf

Statutory Construction

U.S. Supreme Court

Kansas v. Garcia: March 3, 2020
589 U.S. ___
Certiorari to the Kansas Supreme Court: Kansas appeals the dismissal of prosecutions for Identity Theft on Supremacy Clause grounds.

Facts: The defendants secured employment by using stolen identities on the I–9 forms that they completed when they applied for work. They also used these same false identities when they completed their W–4's and K–4's. All three were convicted under Kansas Identity Theft statutes for fraudulently using another person's Social Security number on tax-withholding forms. However, on appeal, the Supreme Court of Kansas held that a provision of the Federal Immigration Reform and Control Act of 1986 expressly preempts the Kansas statutes at issue insofar as they provide a basis for these prosecutions.

Held: Reversed, convictions reinstated. In a 5-4 ruling, the Court found that there was no basis for finding field preemption in these cases. The Court explained that "Our federal system would be turned upside down if we were to hold that federal criminal law preempts state law whenever they overlap, and there is no basis for inferring that federal criminal statutes preempt state laws whenever they overlap."

Justices Thomas and Gorsuch concurred, but wrote separately to argue that the Court should explicitly abandon its "purposes and objectives" pre-emption jurisprudence. Justice Breyer wrote the dissent and did not agree with the majority's conclusion about implied preemption.

Full Case At:
https://www.supremecourt.gov/opinions/19pdf/17-834_k53l.pdf

Trial by Jury

Virginia Court of Appeals
Published

Jiddou v. Commonwealth: December 31, 2019
71 Va. App. 353, 836 S.E.2d 700 (2019)
Chesterfield: Defendant appeals his convictions for Cigarette Trafficking on sufficiency of the evidence and the Commonwealth's Request for a Jury.

Facts: The defendant bought hundreds of cases of un-taxed cigarettes with the intent to sell them unlawfully. The defendant purchased more than 40,000 cigarettes on three separate occasions within a short period of time using cash. He purchased the cigarettes from Sam's Club using a membership for a business that no longer existed, and, in doing so, relied upon the ST-10 filed in 2015 to avoid sales tax upon the purchases. At that time, however, the ST-4 for his business was invalid and, consequently, the ST-10 was invalid also.

On one occasion, a witness saw the defendant leaving the store with 240 cases of cigarettes. The store's security camera recorded video the purchase, and the Commonwealth introduced the receipt at trial. The defendant submitted no documentation to the state indicating the collection of sales taxes in connection with cigarette sales. The defendant had never told the state that his business was no longer operating and he had not returned the tax exemption form to the state, as required.

The trial initially was set for a bench trial on October 10, 2017, but neither party nor the court had previously indicated that it was waiving the right to a jury. On the trial date, the Commonwealth requested a trial by jury. The Court granted the Commonwealth's motion over the defendant's objection and set the matter for a jury trial.

At trial, the Commonwealth's cigarette trafficking expert stated that the purchase of such quantities with cash was inconsistent with possession of cigarettes for personal use or in connection with a legitimate business.

Held: Affirmed. The Court rejected the defendant's argument that, because the standardized form itself states that it "shall remain in effect until revoked in writing by the Department of Taxation," his ST-10 form remained valid. Instead, the Court agreed that, under § 58.1-623(A), a certificate of exemption may be invalid even without written notice from the Department. The Court concluded that the defendant had notice that the validity of the ST-10 was linked to the validity of his ST-4, which he did not return to the state after he sold his business.

The Court found that the evidence was sufficient to prove that the defendant possessed cigarettes in violation of § 58.1-1017.1 and § 58.1-1017.3. The Court agreed that, as a carton contains 200 cigarettes, the Commonwealth proved the purchase of more than 40,000 cigarettes on each occasion. The Court also agreed that, once employees testified that they verified the identity of the purchaser as the club member presenting his or her card, the jury reasonably could conclude that the defendant was the purchaser on all the occasions, even without video evidence of the transactions. The Court pointed out that un-stamped cigarettes would not have been for sale at Sam's Club and no evidence tended to show that un-stamped packages of cigarettes had somehow infiltrated the inventory at Sam's Club.

The Court also agreed that a reasonable finder of fact could conclude beyond a reasonable doubt that the defendant had the intent to distribute the cigarettes he purchased and that he was guilty of three counts of violating Code § 58.1-1017.1.

Regarding the Commonwealth's request for a jury trial, the Court observed that, under Virginia law, there is no time limitation within which the Commonwealth must exercise its right to choose a jury trial. Accordingly, the Court concluded that the trial court did not err in granting the Commonwealth's motion and in holding a jury trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1910182.pdf

Trial Issues

Virginia Court of Appeals
Published

Kenner v. Commonwealth: December 3, 2019
71 Va. App. 279, 835 S.E.2d 107 (2019)
Northhampton: Defendant appeals his convictions for Child Sexual Assault on Admission of Prior Bad Acts, Refusal of a Motion to Withdraw, and Refusal to Poll the Jury

Facts: The defendant sexually assaulted a six-year-old child while he was living with the child and the child's cousin. The defendant showed the child adult pornography on his computer while assaulting her. Police executed a search warrant on the defendant's computer and found child pornography on the computer that the defendant had used to show the victim adult pornography. The titles of those videos described sex with young children or teaching young children to have sex. A forensic analysis revealed that the videos were either downloaded or attempted to be downloaded during the time frame that the victim lived with the defendant.

Prior to trial, the Commonwealth filed a motion in limine asking the court to allow it to introduce evidence of the child pornography found on the computer. The trial court granted the Commonwealth's motion over the defendant's objection, specifically allowing it to introduce images or evidence of child pornography from the computer as well as evidence that the computer had been used to download or attempt to download certain files. The Court did not permit the Commonwealth to admit the videos or photos themselves.

Just prior to trial, defense counsel moved to withdraw. Defense counsel cited the possibility that he could be called as a witness because it appeared that a potential defense witness's testimony had changed and now might prove adverse to the defendant. Defense counsel also noted that his client appeared to have filed a bar complaint against him. The trial court denied the motion.

The jury found the defendant guilty. The clerk asked the jurors if the verdict was their verdict by asking "so say you all," to which they verbally agreed. However, during the sentencing phase, the defendant asked the court to poll the jury on their verdict. The trial court refused the request.

Held: Affirmed. Regarding the admission of child pornography, the Court ruled that, in addition to showing the defendant's specific intent, the other crimes evidence in this case was also relevant to show the defendant's conduct or attitude toward the victim, to corroborate the victim's allegations, and establish the relationship between the defendant and the victim, and was connected with and led up to the offense for which the defendant was on trial, all of which the Court found to be proper uses of other crimes evidence under *Kirkpatrick* and its progeny. The Court also pointed out that the defendant failed to request that the jury be instructed that it could consider the evidence only for the limited purposes discussed above.

The Court reasoned that, while the evidence of child pornography introduced might have improperly shown the defendant's propensity to engage in sexual acts with a minor, the evidence was not admitted for that purpose. Instead, the evidence was relevant to show the defendant's conduct or attitude toward the victim, to prove motive or method of committing the sexual assaults, as evidence of the defendant's specific intent to engage in sex with a minor, and to corroborate her allegations. The

Court also pointed out that, because the videos were found on the same computer and because the videos were either downloaded or attempted to be downloaded during the time frame that the victim lived with the victim, the child pornography evidence found in the defendant's apartment related to and led up to the offense for which he was on trial.

The Court specifically addressed the *Blaylock* case, which reached a contrary conclusion. To the extent that *Blaylock* conflicted with the *Ortiz* approach to the admission of other crimes evidence, the Court concluded that *Blaylock* was improperly decided, contrary to the Virginia Supreme Court's prior holdings in *Moore,* and/or was implicitly overruled by that Court's subsequent decision in *Ortiz*. The Court explained that, provided a cautionary instruction is given if requested, other crimes evidence is admissible to show the conduct or attitude of the accused toward his victim, his specific intent, and any other relevant issue. The Court criticized *Blaylock*, which had held that, unless the defendant concedes that he committed the acts alleged but did so without the relevant specific intent, he has not "genuinely disputed" intent and the Commonwealth may not admit other crimes evidence relevant to intent despite the fact that intent is at issue in every specific intent offense because the Commonwealth is required to prove that element.

Regarding the refusal to permit defense counsel to withdraw, the Court found that the trial court did not abuse its discretion in denying the motion to withdraw based on a conflict of interest because an actual conflict had not yet ripened. When trial counsel moved to withdraw from the case, no actual conflict existed. The Court repeated that the mere possibility that a witness may prove adverse is insufficient to create a conflict of interest that deprives the defendant of his Sixth Amendment right to counsel. Similarly, the Court concluded that the filing of a formal bar complaint against defense counsel did not create a per se conflict of interest, complaining that the defendant had neither alleged any prejudice nor that the complaint had any foundation.

Regarding the refusal to poll the jury, the Court noted that any motion to poll the jury on their verdict during each phase of a bifurcated trial must be made before the conclusion of that phase. However, the Court complained that here, after the jury returned a verdict of guilty on all counts, the defendant failed to timely exercise his right under Rule 3A:17(d) to poll the jury regarding its guilty verdict and therefore his motion was untimely.

Judge Malveaux wrote an extensive dissent concerning the admission of prior bad acts, concluding that the evidence of the presence of child pornography on the defendant's computer did not tend to prove any issue at trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0934181.pdf

Venue

Virginia Court of Appeals
Published

Ramos v. Commonwealth: November 12, 2019

71 Va. App. 150, 834 S.E.2d 499 (2019)
Charlottesville: Defendant appeals his conviction for Malicious Wounding on Refusal to Strike a Juror for Cause, Refusal to Change Venue, and sufficiency of the evidence.

Facts: During the August 12 "Unite the Right" rally in Charlottesville, the defendant joined a mob that had been beating a man. After the victim had already been kicked multiple times and beaten with poles, a board, and a shield, and was already on the ground and had stumbled trying to rise at least once, the defendant used a large wind-up to deliver a significant punch to the victim.

Prior to trial, the defendant moved to change venue, but the trial court took the motion under advisement until jury selection. The defendant did not renew his motion for a change of venue, or insist on a ruling, before the jury was empaneled. Although the Commonwealth eventually requested a ruling on the motion, it was not until after the jury was sworn, the first witness had testified, and jeopardy had attached.

The defendant is a co-defendant with a man named Goodwin. [*The Court issued an opinion in that case today as well – EJC*]. Two days prior to trial in this case, a jury convicted the co-defendant of malicious wounding and recommended ten years to serve. During jury selection, several jurors revealed that they were aware of the co-defendant's case and the outcome of that trial. Citing *Farar,* the defendant moved to strike all the jurors who know about the previous verdict in the co-defendant's case. The trial court refused to strike them based on the defendant's blanket objection.

At trial, the defendant argued that the evidence showed that at most he struck the victim once and that a single blow cannot demonstrate sufficient malice to support a malicious wounding conviction.

Held: Affirmed. The Court first ruled that knowledge of a separately tried co-defendant's earlier conviction does not create a *per se* bar to jury service. The Court explained that a prospective juror who vaguely knows that another person was convicted of some crime will not need to be excluded on that basis, but a prospective juror who knows the details of the other case and how it is connected to the case for which he is being considered might warrant further individual questioning about potential bias.

The Court also pointed out that, in this case, the prospective jurors' knowledge of the previous case, and its connection to this case, varied greatly, and the source of that knowledge was the media, not the court itself.

The Court then ruled that the defendant argued his motion to change venue too late. The Court repeated that, when a trial court takes a change of venue motion under advisement, it is incumbent upon the defendant to renew the motion before the jury was empaneled and sworn, or at least remind the court that it was still pending and that he wanted the court to rule on it.

The Court also ruled that the evidence was sufficient to prove malice, because a single punch can be malicious when delivered at the tail end of a beating by a mob.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1595182.pdf

Withdrawal of Guilty Plea

Virginia Court of Appeals
Unpublished

Chapman v. Commonwealth: May 12, 2020

Williamsburg: Defendant appeals his convictions for Aggravated Malicious Wounding, Obstruction of Justice, and related charges on Refusal to Permit Withdrawal of his Guilty Plea.

Facts: The defendant shot two people. After his arrest, he made calls from the jail attempting to intimidate witnesses from appearing in Court. After indictment, the defendant moved for a continuance sixteen times from the date of his indictment until the final trial date, and repeatedly sought new counsel, approximately five times, during that period. At the final trial date, the trial court denied another of the defendant's continuance requests.

On the trial date, the defendant and the Commonwealth reached a plea agreement, where the defendant pled no contest to six charges. During the plea hearing, the defendant caused "different delays and recesses," ultimately requiring the court to spend "several hours" conducting the pleas. In the plea agreement, the defendant waived his right to withdraw his no contest pleas. The trial court conducted an extensive colloquy with the defendant at the plea hearing.

Before sentencing, the defendant moved to withdraw the pleas. At the hearing, the defendant testified that, although he signed the plea agreement, his attorney had never discussed any plea negotiations with him prior to the trial date. His attorney testified to the contrary. The Commonwealth noted that it had difficulty in keeping witnesses engaged due to the defendant's behavior from jail. After a hearing, the trial court denied the motion.

Held: Affirmed. The Court held the trial court did not err by denying the defendant's motion to withdraw his no contest pleas. The Court agreed that the evidence indicated that the defendant entered into the plea agreement to "buy time." The Court concluded that the evidence demonstrated that the defendant knowingly and intelligently entered into a valid contract and acted in bad faith in moving to withdraw his pleas.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0838191.pdf

CRIMES & OFFENSES

Abduction

Chastang v. Commonwealth: April 21, 2020

Roanoke: The defendant appeals his convictions for Abduction and Use of a Firearm on sufficiency of the evidence.

Facts: The defendant robbed a bank at gunpoint. Having already taken the money, the defendant ordered bank employees to the floor and commanded them to stay there for a definite period. At trial, the defendant argued that he was not guilty of abduction because any restriction on liberty was inherent in the underlying robbery.

Held: Affirmed. Because the commands that the defendant issued and the threats he made after he obtained unquestioned possession of the money were designed to facilitate his escape and to assist his evasion of capture and detection, the Court concluded that they were not inherent in the underlying robbery. Accordingly, the Court ruled that his actions were sufficient to constitute independent abductions.

The Court repeated that a detention or other restriction on liberty that is designed to assist the perpetrator evade detection, as opposed to accomplish an element of the underlying crime, is not inherent in the underlying crime, but rather, constitutes an independent abduction. In this case, the defendant had already achieved complete possession, as opposed to mere custody, of the money when he stuffed it into his pants. Accordingly, the Court found that his commands to the bank employees to lie on the floor and remain there were extraneous to and not in support of his efforts to take the money, and thus, occurred after the robbery had been completed.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1285183.pdf

Animal Offenses

Virginia Court of Appeals
Published

Blankenship v. Commonwealth: March 10, 2020

Roanoke: Defendant appeals his convictions for Assault, Assault on Law Enforcement, and Animal Cruelty on sufficiency of the evidence.

Facts: The defendant showed up at the victim's home after he was told that he was not welcome on the property. The defendant told the victim to call the police several times. When the

victim asked the defendant to leave, the defendant, standing about twenty feet away from the victim, told the victim "I'm going to kill you." The defendant also repeatedly moved back and forth toward the victim, walking up the steps toward the victim's home and back down again several times. Officers responded.

The officers were wearing their police uniforms with their badges displayed. While standing only a few feet from the officers, the defendant shook his fists at them. The defendant also repeatedly cursed at the officers, told them to "F off," called them "motherfuckers," and progressively became more "angry," and "amped up." After the officers told the defendant he was under arrest, he told the officers "you're not going to fucking touch me" and then moved toward the officers while clenching his fists. Each time the officers attempted to effectuate an arrest, the defendant clenched his fists, took a step toward them, and took a fighting stance.

At trial, the officers testified that they felt threatened by the defendant's behavior and that they were concerned it would lead to a physical altercation. Rather than risk the defendant lunging at or punching one of the officers, the officers told the defendant to get on the ground. When he did not comply, an officer pepper sprayed him, and the other officer released a K9 dog.

Once the K9 dog was within the distance to apprehend the defendant, the defendant turned around and punched the dog in the side of the head. The dog "went off to the side," but then "came back on as they continued to run." The defendant again continued to swing and kicked the dog in the chest. The defendant repeatedly punched the dog in the ribs. The defendant also kicked the dog somewhere in his stomach/ab area. The kick caused the dog to retreat, "as if he didn't want to engage him more." The dog then backed off, which was "not typical for him to do" and was not what the dog was trained to do.

At trial, a veterinarian testified that dogs can feel pain and opined that he would expect the dog felt pain from these repeated blows. The dog later stopped eating and seemed lethargic. Although the veterinarian was able to rule out more serious internal injuries, he did still opine that the dog had a "digestive injury."

Held: Affirmed. Regarding the assaults, the Court first re-emphasized that, in addition to proving an unlawful touching, the Commonwealth can prove common law criminal assault by establishing that the defendant engaged in an overt act intended to inflict bodily harm with the present ability to inflict such harm. The Court also re-emphasized that the Commonwealth can prove common law tortious assault, sometimes referred to as the "merged tort law definition," by establishing that the defendant engaged "in an overt act intended to place the victim in fear or apprehension of bodily harm," which did in fact create "such reasonable fear or apprehension in the victim."

The Court observed that the defendant's overt acts demonstrated his intent to place the officers in fear of bodily harm, which caused the officers to actually and reasonably fear bodily harm. Under the totality of the circumstances, the Court agreed that the officers' testimony and actions demonstrated that they reasonably feared a threat of bodily injury.

Regarding the assault on the victim, the Court explained that, although words alone are insufficient to constitute assault, considering the attending circumstances, the trial court could reasonably find that the defendant's overt act of moving towards the victim while threatening to kill him was sufficient to establish the elements of assault and battery.

Regarding the Animal Cruelty conviction, the Court also reaffirmed that a person may not resist a lawful arrest effectuated with reasonable force. The Court also noted that officers may use police K-9 dogs as an instrumentality to effectuate an arrest, and the mere use of a police K-9 to apprehend a defendant does not render the use of force unreasonable. Thus, the defendant had no right to resist the lawful arrest by punching and kicking the K9 dog, and his actions were not "necessary." For these reasons, the Court held that the evidence was sufficient to support the defendant's conviction for animal cruelty.

The Court remanded this case to the circuit court solely for correction of its sentencing order.

http://www.courts.state.va.us/opinions/opncavwp/1455183.pdf

Assaults

Virginia Court of Appeals
Published

Blankenship v. Commonwealth: March 10, 2020

Roanoke: Defendant appeals his convictions for Assault, Assault on Law Enforcement, and Animal Cruelty on sufficiency of the evidence.

Facts: The defendant showed up at the victim's home after he was told that he was not welcome on the property. The defendant told the victim to call the police several times. When the victim asked the defendant to leave, the defendant, standing about twenty feet away from the victim, told the victim "I'm going to kill you." The defendant also repeatedly moved back and forth toward the victim, walking up the steps toward the victim's home and back down again several times. Officers responded.

The officers were wearing their police uniforms with their badges displayed. While standing only a few feet from the officers, the defendant shook his fists at them. The defendant also repeatedly cursed at the officers, told them to "F off," called them "motherfuckers," and progressively became more "angry," and "amped up." After the officers told the defendant he was under arrest, he told the officers "you're not going to fucking touch me" and then moved toward the officers while clenching his fists. Each time the officers attempted to effectuate an arrest, the defendant clenched his fists, took a step toward them, and took a fighting stance.

At trial, the officers testified that they felt threatened by the defendant's behavior and that they were concerned it would lead to a physical altercation. Rather than risk the defendant lunging at or punching one of the officers, the officers told the defendant to get on the ground. When he did not comply, an officer pepper sprayed him, and the other officer released a K9 dog.

Once the K9 dog was within the distance to apprehend the defendant, the defendant turned around and punched the dog in the side of the head. The dog "went off to the side," but then "came back on as they continued to run." The defendant again continued to swing and kicked the dog in the

chest. The defendant repeatedly punched the dog in the ribs. The defendant also kicked the dog somewhere in his stomach/ab area. The kick caused the dog to retreat, "as if he didn't want to engage him more." The dog then backed off, which was "not typical for him to do" and was not what the dog was trained to do.

At trial, a veterinarian testified that dogs can feel pain and opined that he would expect the dog felt pain from these repeated blows. The dog later stopped eating and seemed lethargic. Although the veterinarian was able to rule out more serious internal injuries, he did still opine that the dog had a "digestive injury."

Held: Affirmed. Regarding the assaults, the Court first re-emphasized that, in addition to proving an unlawful touching, the Commonwealth can prove common law criminal assault by establishing that the defendant engaged in an overt act intended to inflict bodily harm with the present ability to inflict such harm. The Court also re-emphasized that the Commonwealth can prove common law tortious assault, sometimes referred to as the "merged tort law definition," by establishing that the defendant engaged "in an overt act intended to place the victim in fear or apprehension of bodily harm," which did in fact create "such reasonable fear or apprehension in the victim."

The Court observed that the defendant's overt acts demonstrated his intent to place the officers in fear of bodily harm, which caused the officers to actually and reasonably fear bodily harm. Under the totality of the circumstances, the Court agreed that the officers' testimony and actions demonstrated that they reasonably feared a threat of bodily injury.

Regarding the assault on the victim, the Court explained that, although words alone are insufficient to constitute assault, considering the attending circumstances, the trial court could reasonably find that the defendant's overt act of moving towards the victim while threatening to kill him was sufficient to establish the elements of assault and battery.

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The Court remanded this case to the circuit court solely for correction of its sentencing order.

http://www.courts.state.va.us/opinions/opncavwp/1455183.pdf

Malicious Wounding

Virginia Court of Appeals
Published

Ramos v. Commonwealth: November 12, 2019

71 Va. App. 150, 834 S.E.2d 499 (2019)
Charlottesville: Defendant appeals his conviction for Malicious Wounding on Refusal to Strike a Juror for Cause, Refusal to Change Venue, and sufficiency of the evidence.

Facts: During the August 12 "Unite the Right" rally in Charlottesville, the defendant joined a mob that had been beating a man. After the victim had already been kicked multiple times and beaten with poles, a board, and a shield, and was already on the ground and had stumbled trying to rise at least once, the defendant used a large wind-up to deliver a significant punch to the victim.

Prior to trial, the defendant moved to change venue, but the trial court took the motion under advisement until jury selection. The defendant did not renew his motion for a change of venue, or insist on a ruling, before the jury was empaneled. Although the Commonwealth eventually requested a ruling on the motion, it was not until after the jury was sworn, the first witness had testified, and jeopardy had attached.

The defendant is a co-defendant with a man named Goodwin. [*The Court issued an opinion in that case today as well – EJC*]. Two days prior to trial in this case, a jury convicted the co-defendant of malicious wounding and recommended ten years to serve. During jury selection, several jurors revealed that they were aware of the co-defendant's case and the outcome of that trial. Citing *Farar,* the defendant moved to strike all the jurors who know about the previous verdict in the co-defendant's case. The trial court refused to strike them based on the defendant's blanket objection.

At trial, the defendant argued that the evidence showed that at most he struck the victim once and that a single blow cannot demonstrate sufficient malice to support a malicious wounding conviction.

Held: Affirmed. The Court first ruled that knowledge of a separately tried co-defendant's earlier conviction does not create a *per se* bar to jury service. The Court explained that a prospective juror who vaguely knows that another person was convicted of some crime will not need to be excluded on that basis, but a prospective juror who knows the details of the other case and how it is connected to the case for which he is being considered might warrant further individual questioning about potential bias.

The Court also pointed out that, in this case, the prospective jurors' knowledge of the previous case, and its connection to this case, varied greatly, and the source of that knowledge was the media, not the court itself.

The Court then ruled that the defendant argued his motion to change venue too late. The Court repeated that, when a trial court takes a change of venue motion under advisement, it is incumbent upon the defendant to renew the motion before the jury was empaneled and sworn, or at least remind the court that it was still pending and that he wanted the court to rule on it.

The Court also ruled that the evidence was sufficient to prove malice, because a single punch can be malicious when delivered at the tail end of a beating by a mob.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1595182.pdf

Virginia Court of Appeals

Unpublished

Gram v. Commonwealth: March 3, 2020

Prince William: Defendant appeals his conviction for Unlawful Wounding on sufficiency of the evidence and denial of his defense of self-defense.

Facts: The defendant, angry at his family, attacked his brothers, beating and cutting them with a knife. At trial, one brother testified that the defendant was the initial aggressor in the fight and that he only joined in the fight to defend his other brother, after witnessing the defendant's aggressive actions toward the other brother. Both brothers further testified that the defendant was brandishing a knife during the fight, which they attempted to remove from the defendant's possession. A brother testified that he could not count the number of times the defendant had previously struck him. The defendant admitted to being proud of his wrestling prowess and his ability to subdue both of his brothers in previous battles.

One victim received a deep cut to his hand. Another received an open stab wound in the side and a slice wound to his ear. At trial, the defendant complained that no witness testified as to how their injuries occurred and what instrumentality caused the injuries.

Held: Affirmed. The Court repeated that the Commonwealth is not required to conclusively show how the victims received their wounds. Instead, the Court explained that the finder of fact may infer from the circumstances of this case (i.e., that the wounds were of a type caused by a knife, and the defendant was the only combatant who used a knife during the fight) that the defendant unlawfully wounded his brothers. Regarding the victims' injuries, the Court agreed that the trial court credibly found that the defendant caused them with a knife due to the depth of the wound.

The Court agreed that the trial court reasonably determined that the defendant was the initial aggressor in the fight, having threatened to kill everyone in the home prior to the commencement of the altercation. The defendant wielded a knife throughout the altercation, which the trial court reasonably concluded resulted in the significant injuries suffered by both of his younger brothers.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0728194.pdf

Blowe v. Commonwealth: October 8, 2019

Fluvanna: Defendant appeals his convictions for Aggravated Malicious Wounding, Attempting Malicious Wounding, and related charges on sufficiency of the evidence.

Facts: The defendant and his confederates conspired to steal guns from an apartment over a garage shop. They entered the apartment, but discovered that the guns were not there. However, while they were still there, the owner returned. The defendant began shooting at the owner, striking the

owner in the side of his knee while the victim was trying to find cover. The defendant continued to shoot at the victim as the victim was crawling on the floor to avoid the gun fire.

The victim's friend and his brother arrived, and the friend began shooting at the thieves. The thieves retreated to cover but then began shooting again, striking the victim a second time in the leg. The defendant escaped to a vehicle and drove away, shooting while he fled. The Commonwealth charged the defendant for aggravated malicious wounding of the shooting victim and two counts of attempted malicious wounding of the victim's friend.

At trial, the victim's doctors did not testify that the "foot drop" the victim suffered was a "significant injury." However, the two gunshots to the victim's leg damaged a nerve that has caused "foot drop." He cannot raise his foot normally when walking. He must wear an orthotic boot while walking to prevent his toes from "always catching onto everything" causing him to trip.

At trial, the defendant argued that, because intent is an element of attempted malicious wounding, a single continuous intent to wound the friend throughout the battle prevents conviction for two counts of attempted malicious wounding.

Held: Affirmed. The Court ruled that there were at least two separate and distinct attacks on the friend, supporting two attempted malicious wounding convictions. The Court likened this case to *Jin* and explained that, although the defendant and his accomplices may have had a singular intent to maliciously wound the friend, they attacked the friend, retreated, and then attacked again, which was a new "execution of purpose."

In a footnote, the Court explained that there were probably three different attempts in this case: First, shooting at the friend through the apartment walls; second, after the defendant and his accomplices retreated and returned fire; and third, after the defendant got into his getaway vehicle and fired back as he was driving away.

In a different footnote, the Court pointed out that the defendant's guilt is the same whether he shot at the friend when the friend arrived or if one of his accomplices did. In another footnote, the Court dodged the question of whether, in every circumstance, each pull of the trigger is individually a separate act of attempted malicious wounding.

The Court also agreed that the evidence supported the conviction for aggravated malicious wounding. The Court found out that the limitation on the victim's daily activity inherent in his "foot drop" is a "significant physical impairment."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1189182.pdf

Burglary

Virginia Court of Appeals
Published

Pooler v. Commonwealth: November 19, 2019

71 Va. App. 214, 834 S.E.2d 530 (2019)
Chesapeake: The defendant appeals her conviction for Burglary on sufficiency of the evidence.

Facts: The defendant kicked in the door of her boyfriend's house and attacked him and a woman who was inside the residence with him, biting the woman. The defendant had her own separate residence and only spent certain evenings with the victim at his mobile home. She kept some personal effects at the mobile home and assisted with paying some utility bills and also had a key to the mobile home. However, both the victim and a witness testified that the defendant did not reside there and had no permission to be at the mobile home if the victim was not there. The victim testified that he did not invite the defendant to the residence and that there were no plans for her to be at the residence on the day of the attack.

At trial, the defendant argued that there was no burglary because she had permission to be at the residence at the time of the incident.

Held: Affirmed. The Court found that the defendant did not have permission to be at the mobile home the day the burglary occurred, nor did the defendant have a right to occupy the residence. The Court concluded that the defendant had no legally cognizable special relationship to the victim and therefore had no possessory interest in the residence and no right to occupy.

The opinion is heavily footnoted, with many provisos and asides. For example, the Court explained that a husband can burglarize his former marital home—even if he retains a joint tenancy in the property—if his wife has a right to exclusive habitation pursuant to a court order. The Court also pointed out that provisions related to marital property, such as § 20-107.3, and duties to provide support and maintenance to spouses and children, such as § 20-61, may extend a right to occupy to individuals other than the estate holder. Alternatively, such provisions may restrict an estate holder's ability to retract permission to enter his or her residence for purposes of the "breaking" element of the burglary offense.

A further footnote complained that courts use the terms "right to occupy the premises" and "right of habitation" to imply they mean different things. However, the Court explained that there is no analytical distinction among these terms. In another footnote, the Court stated that it "expresses no opinion on whether a breaking occurs if a person exceeds the scope of their permission to enter or be present in the dwelling—a matter of substantial ambiguity in the jurisprudence of this Commonwealth."

In its final footnote, the Court rejected the defendant's reliance on the definition of "cohabitant" in *Rickman*. The court explained that the existence of one of the *Rickman* factors is not determinative of the others and therefore, the cohabitation analysis set forth in *Rickman* is inapposite to the pertinent burglary analyses.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1786181.pdf

Child Abuse & Neglect

Virginia Court of Appeals
Unpublished

Astudillo v. Commonwealth: April 21, 2020

Chesapeake: Defendant appeals her conviction for Child Abuse on sufficiency of the evidence.

Facts: The defendant beat her eleven-year-old child with a belt in repeated beatings, lasting several hours, for failing to complete his homework. The defendant also used the victim's shirt to strangle him until his nose bled. The victim suffered markings and bruises all over his body. The defendant's sister described the marks as "red raised welts on his body, long strips." Although the victim did not need medical attention, the incident caused his sister to call the police. The responding officer photographed the bruises, abrasions, and redness that the victim sustained to his upper body.

The defendant later admitted that although she was aiming for the victim's buttocks, she continued to hit him on other areas of his body when he moved away.

Held: Affirmed. The Court ruled that the defendant's conduct showed a "reckless disregard for human life" and was "willful" as required by § 18.2-371.1(B)(1). The Court agreed with the trial court that the defendant "exceed[ed] the bounds of moderation" by continuing to strike her child on his upper body as he dodged her and that her conduct was not excusable simply because she was frustrated by his behavioral issues at school and his defiance of instructions to complete his homework.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0713191.pdf

Dorestal v. Commonwealth: November 5, 2019

Fredericksburg: Defendant appeals his conviction for Child Cruelty on sufficiency of the evidence.

Facts: The defendant, an adult who was six feet and six inches tall, struck a four-year-old child repeatedly with a belt. Well over three dozen bruises were still visible weeks later when someone finally brought the child to the emergency room. Two doctors, including Dr. Robin Foster, testified that the marks, which covered the child's body and resulted in petechiae near the child's eyes and forehead, were consistent with multiple falls or blunt force trauma and with physical abuse. During an interview, the defendant stated that he stuck the child four times with a belt for minor misbehavior.

The trial court convicted the defendant of Child Cruelty under § 40.1-103(A)

Held: Affirmed. The Court found ample evidence to corroborate the defendant's statement to the police. The Court explained that the fact that the marks were still visible weeks later "speaks volumes to the force and violence of that incident" and that the defendant did not discipline the child "within the bounds of moderation and reason."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1373182.pdf

Pullin v. Commonwealth: October 15, 2019

Portsmouth: Defendant appeals her conviction for Felony Child Abuse on sufficiency of the evidence.

Facts: The defendant severely injured her own child. The defendant had only visitation, but not custody, of her child. The child's grandmother, who had custody, did not observe bruising on the child on Thursday morning, but thereafter, the defendant had the child in her care until Sunday. When the child returned, the grandmother saw bruising on the child's buttocks, back, and leg, and sought medical attention.

The defendant told police that while her roommate and boyfriend were present at times during her visitation, neither was ever alone with the child. The defendant stated that she was the only one who had sole care and custody for the whole weekend. When police asked the defendant what happened with the child's injuries, the defendant abruptly ended the interview.

At trial, a doctor testified that the injuries the child suffered posed a risk of "widespread tissue damage because of the application of blunt force trauma to an extensive body area" and that "any child who has injuries such as these actually can develop kidney issues as a result if there is enough widespread tissue damage and tissue death." In addition, because the bruises in the photographs were fading, the doctor was "concern[ed] . . . that the injuries were a lot more extensive in the immediate timeframe after their occurrence, and widespread injury certainly can cause . . . long term injury to the child's internal organs."

The doctor opined that the child's injuries could not have resulted from the child falling from a standing position, tumbling down the stairs, or falling on a toy. In addition, she noted that the injuries could not have resulted from an accidental touching.

The defendant argued that the evidence failed to show that she committed an act or omission that was so gross, wanton, or culpable as to show a reckless disregard for human life. The trial court convicted the defendant of a felony violation of § 18.2-371.1(B)(1).

Held: Affirmed. The Court agreed that a rational fact finder could have found that the defendant inflicted non-accidental injuries on the child while the child was in her care and that this conduct exposed the child to a substantial risk of serious injury. Although there was no direct evidence of how the bruising occurred or when it occurred, the Court found that circumstantial evidence tended to prove that the defendant inflicted the injuries while the child was in the defendant's care.

Based on the doctor's testimony that the child's injuries created a risk of tissue and long-term organ damage to the child, the Court also concluded that the evidence was sufficient to establish that the defendant's acts created a substantial risk of serious injury to the child.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1011181.pdf

Child Pornography & Solicitation

Virginia Supreme Court

Stoltz v. Commonwealth: August 1, 2019
831 S.E.2d 164 (2019)
Aff'd Court of Appeals Ruling of June 19, 2019
Fairfax: Defendant appeals his conviction for Using a Computer to Solicit a Minor on Constitutionality grounds.

Facts: The defendant posted an Internet personal seeking a sexual partner. A detective, posing as a thirteen-year-old girl, responded. The detective repeatedly affirmed that he was only thirteen, but the defendant arranged for them to meet for a sexual encounter. At trial, the defendant argued that §18.2-374.3 is unconstitutional because it is impermissibly vague and criminalizes conduct that is protected by the First Amendment, and this overbreadth violates his right to due process. He also contended that he was convicted for innocent conduct because no child was involved and he "reasonably, objectively and correctly believed" that he was communicating with an adult. The trial court rejected those arguments.

Held: Affirmed. The Court rejected the defendant's vagueness argument, noting that the statute advances its goal of combating the sexual exploitation of children by unmistakably saying that no adult may use a communications system for the purpose of soliciting an individual that "he knows or has reason to believe is a child younger than 15 years of age." The Court expressed the view that an ordinary person would understand what conduct this statute prohibits.

The Court agreed that the facts, in aggregate, did not prove that the defendant actually knew that the "child" was underage. However, the Court found that the facts demonstrated that the defendant had reason to believe that she was underage. In a footnote, the Court stated that it was unnecessary for the trial court to give a specific instruction on the "reason- to-believe" concept and refused to comment on the instruction that the trial court gave on that concept.

The Court also rejected the defendant's First Amendment "overbreadth" argument. The Court noted that § 18.2-374.3(C) does not target speech, but conduct — specifically the use of a communications system (in this case, the Internet) for the purpose of soliciting a minor. The act of using a communications system is the *actus reus* of the crime, while the purpose of soliciting the child is the *mens rea*. In light of that, the Court explained that the fact that the defendant engaged in this conduct through the means of speech is only relevant if the statute sweeps in substantial amounts of protected speech in comparison to its legitimate proscription. However, the Court found that nothing in the statute criminalizes a substantial amount of protected speech when "judged in relation to the statute's plainly legitimate sweep."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1181033.pdf

Original Court of Appeals Ruling:
http://www.courts.state.va.us/opinions/opncavwp/0352174.pdf

Virginia Court of Appeals
Published

Ducharme v. Commonwealth: August 6, 2019
70 Va. App. 668, 830 S.E.2d 924 (2019)
Shenandoah: Defendant appeals his conviction for Use of a Communications Device to Solicit a Minor on Jury Instruction issues.

Facts: The defendant met a fifteen-year-old child online. Although her internet profile indicated that she was eighteen years old, when she told the defendant that she was "only" sixteen years old, he responded that they could still be friends and suggested meeting with her parents to get their approval. She did not take the defendant up on his suggestion and he initially did not insist on continuing the relationship. However, after she re-initiated contact, claiming to be eighteen years old, the defendant asked the child to send him "sexy" pictures of herself. He then exchanged text messages about meeting in which the child stated: "I hope if it's okay if we don't have sex tonight but we can do other stuff."

The Commonwealth indicted the defendant for a violation of 18.2-374.3(B). At trial, the defendant requested a jury instruction that actual knowledge of the child victim's age is required proof under 18.2-374.3(B). The trial court rejected the defendant's proposed jury instruction.

Held: Affirmed. The Court ruled that the jury instruction offered by the defendant improperly limited the Commonwealth's proof to showing the defendant "knows" the age of the subject of his solicitation. The Court explained that, under all subsections of § 18.2-374.3, proof the defendant "has reason to believe" the subject of the solicitation is a child is an alternative finding that the trier of fact may make to sustain a conviction.

Instead, the Court approved of the Commonwealth's jury instruction, which required the jury to find beyond a reasonable doubt that that the defendant "knew, or had reason to believe, that [the victim] was less than eighteen (18) years of age at the time" of the offense." In this case, the Court found that the reasonable inference from the defendant's text messages was that he knew or reasonably believed the child was a minor. Thus, by choosing to re-initiate contact with the child after she asked him to call her, the defendant "acted at his peril in regard to her being a minor."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0706184.pdf

Virginia Court of Appeals
Unpublished

Servais v. Commonwealth: April 28, 2020

Pittsylvania: Defendant appeals his convictions for Possession of Child Pornography and Production of Child Pornography on Double Jeopardy grounds.

Facts: A jury convicted the defendant of Production of Child Pornography in violation of § 18.2-374.1 and Possession of Child Pornography in violation of § 18.2-374.1:1. The trial court imposed separate sentences for each conviction. The defendant argued a double jeopardy challenge to the simultaneous convictions, but the trial court overruled his argument.

Held: Affirmed. The Court ruled that Possession of Child Pornography in violation of § 18.2-374.1:1 is not a lesser-included offense of Production of Child Pornography in violation of § 18.2-374.1(B). The Court analyzed the elements of both offenses under *Blockburger* and concluded that, because proof of production of child pornography does not necessarily prove possession of child pornography, and because the offenses do not always require proof of the same elements, they are not the same offense for double jeopardy purposes. The Court described "a myriad of ways that one can be guilty of production of child pornography without ever actually having possessed the child pornography."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0297193.pdf

Cigarette Trafficking

Virginia Court of Appeals
Published

Jiddou v. Commonwealth: December 31, 2019
71 Va. App. 353, 836 S.E.2d 700 (2019)
Chesterfield: Defendant appeals his convictions for Cigarette Trafficking on sufficiency of the evidence and the Commonwealth's Request for a Jury.

Facts: The defendant bought hundreds of cases of un-taxed cigarettes with the intent to sell them unlawfully. The defendant purchased more than 40,000 cigarettes on three separate occasions within a short period of time using cash. He purchased the cigarettes from Sam's Club using a membership for a business that no longer existed, and, in doing so, relied upon the ST-10 filed in 2015 to avoid sales tax upon the purchases. At that time, however, the ST-4 for his business was invalid and, consequently, the ST-10 was invalid also.

On one occasion, a witness saw the defendant leaving the store with 240 cases of cigarettes. The store's security camera recorded video the purchase, and the Commonwealth introduced the receipt at trial. The defendant submitted no documentation to the state indicating the collection of sales

taxes in connection with cigarette sales. The defendant had never told the state that his business was no longer operating and he had not returned the tax exemption form to the state, as required.

The trial initially was set for a bench trial on October 10, 2017, but neither party nor the court had previously indicated that it was waiving the right to a jury. On the trial date, the Commonwealth requested a trial by jury. The Court granted the Commonwealth's motion over the defendant's objection and set the matter for a jury trial.

At trial, the Commonwealth's cigarette trafficking expert stated that the purchase of such quantities with cash was inconsistent with possession of cigarettes for personal use or in connection with a legitimate business.

Held: Affirmed. The Court rejected the defendant's argument that, because the standardized form itself states that it "shall remain in effect until revoked in writing by the Department of Taxation," his ST-10 form remained valid. Instead, the Court agreed that, under § 58.1-623(A), a certificate of exemption may be invalid even without written notice from the Department. The Court concluded that the defendant had notice that the validity of the ST-10 was linked to the validity of his ST-4, which he did not return to the state after he sold his business.

The Court found that the evidence was sufficient to prove that the defendant possessed cigarettes in violation of § 58.1-1017.1 and § 58.1-1017.3. The Court agreed that, as a carton contains 200 cigarettes, the Commonwealth proved the purchase of more than 40,000 cigarettes on each occasion. The Court also agreed that, once employees testified that they verified the identity of the purchaser as the club member presenting his or her card, the jury reasonably could conclude that the defendant was the purchaser on all the occasions, even without video evidence of the transactions. The Court pointed out that un-stamped cigarettes would not have been for sale at Sam's Club and no evidence tended to show that un-stamped packages of cigarettes had somehow infiltrated the inventory at Sam's Club.

The Court also agreed that a reasonable finder of fact could conclude beyond a reasonable doubt that the defendant had the intent to distribute the cigarettes he purchased and that he was guilty of three counts of violating Code § 58.1-1017.1.

Regarding the Commonwealth's request for a jury trial, the Court observed that, under Virginia law, there is no time limitation within which the Commonwealth must exercise its right to choose a jury trial. Accordingly, the Court concluded that the trial court did not err in granting the Commonwealth's motion and in holding a jury trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1910182.pdf

Conspiracy

Virginia Court of Appeals
Published

Smallwood v. Commonwealth: May 12, 2020

Pittsylvania: Defendant appeals his conviction for Conspiracy to Obtain Money by False Pretense on sufficiency of the evidence.

Facts: The defendant and his co-conspirator set up a "Ponzi" or pyramid scheme to obtain money from multiple individuals. The defendant and his co-conspirator targeted three victims, although they planned to target as many people as they could to become "investors." The trial court convicted the defendant of three counts of Conspiracy to Obtain Money by False Pretense.

Held: Reversed. The Court found that the trial court erred in convicting the defendant of multiple conspiracies. Here, because the trial court found that there was only a single agreement, the Court directed that it should have only convicted the defendant of one count of conspiracy to obtain money by false pretenses and sentenced him accordingly.

In this case, the Court noted that the defendant planned to use the "investors'" money to reimburse other earlier investors before any of the victims discovered the scheme. The Court concluded that the fact that the plan necessarily required multiple victims in order to work also suggests the existence of a single plan.

The Court agreed that, under *Cartwright*, it is sometimes the case that a single agreement can support multiple conspiracy convictions. For example, when a single agreement encompasses multiple crimes that are different and have different punishments, a single agreement can be punished as multiple conspiracies—one for each offense contemplated. However, the Court concluded that the common law rule that the number of convictions depends upon the number of conspiratorial agreements was operable in this situation.

The Court remanded the case with direction that two of the conspiracy convictions be vacated and those indictments dismissed.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0375193.pdf

Contributing to the Delinquency of a Minor

Virginia Court of Appeals
Unpublished

Gibson v. Commonwealth: July 23, 2019

Alexandria: Defendant appeals her convictions for Contributing and False Report on sufficiency of the evidence.

Facts: During a contentious divorce and custody proceeding, the defendant convinced her five-year-old child to report false allegations that the child's father had sexually abused her to authorities.

The defendant took her daughter to the doctor's office, where the child made a report of sexual abuse by her father. After visiting the doctor, the defendant took her child to the CAC, where the defendant reported to a detective and a CPS investigator that, on the previous day, the child had told her that the father had touched her "private area" during a recent visit. The defendant also informed the detective that she and other family members had asked the child questions about the touching and video recorded parts of these conversations. The defendant provided these recordings to the police. Police found these conversations to be "very leading" and "very suggestive."

During the investigation, police obtained the defendant's phone for forensic examination. During the examination, police located a file that essentially constituted hypnotic instructions to the child, detailing fabricated abuse allegations that the defendant wanted the child to report to authorities. The forensic analyst was able to determine that a file was created a day prior to when the defendant alleged that her child had reported the abuse to her.

Police returned the defendant's phone to her and confronted her about the audio, which she denied she had ever used. She also claimed that she created the file after the child had reported the abuse. Police investigated further, obtaining the defendant's phone again for further forensic examination. A second examination of her phone revealed that several files had been deleted since the previous police examination. According to the forensic analyst, the deleted files included the "hypnosis files" as well as the three video-recorded family interviews that the defendant had provided to the police.

At trial, the detective noted that in the forensic interview, the child kept repeating, "Daddy touches my private part . . . put his finger in my private part," and that these "keywords" were the "exact words" in both the audio file and the forensic interview. The trial court convicted the defendant of Contributing to the Delinquency of a Minor under § 18.2-371(i), False Report of Child Abuse under § 63.2-1513, and False Report to Law Enforcement under § 18.2-461.

Held: Affirmed. Regarding the offense of Contributing to the Delinquency of a Minor, the Court agreed that it was proper to conclude that the defendant hypnotized her child using the audio file found on her cell phone and that her actions caused the child to falsely report sexual abuse, a criminal act under the laws of Virginia.

In a footnote, the Court rejected the defendant's argument that the common law defense of infancy precluded her actions from constituting the crime of contributing to the delinquency of a minor. The Court explained that the fact that the child was not legally culpable of the offense did not negate the fact that she actually carried out the act of making a false report of sexual abuse, a criminal offense in Virginia notwithstanding any legal defense available to her.

Regarding her false report, the Court agreed that § 63.2-1513(A) punishes an individual who either "makes or causes to be made" a false report of child abuse. The Court pointed out that, at the time when the defendant repeated her child's allegation to the detective, she knew that the report was false. Thus, the defendant herself knowingly gave a false report as to the commission of a crime to a law enforcement official with intent to mislead. The Court agreed that was also reasonable to infer that the

defendant used the audio file and other methods to help her child provide a full account of the alleged child abuse to authorities.

The Court rejected the defendant's argument that she could not have committed the offense because the child was the one who reported the crime. Instead, the Court observed that the false report to law enforcement was the result of the defendant using her child as her innocent and unwitting agent. Because the defendant engaged in actions which caused the child to commit the crime as an innocent agent of the defendant, the Court agreed that was guilty of giving a false report to law enforcement as a principal in the first degree.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0986184.pdf

Credit Card Offenses

Virginia Court of Appeals
Published

Bryant v Commonwealth: September 10, 2019
70 Va. App. 697, 832 S.E.2d 48 (2019)
Arlington: Defendant appeals his convictions for Credit Card Theft and Fraud on jurisdiction and venue grounds.

Facts: The defendant possessed four stolen credit cards and used three of them at an Arlington County CVS to purchase five $100 gift cards in separate transactions, one after the other. The victim had not given the defendant the cards and had not even been to Arlington. Police investigated and spoke to the defendant. He repeatedly lied to the police about his identity and how he came to possess the credit cards.

At trial, the defendant argued that venue for Credit Card Theft was not proper in Arlington, especially regarding the one credit card that he possessed but did not use.

Held: Affirmed. The Court first rejected the defendant's argument that Arlington lacked subject matter jurisdiction. The Court recalled that, in the *Meeks* case, the Court had once held that the crime of credit card theft was not a continuing offense and instead was complete when a defendant takes possession of the stolen credit card or number. The Court noted that, immediately following the decision in *Meeks*, the General Assembly implicitly overruled it by specifically expanding the reach of the special venue statute for credit card theft—§ 18.2-198.1—restoring its status as a continuing offense by allowing prosecution for credit card theft in any county or city where a stolen credit card or credit card number is used, is attempted to be used, or is possessed with intent to commit credit card fraud or certain other credit card offenses.

Regarding venue, the Court ruled that the trial court did not err in concluding that venue was proper in that court to prosecute the defendant for the credit card theft charge related to the unused

credit card. The Court again pointed out that the 2008 amendment to § 18.2-198.1 overruled the ruling in *Meeks*. The Court concluded that the Commonwealth presented sufficient circumstantial evidence to give rise to both a reasonable inference beyond a reasonable doubt that the defendant possessed the unused credit card with the requisite intent to use it without the victim's authorization as well as a strong presumption that he intended to do so in Arlington County.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1907174.pdf

Defiling a Dead Body

Virginia Court of Appeals
Unpublished

Everett v. Commonwealth: April 14, 2020

Norfolk: Defendant appeals his conviction for Defiling a Dead Body on sufficiency of the evidence.

Facts: A day after the defendant had been in an argument with his girlfriend about child custody, the defendant's girlfriend was dead. The defendant approached his friend about disposing of the victim's body. He and his friend put her body in a trash bag and disposed of the body in a garbage-strewn and filthy park, where animals gnawed off part of her body. The defendant's family paid the defendant's friend $10,000.

After disposing of the victim's body, the defendant told her family "not to worry" after they reported her missing and assured them that she would return, even though he knew that she was dead and he had left her body in a city park. The defendant told the police who initially investigated the death that he last saw her when she left the house to buy drugs, but he did not admit that, in fact, she had died in his bedroom.

Held: Affirmed. The Court held that the meaning of "defile" in 18.2-126(B) is not limited to sexual molestation and includes any action that dishonors or desecrates a corpse by treating it in an offensive manner. The Court distinguished the use of the word "defile" in 18.2-126(B) from its use in §18.2-48. The Court also explained that concealing a body under § 18.2-323.02 may occur without dishonoring or desecrating a corpse, the conduct addressed in § 18.2-126(B).

The Court also held that the defendant's disposal of the victim's body constituted defilement under the statute. The Court pointed out that the defendant purposely left her body in an area where harm to the sanctity of the body was foreseeable and, in fact, ultimately caused such severe disfigurement to her body that dental records were needed to identify it. In the eyes of the Court, his actions clearly showed disrespect for the corpse.

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/1679181.pdf

Destruction of Property

Virginia Supreme Court

Spratley v. Commonwealth: December 12, 2019
Aff'd Court of Appeals Opinion of October 9, 2018
836 S.E.2d 385 (2019)
Loudoun: Defendant appeals his conviction for Felony Destruction of Property on sufficiency of the evidence.

Facts: During an argument at a grocery store, the defendant deliberately destroyed a scale used to weigh food. The scale was unrepairable, and the store could not find an exact replacement. However, the store found a different model that was "virtually identical" to replace the destroyed scale. The new scale cost over $4,000. The trial court rejected the defendant's argument that the Commonwealth never proved the value of the scale that he destroyed and convicted the defendant of felony property destruction. The Court of Appeals affirmed.

Held: Affirmed. The Court noted that the Destruction of Property statute, § 18.2-137, unlike larceny statutes, provides that the "amount of loss" caused by the destruction of property "may be established by proof of the . . . fair market replacement value." The Court agreed with the Court of Appeals that the term "replacement" contemplates the cost of obtaining a substitute item to take the place of the original, destroyed item. The Court ruled that the Commonwealth was not required to present evidence of the age, depreciation, or original purchase price of the scale to establish its fair market replacement value.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1181452.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/1715174.pdf

Virginia Court of Appeals
Unpublished

Knott v. Commonwealth: May 12, 2020

Shenandoah: Defendant appeals his conviction for Destruction of Property on sufficiency of the evidence.

Facts: The defendant struck the victim's vehicle, causing more than $1,000 of damage. The trial court found the defendant guilty at trial, after it specifically found that § 18.2-137(B) only requires a finding of "general intent" to sustain a conviction and that the Commonwealth does not "have to prove it intentionally happened."

Held: Reversed. The Court pointed out that, after its 1993 ruling in *Crowder*, the General Assembly amended § 18.2-137 to require that felony criminal property destruction be done intentionally. Accordingly, the statute superseded the holding in *Crowder*, something that the Court had noted in *Scott* in 2011. The Court remanded the case for a new trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1016184.pdf

Driving Suspended or Revoked

Virginia Supreme Court

Yoder v. Commonwealth: December 12, 2019
Aff'd Court of Appeals Opinion of December 11, 2018

Augusta: Defendant appeals her conviction for Driving After Forfeiture of her License, 3rd Offense, on sufficiency of the evidence.

Facts: The defendant drove on a revoked license in violation of § 18.2-272(A). When the police stopped her and asked her for her driver's license, the defendant produced a special identification card that is issued only to individuals without a valid driver's license. The defendant had been previously convicted twice of driving on a revoked license and had served 10 days in jail on the second conviction. She was present in the courtroom on both occasions and pled guilty each time.

At trial, the Commonwealth introduced into evidence a certified copy of the defendant's 2010 and 2014 prior conviction. The 2014 conviction was on a summons for "driving on a revoked license 3rd offense" in violation of § 18.2-272. The defendant argued that the charge in 2014 would have been a felony and could not be issued on a summons and, consequently, that the prior was invalid.

The Court of Appeals affirmed.

Held: Affirmed. The Court agreed that the facts in this case demonstrated that the defendant knew she was driving without any legal "right to do so" under § 18.2-272(A). The Court repeated that the requisite notice can be inferred from the circumstances and need only be enough to show that the driver knew he was driving without any legal "right to do so." In this case, the Court agreed that the defendant, by handing the deputy a DMV ID card instead of a license, made a tacit admission that she knew she did not have a valid driver's license.

The Court rejected the defendant's analogy to the Court of Appeals ruling in *Barden. Barden* had held that, upon the expiration of a statutory revocation period, a license does not remain in a revoked status, nor does it revert back to the status of a valid license. Instead, under *Barden*, until the driver successfully obtains a reinstatement of his license, he is neither driving on a revoked license nor driving on a valid license, but rather is merely driving without a valid license. Instead, the Supreme Court explicitly refused to endorse or reject *Barden*'s reasoning, although it cited over a dozen rulings from other states that reject *Barden*'s reasoning.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1190047.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/1023173.pdf

Virginia Court of Appeals
Unpublished

Dorman v. DMV: September 24, 2019

Richmond: Plaintiff appeals the denial of the reinstatement of his privilege to operate a motor vehicle.

Facts: The defendant had a Florida driver's license in 1987. However, because he was convicted of DUI in Tennessee in 1987, Florida revoked the plaintiff's driving privileges. In 1990, the defendant was again convicted of DUI, this time in Georgia. Georgia suspended his driving privileges as well. He was convicted of driving suspended in Georgia in 1991 and Georgia issued another suspension of his privilege to drive.

The plaintiff moved to Virginia in 1995 and applied for a driver's license here. Virginia issued him a license and renewed it repeatedly on his request until 2017, when a DMV employee queried the National Driver Registry ("NDR") and discovered the plaintiff's multiple suspensions. DMV denied his request for renewal and voided his license. The plaintiff appealed within the DMV administrative process.

Florida sent DMV a "release letter" that stated that the plaintiff's revocation case relating to a 1983 Florida conviction for driving under the influence had been closed and that he was eligible for a license. The letter did not mention the 1987 Tennessee conviction and subsequent revocation in Florida. However, later Florida notified Virginia that it had made an error because the plaintiff mistakenly had two Florida NDR profiles. Florida sent two new NDR profiles: one profile for the name "Dorman, Carl, E" and one for the name "DORMAN@CARLE." Although the NDR report for "DORMAN@CARLE" lists him as eligible, both the NDR reports for "Dorman, Carl, E" listed him as ineligible.

DMV denied the plaintiff's appeal. The plaintiff appealed to the Circuit Court for the City of Richmond, but that court also denied his appeal.

Held: Affirmed. The Court agreed that the DMV did not violate the plaintiff's due process rights, and that the DMV's ultimate decision was supported by the evidence.

The Court repeated that a person's right to operate a motor vehicle cannot be taken away without the protections of procedural due process. The Court also repeated that a post-deprivation hearing must provide certain minimum requirements including timely and adequate notice; the right to present evidence and confront adverse witnesses; the right to assistance of retained counsel; and the right to an impartial decision maker. In this case, the Court agreed that the plaintiff received an adequate post-deprivation hearing in which he presented his due process arguments.

Noting that, under § 46.2-316(A)(4), the DMV is prohibited from issuing a driver's license to any individual who has been convicted in another state of a charge similar to §§ 18.2-266 or 18.2-272, the Court examined the Georgia offense of driving on a suspended license. Comparing the Georgia statute to § 18.2-272, the Court concluded that these laws are similar for purposes of Code § 46.2-316(A).

Addressing the factual question of whether there was a predicate conviction and suspension under Florida law, the Court agreed with the DMV's conclusion.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0170192.pdf

DUI

U.S. Supreme Court

Mitchell v. Wisconsin: June 27, 2019
588 U.S. ___ , 139 S. Ct. 2525; 204 L. Ed. 2d 1040 (2019)
Certiorari to the Wisconsin Supreme Court: Defendant appeals his conviction for DUI on Fourth Amendment grounds.

Facts: After officers arrested the defendant for DUI, the defendant passed out in the police car. Officers transported him to the hospital, where hospital staff drew the defendant's blood on police request without a warrant. The defendant was unconscious at the time. His BAC was .22. The trial court and the Wisconsin Supreme Court rejected the defendant's argument that the seizure of his blood violated the Fourth Amendment.

Held: Denial of Motion to Suppress Affirmed. In a plurality opinion, four justices held that, where the driver is unconscious and therefore cannot be given a breath test, the exigent- circumstances rule almost always permits a blood test without a warrant. Justice Thomas concurred in the judgment, but argued that the natural metabolization of alcohol in the blood stream "'creates an exigency once police have probable cause to believe the driver is drunk,'" regardless of whether the driver is conscious.

The plurality reaffirmed the Court's many previous holdings, as well as *Birchfield*'s holding that, if an officer has probable cause to arrest a motorist for drunk driving, the officer may conduct a breath test (but not a blood test) under the rule allowing warrantless searches of a person incident to arrest.

The plurality then emphasized the crucial highway safety needs at stake in DUI cases and wrote: "Drivers who are drunk enough to pass out at the wheel or soon afterward pose a much greater risk. It would be perverse if the more wanton behavior were rewarded—if the more harrowing threat were harder to punish."

The plurality reaffirmed that, under *Schmerber*, exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. While in *Schmerber* the extra factor was a car crash, in this case the plurality found that the defendant's unconsciousness was itself a medical emergency.

The plurality concluded: "When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment."

The Court did not rule out the possibility that, in an unusual case, a defendant might be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. The plurality then remanded the case to Wisconsin to permit the defendant to make such an argument, if he so chose.

Justices Sotomayor, Ginsburg, and Kagan dissented, arguing "If there is time, get a warrant." Justice Gorsuch dissented, arguing that the Court should have dismissed the appeal as improvidently granted.

Full Case At:
https://www.supremecourt.gov/opinions/18pdf/18-6210_2co3.pdf

Virginia Supreme Court

Lambert v. Commonwealth: April 9, 2020
Aff'd Ct. App. Ruling of March 12, 2019
Russell: Defendant appeals his convictions for Aggravated Involuntary Manslaughter and DUI on sufficiency of the evidence.

Facts: While intoxicated, the defendant drove his truck into oncoming traffic. The defendant slammed into a vehicle, killing the passenger and severely injuring the driver of that vehicle. Witnesses observed the defendant had glassy eyes, slurred speech, appeared sleepy, and needed to lean on a guardrail for support. Witnesses did not see him consume anything after the crash. The defendant first lied to a trooper and stated that he was not under the influence of anything, but ultimately admitted that he had just received a dose of methadone at a local treatment clinic.

Forensic analysis of the defendant's blood revealed the presence of methadone, alprazolam (Xanax), and nordiazepam. At trial, an expert testified that methadone can cause depressant effects that impair the ability to drive including lethargy, dizziness, slowed hand-eye coordination, and difficulty

balancing and also that the level of alprazolam in the defendant's blood was also "significant" and could be especially "dangerous" when taken in combination with methadone.

The Court of Appeals affirmed, finding that the evidence of the defendant's methadone use, coupled with the expert's testimony regarding its effect, was sufficient standing alone to prove that the defendant was under the influence of an intoxicant while driving. However, the Court added that the defendant's initial false statement, the observations of witnesses and medical personnel of the defendant's physical condition, and the lack of evidence that he consumed anything after the accident also supported the conclusion that the defendant was driving under the influence of self-administered intoxicants at the time of the collision.

Held: Affirmed. The Court concluded that the evidence before the jury, and the inferences reasonably deducible therefrom, were sufficient to support a finding beyond a reasonable doubt that the defendant had, prior to the crash, self-administered drugs that impaired his ability to drive safely.

The Court pointed out that the defendant had voluntarily taken methadone. The Court acknowledged that there was no evidence as to how the other drugs had found their way into the defendant's blood, but explained that the jury was entitled to draw the inference that he had initially lied about consuming any drugs out of his consciousness of guilt and a desire to conceal it.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1190439.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/1762173.pdf

Virginia Court of Appeals
Unpublished

Johnson v. Commonwealth: February 18, 2020

Virginia Beach: Defendant appeals his convictions for Aggravated Involuntary Manslaughter on Fourth and Fifth Amendment grounds.

Facts: The defendant drove a furniture truck while intoxicated, crossed into oncoming traffic and struck another vehicle, killing the driver and permanently injuring the passenger. The defendant fled the scene, but an officer found him in the backyard of a house nearby. The officer identified the defendant and administered several field sobriety tests. The officer arrested the defendant and immediately advised him of his *Miranda* rights. The defendant voluntarily stated that he understood his rights and was willing to speak with the police.

The officer read the defendant implied consent. The defendant asked the officer if he could "say no" to having additional blood drawn. The officer responded that he could decline the blood test, but that if he refused, he would get a "second charge" in addition to the DUI charge for which he was already under arrest. The defendant stated that he had "no choice," he did not want another charge,

and agreed to the blood test. The blood sample taken pursuant to the implied consent law indicated a BAC of .09.

The defendant moved to suppress the evidence in this case. He first argued that he was in custody, for the purposes of *Miranda*, when he was detained by the police officers in the backyard of the home near the scene of the accident. Second, he argued that the injuries suffered in the accident, his difficulty in remaining awake, and his voluntary intoxication rendered him unable to voluntarily and intelligently waive his rights under *Miranda*. Third, the defendant also argued that the officer's use of the word "charge" when describing what would happen if the defendant refused the blood test created an unconstitutional condition upon him that rendered his consent to the blood draw unconstitutional under the Fourth Amendment. The trial court rejected all three arguments.

Held: Affirmed. Regarding the *Miranda* issue, the Court likened this case to *Nash* and found that the defendant was not in "custodial interrogation" when the officer conducted the field sobriety tests in this case.

Regarding the voluntariness issue, the Court complained that the defendant could point to no examples of coercive police activity for the assertion that his waiver was involuntary, but rather relied on his intoxication to show that his will was overborne. The Court noted, however, that the defendant's memory regarding the details of the accident was not impaired, since he provided a coherent attempt at explaining the accident by blaming it on defective equipment.

The Court found that the officer's use of the word "charge" when describing the possible consequences that the defendant would face if he refused the blood draw pursuant to the implied consent law did not place an unconstitutional condition upon the defendant. The Court repeated that the holding in *Birchfield* should not be read to cast doubt on "laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1591184.pdf

Drugs

Distribution

Virginia Court of Appeals
Unpublished

Middleton v. Commonwealth: March 3, 2020

Prince William: Defendant appeals his convictions for Possession with Intent to Distribute on denial of his Entrapment instruction.

Facts: The defendant agreed to cooperate with law enforcement by buying drugs from a third party under police control, but also repeatedly sold drugs outside of police control on several occasions. The police testified that they never told the defendant that he should or had the authority to sell drugs. The defendant signed a written confidential informant agreement, which included the express prohibitions on purchases or sales of drugs outside the supervision of the police.

At trial, the defendant claimed that he informed the detectives that "the only way I could get in good [with the third -party] was if I sold drugs" and that the detectives responded that the defendant should "go and do what you need to do." The trial court denied the defendant's request for an Entrapment instruction.

Held: Affirmed. The Court emphasized that law enforcement's entrapment of a citizen by enticing him to commit a particular crime he was not predisposed to commit does not give that citizen a license to commit other crimes. Instead, the protection afforded by an entrapment defense is coextensive with the crime or crimes police entice a citizen to commit and those that are factually necessary components of any such crime or crimes.

In this case, the Court found that the evidence established that law enforcement originated the idea that the defendant commit a particular crime—possession of a controlled substance that he was to purchase from the third party. However, the Court noted that nothing about the commission of that crime required the defendant to sell drugs; the subsequent sale of drugs is not an element of simple possession. Thus, even viewed in the light most favorable to the defendant, nothing in the evidence suggests that, in requesting that the defendant purchase drugs, the detectives requested, coerced, or did anything else to entice appellant to engage in drug distribution, a distinct criminal act. Because the idea that the defendant sell drugs did not originate with the detectives, the Court ruled that the evidence did not support the origination element of an entrapment defense.

The Court explained that, even if it assumed that the alleged statements of the detectives acquiesced in the defendant's plan to sell drugs and constituted "trickery," that did not lead to the conclusion that the defendant was entitled to the entrapment instruction. The "trickery, persuasion or fraud" element of the entrapment defense is a distinct element, separate and apart from the origination element.

In a footnote, the Court saw no meaningful distinction in this case between originating the idea to commit the criminal act and originating the intent to commit that same criminal act.

Justice Huff filed an extensive dissent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0668184.pdf

McLean v. Commonwealth: February 4, 2020

Prince William: Defendant appeals his conviction for Distribution of Heroin on denial of his accommodation defense.

Facts: The defendant sold heroin to a police informant for money. At sentencing, in an attempt to demonstrate that the defendant had possessed and distributed drugs only as an accommodation, the defendant called three witnesses to testify regarding their knowledge of the defendant's participation in a drug transaction on the day in question. None of the witnesses, however, had been present at the location, and therefore, none saw the defendant engage in the transaction about which they testified.

The defense witnesses described a transaction that differed in several significant ways from the transaction that the Commonwealth's evidence described. The trial court concluded that, in fact, two separate transactions had occurred. The trial court denied the defendant's accommodation defense.

Held: Affirmed. Because evidence in the record supported both a conclusion that the defendant sold heroin to two different people on the day in question, the Court could not say that the trial court's factual finding was plainly wrong. Thus, the Court agreed that the defendant had not met his burden to establish that his involvement in that transaction constituted an accommodation under § 18.2-248(D).

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0552194.pdf

Harrell v. Commonwealth: December 27, 2019

Norfolk: Defendant appeals his conviction for Conspiracy to Distribute Heroin on sufficiency of the evidence.

Facts: The defendant repeatedly arranged to sell heroin to an undercover officer. Before the fourth, and final, purchase, the officer spoke with the defendant on the phone. The defendant instructed the officer where to meet him and told the officer that he could find the defendant's vehicle by its flashing brake lights. While on the phone with the defendant, the officer heard another male voice in the background.

The undercover officer drove to the location of the planned meeting. Officers who were surveilling the meeting saw a vehicle, with two individuals in it, flash its brake lights. They then observed the defendant get out of the passenger seat of that vehicle, head towards, and enter the passenger side of the undercover officer's vehicle. The defendant completed the sale of heroin to the undercover officer.

The driver of the defendant's car attempted to flee when he saw the police moving in to arrest the defendant. He accelerated quickly in reverse, striking a police car and nearly running over one of the officers.

Held: Affirmed. The Court noted that the driver provided the prearranged signal by flashing the vehicle's brake lights and demonstrated his consciousness of guilt when he fled from the police. The Court agreed that the trial court could rationally infer that the driver was "performing one part" of the plan to sell heroin while the defendant was "performing another part."

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/1283181.pdf

Terry v. Commonwealth: November 26, 2019

Alexandria: Defendant appeals his convictions for Conspiracy to Distribute Fentanyl on sufficiency of the evidence.

Facts: The defendant sold a cooperating witness drugs between thirty and forty times. The cooperating witness generally paid for them after he repackaged and sold them. The cooperating witness explained that sometimes when he and the defendant met, he saw the defendant add something to the heroin that made it "better." Once, the witness used the drugs himself and overdosed. The witness to using up to approximately twenty bags a day of the drugs that he obtained. He acknowledged that fentanyl is "more powerful" than heroin. He was also aware that the drugs the defendant supplied him varied in intensity. In addition, the cooperating witness testified that he "couldn't use the fentanyl that [he] was getting from [the appellant] because they wouldn't give [him] methadone at the clinic with fentanyl in [his] system." At least once, the witness planned to buy drugs from someone other than the defendant in order to avoid ingesting fentanyl.

The lab identified the drugs as heroin, fentanyl, and furanyl fentanyl. At trial, the court convicted the defendant of distribution and conspiracy for both the heroin and the fentanyl. The defendant argued that there was not sufficient evidence that he intended to distribute fentanyl, specifically, rather than heroin, but the trial court rejected that argument.

Held: Affirmed. The Court agreed that the evidence permitted the fact finder to conclude that the defendant and the cooperating witness had an agreement, either express or implied, to distribute controlled substances in addition to the heroin. The Court noted that It was within the jury's purview to disbelieve the cooperating witness's protestations that he did not realize that he bought two other controlled substances from the defendant for redistribution in addition to heroin.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1364184.pdf

Possession with Intent to Distribute

Virginia Court of Appeals
Unpublished

Moore v. Commonwealth: October 2, 2019

Newport News: Defendant appeals his sentence for Possession of a Firearm while in Possession with Intent to Distribute on sufficiency of the indictment.

Facts: The defendant possessed a firearm while in possession with intent to distribute cocaine. He admitted that he had been selling drugs and admitted that he had a firearm in his vehicle. In a recorded phone call, the defendant told someone that he had been "caught with [a] gun and crack cocaine." The Commonwealth obtained an indictment that alleged that the defendant knowingly and intentionally "possess[ed] a firearm while committing or attempting to commit the illegal manufacture, sale, distribution, or the possession with intent to sell, give or distribute a controlled substance . . . , in violation of . . . § 18.2-308.4."

The defendant pled guilty to the offense. At sentencing, the trial court sentenced the defendant to the mandatory minimum sentence of five years. The defendant objected, noting that his indictment did not specifically refer to § 18.2-308.4(C), the subsection that requires a five-year mandatory minimum sentence. He also objected that, because the indictment did not allege, and the evidence stipulated by the parties did not prove, that the defendant "displayed the weapon in a threatening manner," § 18.2-308.4(C) did not apply.

Held: Affirmed. As it had in the *Wright* case, the Court rejected the argument that the indictment must allege that the defendant possessed or displayed a firearm "in a threatening manner." The Court agreed that the evidence was sufficient to prove that the defendant was in possession of both a firearm and controlled substances that he intended to distribute.

In this case, the Court noted that the indictment included language and an element required for conviction that appear in only one subsection of the cited statute—subsection (C)— and therefore concluded that the indictment was clear on its face that the offense charged was a violation of § 18.2-308.4(C). The Court found that the indictment was sufficient when it alleged that the defendant possessed a firearm while possessing controlled substances with intent to distribute them, writing: "Nothing more was required to indict appellant or support his conviction."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1113181.pdf

Johnson v. Commonwealth: June 11, 2019

Chesapeake: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth and Fifth Amendment grounds as well as sufficiency of the evidence.

Facts: The defendant possessed MDMA and LSD for distribution. While the defendant was driving, an officer stopped the defendant for an equipment violation and smelled burnt marijuana emanating from the car. The defendant was the only person in the car. The officer searched the car and found marijuana. The officer then searched the defendant's pockets and found MDMA and LSD, which were divided into small amounts and separately packaged.

For about 30 seconds after the officer had asked a question, the defendant rambled about how his life was over and he had tried to do better. The defendant then spontaneously stated: "I have to try to sell some drugs and make a $%*ing living and not die."

Prior to trial, the trial court denied the defendant's motions to suppress the search of his pockets, which the defendant argued lacked probable cause, and to suppress his statement to the officer, which he argued was inadmissible without a *Miranda* warning.

At trial, the defendant provided his own expert. The defendant's expert stated that the evidence "teeter[ed] on the line" between distribution and personal use based on the weight of the MDA alone, although other factors were consistent with distribution. The expert testified that the packaging of the drugs was consistent with distribution. However, when the expert heard the defendant's statement, he ultimately concluded that the facts "would be consistent with distribution."

Held: Affirmed. The Court rejected the argument that the officer's search was invalid because she did not originally intend to arrest the defendant. Instead, the Court explained that, because the objective facts establish that the officer had probable cause to arrest the defendant for possession of marijuana, she had the authority to search him incident to arrest, regardless of whether she actually intended to arrest him.

Regarding the defendant's spontaneous statement, the Court ruled that, because the statement was voluntary, it did not fall within the purview of *Miranda*, and the trial court did not err in denying the motion to suppress. The Court found that the defendant's statement was not a foreseeable result of any question or action by the officer, nor could it be considered responsive to the last question asked.

Regarding sufficiency, the Court ruled that the defendant's admission and the circumstantial evidence of the packaging was sufficient to establish that the defendant intended to distribute the drugs.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0899181.pdf

Possession

Virginia Supreme Court

King v. Commonwealth: January 30, 2020

Petersburg: Defendant appeals his conviction for Possession of Heroin on sufficiency of the evidence

Facts: The defendant drove with marijuana and heroin in his vehicle. He was alone in the vehicle. An officer observed the defendant speeding. When the defendant stopped and exited the car, the officer spoke with the defendant. When the officer approached the car, he noticed a strong smell of freshly burned marijuana emanating from the vehicle. The officer searched the car and found marijuana in the center console beneath a baggie containing heroin.

Held: Affirmed. The Court explained that, based on the smell, a factfinder could plausibly infer from this circumstance that the defendant, the sole occupant of the vehicle, had recently smoked

marijuana in the vehicle and that he had smoked the marijuana that the officer found in the vehicle. Furthermore, the Court elucidated that, if the defendant was aware of the nature and presence of the marijuana in the center console, and he exercised dominion and control over the marijuana, the factfinder could likewise deduce that he was aware of the presence and character of the heroin that was located above the marijuana in the center console.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/190424.pdf

Virginia Court of Appeals
Published

Yearling v. Commonwealth: February 18, 2020

Chesapeake: Defendant appeals his conviction for Drug Possession on sufficiency of the evidence.

Facts: An officer stopped the defendant for a traffic violation. The officer found a small corner baggy of marijuana inside the center console between the driver's seat and the front passenger seat. In the console, the officer also found a balled-up sheet of notebook paper. Inside the notebook paper was a pink pill with "K-56" on it. The officer had to call Poison Control to learn what the pill was. Ultimately, the Department of Forensic Science determined it to be Oxycodone. There was no testimony at trial confirming who owned the car the defendant was driving, how long he had been driving it that day, or where, in relation to the small amount of marijuana, the balled-up sheet of notebook paper was found.

Held: Reversed. The Court held that the Commonwealth presented insufficient evidence to demonstrate that the defendant was aware of either the presence or nature of the single pill found in the console of the car. The Court contended that nothing about an odor of marijuana suggested the presence of Oxycodone. Thus, even if he was aware of the presence of the marijuana, the Court found that it did not establish that the defendant was also aware of the presence of the pill.

Citing the *Young* case, the Court also pointed out that the officer did not know what the drug was, and "there was no evidence to indicate that Yearling was any more informed."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1705181.pdf

Virginia Court of Appeals
Unpublished

Morrow v. Commonwealth: December 27, 2019

Arlington: Defendant appeals his conviction for Possession of Marijuana on Admission of the Field Test

Facts: The defendant possessed marijuana. Police arrested the defendant and subjected the drugs to a field test, which was positive. At trial, the defendant objected during a sidebar conference to the admission of the field test results, arguing that the evidence failed to establish that law enforcement provided him with written notice of his right to request a full chemical analysis. In response, the Commonwealth's attorney proffered that the defendant was provided with the written notice required by statute at booking, due to the defendant's disruptive behavior during his initial encounter with police and subsequent arrest. The defendant did not challenge that proffer. The trial court admitted the field test results over the defendant's objection.

Held: Affirmed. The Court agreed that the trial court was entitled to rely on the Commonwealth's proffer "in deciding the evidentiary issue"—whether the officer's testimony regarding the field test was admissible pursuant to § 19.2-188.1(B). The Court explained that, pursuant to *Bloom,* it considered the statement a proper proffer because it was "a unilateral avowal of counsel" that was "unchallenged" at the motion in limine.

In a footnote, the Court rejected the defendant's contention, although he challenged the proffer, the transcript failed to record it and simply stated there was "simultaneous speaking" at the time.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1933184.pdf

Jordan v. Commonwealth: October 22, 2019

Norfolk: Defendant appeals his convictions for Possession of a Firearm and Drug Possession on sufficiency of the evidence.

Facts: The defendant sold drugs from his residence. Police executed a search warrant at the residence. Inside the home, police found mail addressed to the defendant, including a utility bill with his name and the address of the residence. They found no mail addressed to anyone else. The defendant was the only person that the police observed enter the residence with keys. There was a picture of the defendant in the main bedroom. At trial, a detective testified that, based on his investigation, the defendant lived at the residence.

Police found marijuana, cocaine, money, and more packaging in the first drawer of the dresser in the main bedroom. Police also found a revolver on a dresser in the main bedroom in plain view. Police found another firearm in the closet of the main bedroom. At trial, police also testified how a confidential informant previously purchased marijuana from the residence. Police arrested the defendant in the residence.

Held: Affirmed. The Court found the evidence sufficient to show that the defendant knew of the presence and character of the drugs and the firearms. The Court agreed that the items were in a bedroom in which a fact-finder could find that the defendant slept as the sole resident. The Court also

concluded that a fact-finder could also infer that because there was one firearm in plain view, the defendant was aware of other firearms in the residence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0863181.pdf

Hypolite v. Commonwealth: July 16, 2019

Chesapeake: Defendant appeals his conviction of Possession with Intent to Distribute on sufficiency of the evidence.

Facts: Officers stopped a car in which the defendant was a passenger for a traffic infraction. The car did not belong to the defendant or the driver; it was registered to another person who was not present. During the stop, an officer saw the defendant lean to one side of the car. Officers found the cocaine underneath the passenger seat where the defendant was sitting, located in a plastic bag behind two other plastic bags. The defendant disavowed knowledge of the cocaine but conceded possession of an Oxycodone pill found on his seat.

At trial, the defendant testified that he obtained the Oxycodone by prescription. The trial court acquitted the defendant of possession of that drug based on his testimony, but convicted him of possession of the cocaine under his seat.

Held: Reversed. The Court concluded that the Commonwealth failed to prove that the defendant knowingly and intentionally possessed cocaine, instead merely establishing that he was in close proximity to the drug. The Court complained that no evidence linked the defendant's nervousness to an awareness of cocaine beneath the passenger seat, pointing out that his nervousness could have been due to his possession of Oxycodone without being able to produce the prescription for the police officers.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0692181.pdf

Buck v. Commonwealth: July 2, 2019

Franklin: Defendant appeals her conviction for Possession of Heroin on Venue grounds.

Facts: The defendant possessed heroin in her car. She asked her mother to take the car and fill the tank with gasoline. While driving the car in Franklin County, her mother discovered heroin in the car and alerted the police. The police visited the defendant at her home in Franklin County. The defendant admitted to possessing the heroin, describing the packaging in detail. She claimed that she purchased it for a friend.

The trial court convicted the defendant, rejecting her argument that the evidence did not establish venue in Franklin County.

Held: Affirmed. The Court ruled that, as both the heroin she admitted she purchased and her car in which it was stored were both in Franklin County on the day of her arrest, and considering that the defendant knew that the heroin was in her car on that day, the evidence was sufficient to prove venue for constructive possession of heroin in Franklin County.

The Court reaffirmed that possession of illegal drugs is a continuing offense. Thus, a person who knowingly purchases illegal drugs properly may be tried for simple possession in the jurisdiction where he or she purchased the drugs or in any other jurisdiction in which he or she subsequently possesses the drugs. The Court also pointed out that the trial court reasonably could conclude that the defendant was lying about buying heroin "for a friend" in an attempt to lessen her culpability and could consider the lie as affirmative evidence of her guilt.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1347183.pdf

Prescription Fraud

Virginia Court of Appeals
Published

VanDyke v. Commonwealth: March 31, 2020

Richmond: Defendant appeals her conviction for Prescription Fraud on refusal of a Deferred Disposition

Facts: The defendant, a nurse, unlawfully diverted drugs to her own use while on duty. At trial, the judge detailed the evidence and found the defendant "guilty as charged" for violating § 18.2-258.1(A). The defendant then asked the trial court for a deferred disposition under § 18.2-258.1, but the trial court denied the request. The trial court denied the defendant's request again prior to sentencing.

Held: Affirmed. The Court held that the denial of the defendant's request for a deferred disposition was not error because the request came too late. The Court explained that, when the defendant first asked for a deferred disposition, the trial court had already lost authority to grant it. The Court pointed out that § 18.2-258.1(H) specifically provides that the authority to grant a deferred disposition exists "if the facts found by the court would justify a finding of guilt." The Court concluded that the language in the statute makes clear that a deferred disposition is not permitted when the court has taken the additional step of actually pronouncing judgment and finding the defendant guilty.

The Court found that the trial court's oral pronouncement of guilt was all that was required to constitute a judgment of conviction for controlled substance fraud. Thus, the trial court's authority to grant the requested relief of a deferred disposition ceased when it made its oral finding of guilt under § 18.2-258.1(H). The Court ruled that, although a trial court retains authority for twenty-one days following entry of a final order to reconsider a variety of issues (including matters such as the sufficiency

of the evidence), where the issue of guilt has in fact been determined through entry of at least an oral judgment of guilt, the trial court lacks authority to vacate the judgment in order to consider a deferred disposition.

As far as the finality of the trial court's order, the Court found that the trial court's entry of an order of conviction ten days later further confirmed that it had previously made a finding of guilt and no longer had authority to consider a request to defer disposition

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1322182.pdf

Eluding

Virginia Court of Appeals
Unpublished

Pollard v. Commonwealth: June 18, 2019
Wells v. Commonwealth: June 18, 2019

Appomattox County: Defendants appeal their convictions for Larceny on the single larceny doctrine, and one defendant appeals a conviction for Eluding on venue grounds.

Facts: The defendants and two others showed up at the victims' residence and stole items. Although the occupants initially ejected the defendants and their friends from the house, the thieves forced their way back into the house. Defendant Wells took several items from the living room and put them in a vehicle outside. Defendant Pollard then entered the house and confronted one of the victims in a bedroom. The victim had armed himself with a shotgun, but defendant Pollard and another thief disarmed the victim and stole his shotgun.

After a brief fight, the thieves fled to a vehicle and began to flee. As defendant Wells drove down the driveway, she almost immediately encountered a sheriff's deputy who was responding to a 911 call for help. The officer immediately activated his emergency lights and positioned his vehicle on the road in order to attempt to stop the vehicle. Defendant Wells instead drove onto the grassy shoulder of the road, traveled around the officer's vehicle, and fled at a high rate of speed.

At trial, the victims testified that the home was located in Appomattox County. The officer did not directly describe the roadways where the chase took place as being in Appomattox. However, when asked if the "back roads [were] . . . your typical back roads out in the county," the officer replied, "yes." Defendant Wells argued that the Commonwealth did not establish venue for the Eluding offense, but the trial court disagreed.

At trial, the defendants also argued that they were, at most, guilty of a single larceny offense for all of the items that they stole, under the "single larceny doctrine," as articulated by *Acey.* The trial court rejected that argument and found one distinct larceny occurred when defendant Wells removed

electronics from the home, and a second distinct larceny occurred when defendant Pollard took the rifle from the victim in the bedroom

Held: Affirmed. Interpreting the "single larceny doctrine," the Court pointed out that, although the two incidents occurred in the same house, they occurred in different rooms of the house, by different people, and at different times. The Court also observed that each defendant differed in intent; the Court contrasted defendant Wells' intent to steal the items from the living room from defendant Pollard's intent to steal the rifle from the victim in the bedroom.

Regarding venue for defendant Wells' conviction for Eluding, the Court repeated that, as venue is not a substantive element of a crime, the Commonwealth is not required to prove where the crime occurred beyond a reasonable doubt. In this case, the Court pointed to the officer's testimony that he pursued the vehicle on "county" roads. The Court found that that evidence was sufficient to raise a "strong presumption" that defendant Wells' conduct was in Appomattox County and interfered with or endangered the operation of the law-enforcement vehicle or a person.

Full Cases At:
http://www.courts.state.va.us/opinions/opncavwp/1137182.pdf
and
http://www.courts.state.va.us/opinions/opncavwp/0896182.pdf

Embezzlement

Virginia Court of Appeals
Unpublished

Ware v. Commonwealth: October 1, 2019

New Kent: Defendant appeals his convictions for Embezzlement and Attempted Extortion on sufficiency of the evidence.

Facts: The defendant was the manager of a subdivision. Each year, under the subdivision agreement, the lot owners paid $200 for road maintenance fees to the defendant. The fees were for the defendant's future service in maintaining the road. The defendant established a bank account separate from his business account into which he deposited the yearly fees. He had sole control over both bank accounts.

Although the defendant collected fees from 2007 to 2014 and provided "minimal" maintenance, no withdrawal was made from the segregated account prior to 2014. In 2014, the defendant transferred $3,000 from the segregated account to his own business account. The memo line stated "Road repair GHL [Good Hope Landing Subdivision]."

The victim owned two lots in the subdivision and paid $400 per year. In 2009, the defendant unilaterally increased the fee from $200 to $5,000, but offered a "discount" of $4,800 to any owner who

paid on time. The victim continued to pay $400 per year until the defendant claimed that the victim owed over $10,000 in maintenance fees due to a few years of late payments. The defendant sent a letter demanding payment of the fees and attached a draft of a "Memorandum of Lien for Assessments" requested "pursuant to Va. Code Section: 55-516" and an itemized invoice for over $30,000 in fees. A civil suit ensued. The trial court in the civil suit found the defendant's suit to be harassment and awarded the complaining witness sanctions under § 8.01-271.1.

At trial, the Commonwealth argued that the defendant embezzled the $3,000 he transferred into his personal business account. The Commonwealth also argued that the defendant's lien threat constituted attempted extortion.

Held: Reversed. The Court held that the evidence did not prove embezzlement because it did not prove that the money at issue was the property of another entrusted to the defendant. The Court also held that the evidence did not prove attempted extortion because the notice of intent to file a lien, the only alleged threat, was made in the context of a judicial proceeding.

Regarding the embezzlement charge, the Court concluded that, because the road maintenance fees were not the entrusted property of another, the court erred in finding the defendant guilty. In this case, the Court likened this case to *Dove* and *Rooney,* reasoning that, whether the defendant deposited the fees in his business or personal account or created a segregated account, his dominion and control over the money was not unauthorized or wrongful.

Regarding the extortion, the Court concluded that the written notice to the victim was part of the judicial process of perfecting a lien. The Court explained that a threat to exercise a lawful method of enforcement rights, without more, does not constitute extortion. The Court repeated that the perfecting of a lien or the enforcement of the lien enjoy absolute privilege and that statements in the course of that proceeding, if relevant and pertinent, cannot be the basis for a collateral action against the filer of the lien.

In this case, the Court agreed that the defendant used the statutory judicial process when sent the notice, and thus he had a legal claim to the amount he sought until the point a court of competent jurisdiction ruled that he did not. Therefore, the relevant and material statements in the notice were covered by absolute privilege and were not a wrongful threat in the context of an extortion charge. The Court wrote: "To find otherwise would suggest that any creditor who says, "Pay me what you owe me, or I will sue you," is guilty of attempted extortion."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1458182.pdf

Extortion

Virginia Court of Appeals
Unpublished

Burgess v. Commonwealth: May 26, 2020

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 the defendant's hearing was set for August 6, 2018 and that he was present that day but the defendant was not. The defendant argued that the Commonwealth failed to prove "that [the defendant] was provided notice to be in court that particular day."

Held: Affirmed. The Court held that the defendant's narrow argument preserved for appeal, that he did not receive notice of the trial date, even if accurate, failed to establish that the evidence was insufficient to prove the willfulness element of the offense in one of several other recognized ways. Consequently, he failed to establish that the evidence was insufficient to prove "willfulness."

The Court noted that the defendant only challenged "notice," but repeated that establishing that a defendant received "timely notice" of a hearing date "is but one mechanism for proving willfulness." The Court pointed to the other recognized ways in which the Commonwealth might have established willfulness, such as by proof that his attorney was aware of the trial date, proof that he engaged in a course of conduct designed to prevent him from receiving actual notice, or proof that he was advised of an original appearance date from which orders were entered continuing the trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1270191.pdf

Ahmadzi v. Commonwealth: March 24, 2020

Loudoun: Defendant appeals her conviction for Extortion on sufficiency of the evidence

Facts: The defendant, who had placed an online ad on a site that offers prostitution services, made an appointment with the victim for "an hour of companionship" in exchange for $250. The victim went to the defendant's apartment, carrying the cash in an envelope with the defendant's name on it in his wallet. The defendant requested payment before she provided any services. The victim willingly opened his wallet to display an envelope marked with the defendant's name. The defendant immediately took the envelope from the victim's wallet. The defendant did not threaten the victim before she took the envelope.

However, after she took the money, the defendant lied to the victim, telling him that he was under arrest for solicitation. The defendant stated that she would release him if he gave her a satisfactory reason to do so. She did not demand that he give her any additional money or property as a condition of his release. The victim left the apartment. At trial, the victim testified that he did not take back his money because he was "grateful" not to be arrested. Later, he demanded his money back, but the defendant refused. When police arrived, the defendant called in a false report of a stabbing at a nearby gas station to draw away the police. The defendant never returned the victim's money

At trial, the jury found the defendant not guilty of grand larceny, but convicted her of extortion. The defendant argued that the evidence was insufficient to sustain her conviction because there was no connection between the victim's voluntarily paying for her services as agreed and any threat or accusation that she made. The Attorney General conceded error.

Held: Reversed. The Court found that the evidence established that the victim voluntarily agreed to pay the defendant $260 for an hour of her time and willingly opened his wallet to pay her before appellant made any threat or accusation. The Court wrote: "Appellant's conduct, while despicable, did not rise to extortion as a matter of law."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0384194.pdf

Ware v. Commonwealth: October 1, 2019

New Kent: Defendant appeals his convictions for Embezzlement and Attempted Extortion on sufficiency of the evidence.

Facts: The defendant was the manager of a subdivision. Each year, under the subdivision agreement, the lot owners paid $200 for road maintenance fees to the defendant. The fees were for the defendant's future service in maintaining the road. The defendant established a bank account separate from his business account into which he deposited the yearly fees. He had sole control over both bank accounts.

Although the defendant collected fees from 2007 to 2014 and provided "minimal" maintenance, no withdrawal was made from the segregated account prior to 2014. In 2014, the defendant transferred $3,000 from the segregated account to his own business account. The memo line stated "Road repair GHL [Good Hope Landing Subdivision]."

The victim owned two lots in the subdivision and paid $400 per year. In 2009, the defendant unilaterally increased the fee from $200 to $5,000, but offered a "discount" of $4,800 to any owner who paid on time. The victim continued to pay $400 per year until the defendant claimed that the victim owed over $10,000 in maintenance fees due to a few years of late payments. The defendant sent a letter demanding payment of the fees and attached a draft of a "Memorandum of Lien for Assessments" requested "pursuant to Va. Code Section: 55-516" and an itemized invoice for over $30,000 in fees. A civil suit ensued. The trial court in the civil suit found the defendant's suit to be harassment and awarded the complaining witness sanctions under § 8.01-271.1.

At trial, the Commonwealth argued that the defendant embezzled the $3,000 he transferred into his personal business account. The Commonwealth also argued that the defendant's lien threat constituted attempted extortion.

Held: Reversed. The Court held that the evidence did not prove embezzlement because it did not prove that the money at issue was the property of another entrusted to the defendant. The Court

also held that the evidence did not prove attempted extortion because the notice of intent to file a lien, the only alleged threat, was made in the context of a judicial proceeding.

Regarding the embezzlement charge, the Court concluded that, because the road maintenance fees were not the entrusted property of another, the court erred in finding the defendant guilty. In this case, the Court likened this case to *Dove* and *Rooney,* reasoning that, whether the defendant deposited the fees in his business or personal account or created a segregated account, his dominion and control over the money was not unauthorized or wrongful.

Regarding the extortion, the Court concluded that the written notice to the victim was part of the judicial process of perfecting a lien. The Court explained that a threat to exercise a lawful method of enforcement rights, without more, does not constitute extortion. The Court repeated that the perfecting of a lien or the enforcement of the lien enjoy absolute privilege and that statements in the course of that proceeding, if relevant and pertinent, cannot be the basis for a collateral action against the filer of the lien.

In this case, the Court agreed that the defendant used the statutory judicial process when sent the notice, and thus he had a legal claim to the amount he sought until the point a court of competent jurisdiction ruled that he did not. Therefore, the relevant and material statements in the notice were covered by absolute privilege and were not a wrongful threat in the context of an extortion charge. The Court wrote: "To find otherwise would suggest that any creditor who says, "Pay me what you owe me, or I will sue you," is guilty of attempted extortion."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1458182.pdf

Failure to Appear

Virginia Court of Appeals
Unpublished

Partain v. Commonwealth: December 27, 2019

Norfolk: Defendant appeals his conviction for Felony Failure to Appear on sufficiency of the evidence.

Facts: Facing a firearms offense, the defendant appeared in court. The Court continued his case to June 11, 2018, but he failed to appear on that next date. At trial, an officer testified that the defendant was present on the date from which the proceedings were continued. The defendant testified that there was "no excuse" for his missing court and that "[i]t was a complete lapse of memory."

The trial court rejected the defendant's argument that the Commonwealth failed to establish a prima facie case of willfulness by failing to show that he had received notice of the date and time of the June 11, 2018 court appearance.

Held: Affirmed. The Court found that a fact-finder could reasonably infer that, because the defendant was present at the first court date, he had notice and knew when and where he was required to appear. The Court explained that the trial court was not required to believe that the defendant forgot about the court appearance and could also infer that because the defendant knew about the court appearance and did not appear, his absence was intentional.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0488191.pdf

Failure to Register as a Sex Offender

Virginia Court of Appeals
Published

Young v. Commonwealth: July 30, 2019
70 Va. App. 646, 830 S.E.2d 68 (2019)
Richmond: Defendant appeals his conviction for Failure to Register as a Sex Offender on sufficiency of the evidence.

Facts: The defendant has two 1986 sexual assault convictions: for aggravated sexual battery, for which he received sentences of twenty years of incarceration, with ten years suspended, and attempted forcible sodomy, for which he received ten years, with five years suspended. According to his VCIN record, he was received into the DOC in late 1983 for a five-year sentence for uttering. The report further reflects that he was released on discretionary parole after only about nineteen months, was returned from parole in 1986, at which time he was noted to be a "discretionary parole VLTR," and that he was released on mandatory parole in 2002. The VCIN report reflected that, in conjunction with each conviction record included within the report, the defendant was fingerprinted. After the 1994 sex-offender registration went into effect in Virginia, the defendant was classified as a sexually violent offender for purposes of the registry and had a duty to reregister

The defendant failed to register and the Commonwealth indicted the defendant for that offense. At trial, the Commonwealth offered testimony from the VSP custodian of records, a certified copy of the 1986 conviction, and the defendant's VCIN report. Despite an inconsistency in birth dates, it stated that the defendant was the same person who was the subject of the 1986 order. The VCIN report lists the various names and aliases used by the subject of the report, as well as various dates of birth and social security numbers. Further, the report contains a section titled "Correctional History," which details the defendant's periods of incarceration in the Virginia Department of Corrections.

At trial, the defendant argued that the evidence failed to establish that he was "serving a sentence of confinement" or "under community supervision" for one of those offenses on or after July 1, 1994, as required by Code § 9.1-901(A) to compel him to register. He also pointed to various inconsistencies in the VCIN report, as well as language stating that the material listed in the report does not preclude the existence of other criminal history information. He argued that the other evidence in

the record was insufficient to prove that he is the person in the order because it does not "exclude the possibility that another person was convicted of the offenses in 1986and used his name.

Held: Affirmed. The Court agreed that the evidence demonstrated that, although he was convicted of a sexually violent offense in 1986, before the Act took effect, the defendant was incarcerated for that offense on or after July 1, 1994, as required for him to be subject to the Act's provisions.

The Court repeated that "identity of names carries with it a permissive inference of identity of person, the strength of which will vary according to the circumstances." The Court concurred that the VCIN report and its contents support a finding that the defendant is the same person convicted of the offenses set out in the 1986 order, thereby establishing "identity of person."

Regarding the NCIC issues, the Court concluded that, in light of the report's assurance that the convictions it contains involve the same person with the same unique fingerprints, it is not dispositive that the report stated that it does not preclude the existence of possible additional criminal history information. The Court pointed out that the weight to be given the VCIN report under these circumstances was within the province of the fact finder. The Court found that any vagueness in the meaning of the many numbers and abbreviations contained in the report was not fatal to the trial judge's ability to draw reasonable inferences from the data.

The Court remanded the case solely for the correction of a clerical error.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0687182.pdf

Bailey v. Commonwealth: July 30, 2019
70 Va. App. 634, 830 S.E.2d 62 (2019)
Patrick: Defendant appeals his conviction for Failure to Register as a Sex Offender on First Amendment grounds

Facts: Based on his Delaware sexual assault conviction, the defendant is a registered sex offender in Virginia. The defendant registered as a sex offender and repeatedly denied having a social media account. However, an investigator discovered that the defendant had a Facebook account. The Commonwealth indicted the defendant for failure to register.

At trial, the defendant argued the reporting requirements related to his Internet use are unconstitutional as a violation of his First Amendment rights, citing *Packingham v. North Carolina*, the case in which the United States Supreme Court struck down as violative of the First Amendment a North Carolina statute that prohibited registered sex offenders from accessing certain Internet sites.

Held: Affirmed. The Court rejected the defendant's First Amendment claim, finding that the reporting requirements at issue unquestionably advance a significant governmental interest and any burdens on the defendant's First Amendment rights of speech and association are minimal to non-existent. The Court noted that the requirements do not prevent him from speaking or associating;

rather, they simply require that he make his online identity and whereabouts known to law enforcement.

The Court distinguished Virginia's statute from the one from North Carolina in *Packingham*. In this case, the Court observed that nothing in § 9.1-903 prevents the defendant's use of the Internet to speak or associate with anyone, and thus, the Virginia statutory scheme, unlike the North Carolina statute in *Packingham*, does not prohibit his exercise of his First Amendment rights of speech or association.

The Court examined § 9.1-903, which requires that the defendant make law enforcement aware of any "electronic mail address information, any instant message, chat or other Internet communication name or identity information that the person uses or intends to use[;]" The Court pointed out that the statutory scheme does not require him to give law enforcement access to his accounts or to provide the passwords so that law enforcement can access his e-mail, Facebook or other covered accounts.

The Court repeated that the First Amendment does not require that convicted sex offenders be treated exactly the same as those who have not committed such offenses; it requires only that the reporting requirements "advance important governmental interests unrelated to the suppression of free speech and not burden substantially more speech than necessary to further those interests."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0613183.pdf

Virginia Court of Appeals
Unpublished

Wright v. Commonwealth: September 17, 2019

Virginia Beach: Defendant appeals his convictions for Failure to Register as a Violent Sex Offender on sufficiency of the evidence.

Facts: The defendant was convicted of carnal knowledge of a minor, in violation of § 18.2-63. The conviction indicated that the victim was thirteen years old and also showed the defendant's date of birth as 1972, making him thirty years old at the time of his conviction. As a result, the defendant was ordered to register with the Virginia State Police pursuant to § 19.2-298.1. When he initially re-registered, the defendant acknowledged that he was a violent sex offender by registering every ninety days. However, soon the defendant failed to re-register and failed to report his change of address. The Commonwealth prosecuted him for failure to re-register as a sexually violent offender.

The defendant argued that the Commonwealth failed to prove that the conviction was for a sexually violent offense, noting that the conviction order failed to state that he was convicted under what is now subsection A of § 18.2-63. The defendant also argued that, despite his age, he could have originally been convicted under what is now subsection B as part of a plea agreement.

Held: Affirmed. The Court agreed that the evidence was sufficient to prove that the defendant's prior conviction constituted a sexually violent offense and that he was required to register as a sexually

violent offender. The Court examined the version of § 18.2-63 in effect at the time of the original offense. Since the defendant was an adult when the offense occurred, the Court concluded that the second paragraph (now subsection B) could not apply and therefore it was left with the first paragraph, which falls under the sexually violent offender definition.

The Court rejected the defendant's argument that his conviction could have been a plea agreement as based on pure speculation. The Court also noted that the defendant repeatedly acknowledged he was a violent sex offender by his signature next to the box labeled "Sexually Violent Offender."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1238181.pdf

False Pretense & Fraud

Virginia Supreme Court

Caldwell v. Commonwealth: April 9, 2020

Rockbridge: Defendant appeals her conviction for Defrauding an Innkeeper on sufficiency of the evidence.

Facts: The defendant met two hotel guests for breakfast at the hotel. The defendant was not a hotel guest, but ate the hotel breakfast. A member of the hotel's staff asked her to stop by the front desk to pay eight dollars for her meal. The defendant did not pay, but approached the hotel's desk manager and demanded to know why she had to pay for her breakfast. The manager informed the defendant that "if you are not a guest in the hotel then this is what we require." The defendant did not pay and left.

At trial, the trial court found that "maybe [the defendant] did not understand that she could not just be invited by a guest, but when she was told she had to pay for the food and did not, that was "the point at which the evidence turned against" her and it "was clear at that point."

Held: Reversed. The Court addressed whether there was proof of the defendant's intent to defraud or cheat the hotel restaurant. The Court examined the language of § 18.2-188(b)(2) and observed that to "obtain food," as used in the statute, unambiguously refers to when the food is possessed with the intent to eat it. Coupled with the statute's language that requires "the intent to cheat or defraud the owner or keeper to . . . [o]btain food from a restaurant or other eating house," the Court concluded that § 18.2-188(b)(2) required proof that the defendant had the intent to cheat or defraud the hotel restaurant at the time she gained possession of the food.

The Court explained that the trial court's finding reflects that the trial court had reasonable doubt as to the defendant's intent to defraud at the time she gained possession of the food.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1190541.pdf

Virginia Court of Appeals
Published

Brewer v. Commonwealth: March 10, 2020

Colonial Heights: Defendant appeals his conviction for Computer Fraud on sufficiency of the evidence.

Facts: The defendant used an app on his phone to make unauthorized mobile withdrawals from a bank account maintained by his grandmother. Police interviewed the defendant, who admitted engaging in a series of transactions in which he transferred a total of at least $6,000 from the victim's account to his accounts. The victim had once written the defendant a personal check, and a search warrant executed at the defendant's residence produced a voided check from the victim's account. The defendant had downloaded the Capital One iPhone app onto his smart phone to accomplish the transfers, using the routing and account numbers to transfer the money.

At trial, the defendant argued that the phone with which he transferred his grandmother's funds was not a "computer" under § 18.2-152.3.

Held: Affirmed. The Court held that the definition of "computer" in Code § 18.2-152.2 includes the defendant's cellular telephone in the manner in which he used it in this case. The Court concluded that the way in which the defendant used his iPhone, by accessing the Internet and using a mobile app to transfer money from one bank account to another, rendered it a computer for purposes of the Act.

http://www.courts.state.va.us/opinions/opncavwp/1665182.pdf

Welfare Fraud

Virginia Supreme Court

Jefferson v. Commonwealth: October 24, 2019
833 S.E.2d 462 (2019)
Aff'd Court of Appeals Ruling of March 20, 2018
Pittsylvania: Defendant appeals her conviction for Welfare Fraud on Limitations of Cross-Examination and Sufficiency of the Evidence.

Facts: Over a two-year period, the defendant obtained SNAP and fuel-assistance benefits by filing several applications without disclosing her true employment. At trial, a DSS fraud investigator explained that, the more income the defendant had earned, the fewer benefits she would have been

entitled to receive. She testified that the defendant received a total overpayment of approximately $3,500.00. Defense counsel asked the witness if she still would have been entitled to benefits, even if she had reported her true income, but the trial court sustained the Commonwealth's objection, finding that the question was irrelevant.

The trial court convicted the defendant and ordered her to pay restitution of the total amount of overpayments in SNAP benefits and fuel assistance. That amount did not account for all the possible deductions and credits the defendant might have received if she had properly reported her income.

Held: Affirmed as to the convictions, reversed as to restitution. The Court held that when determining whether the value of fraudulently obtained public assistance or benefits meets the statutory threshold for grand larceny, the proper valuation method is the difference between the amount of public assistance or benefits the defendant received, and the amount of public assistance or benefits he would have been entitled to absent fraud. The Court rejected the argument that a court would be bound by the Department's policy that unreported income is ineligible for an earned income deduction. The Court explained that the amount of public assistance or benefits a defendant would have been entitled to necessarily includes any deductions he would have been eligible for if he had reported all of his income.

Nevertheless, regarding the refused cross examination, unlike the Court of Appeals, the Supreme Court merely found that any potential error was harmless. Because the evidence presented at trial clearly established that the overpayments met the statutory threshold for grand larceny, the Court concluded that any further cross-examination regarding the amount of SNAP benefits the defendant would have received if she had reported her income would not have demonstrated that the overpayments were less than the statutory threshold.

However, regarding restitution, because the restitution award was based on the improper calculation of overpayments in SNAP benefits, the Court vacated the restitution award and remanded it for recalculation, applying the Court's holding regarding how to calculate the amount of fraud.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1181114.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0638173.pdf

Firearms and Weapons Offenses

Virginia Court of Appeals
Published

Groffel v. Commonwealth: August 20, 2019
70 Va. App. 681, 831 S.E.2d 503 (2019)

New Kent: Defendant appeals his convictions for Possession of a Firearm While Subject to Protective Order, Possession of a Firearm by Felon, and Possession of Ammunition by Felon on Double Jeopardy grounds.

Facts: The defendant possessed two rifles, ammunition for those rifles, and ammunition for other firearms in a shed at his residence. At the time, the defendant was a convicted felon and subject to five protective orders obtained by five different people. The trial court found the defendant guilty of five counts of transporting a firearm while subject to a protective order and two counts of possessing a firearm or ammunition after conviction for a felony, one each for the firearms and then for the ammunition, rejecting the defendant's motion to dismiss on double jeopardy grounds.

Held: Affirmed in part, reversed in part. The Court first held that the convictions and sentences for transportation of a firearm in violation of five different protective orders did not violate double jeopardy. However, the Court also held that the trial court erred in imposing two sentences under §18.2-308.2 for simultaneous possession of a firearm and ammunition.

Regarding the protective order offense, the Court agreed that § 18.2-308.1:4 is ambiguous on its face, in that the statute prohibits the purchase or transportation of a firearm by a person subject to "a protective order." The Court offered that the use of the singular "a" suggests that for each protective order in place, the act of purchase or transportation of a firearm constitutes a separate offense, but also agreed that the statute "can be understood in more than one way."

The Court looked to the purpose of the statute to resolve the ambiguity in the language, finding that the gravamen of an offense under § 18.2-308.1:4 is not possession, but is the purchase or transportation of a firearm while the protective order is in effect because the purpose of the statute is to protect each principal.

The Court distinguished the Federal cases that construed the Federal prohibition on possession of a firearm by a person subject to a protective order, explaining that the United States Congress chose to prohibit these categories of individuals from having access to firearms by grouping them together in a subsection as a single "possession" offense. In contrast, the Virginia legislature enacted separate statutes to restrict access, possession, and transportation of firearms for certain groups, including persons acquitted by reason of insanity, persons adjudicated legally incompetent or mentally incapacitated, persons involuntarily admitted or ordered to outpatient treatment, persons convicted of certain drug offenses, convicted felons, and aliens and persons not admitted for permanent residence, under §§ 18.2-308.1:1, -308.1:2, -308.1:3, -308.1:5, -308.2, -308.2:01. [*The Court did not indicate whether its ruling in this case would apply to those code sections as well – EJC]*

However, the Court held that the defendant should have been subject to only one punishment under § 18.2-308.2 for the firearms and ammunition which he stored in the shed. The Court applied *Acey,* noting that the General Assembly has not amended the Code since that decision, thereby demonstrating "approval" of that decision. The Court explained that the fact that some of the ammunition in the defendant's possession did not pair with the firearms found with it does not justify separate convictions for simultaneous possession under the statute in question. The Court distinguished the *Baker* case, acknowledging that separate instances of possession may be punished separately.

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 Code § 18.2-308.2. The Court directed the trial court to vacate the other conviction and sentence under that statute

Justice Bumgardner dissented from the ruling affirming the five convictions for transporting a firearm while subject to five protective orders, arguing that the number of crimes committed by acts of possession or transportation should not depend on whether the forbidden status is defined by a protective order or a felony conviction.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0485182.pdf

Virginia Supreme Court
Unpublished

Guerrant v. Commonwealth: February 11, 2020

Roanoke: Defendant appeals his convictions for Possession of a Firearm and Possession of Ammunition by Felon on Double Jeopardy and sufficiency grounds.

Facts: The defendant, a felon, carried a gun concealed on his person while trying to enter a club. Security officers saw the gun and barred him from entering. They called the police, but the defendant fled in his car at high speed, driving into oncoming traffic. The pursuing officer saw an object being thrown out of the passenger side of the defendant's vehicle; his in-car video captured that as well. The defendant crashed into a house.

Officers did not locate a firearm at the crash scene, but later, officers recovered a loaded handgun from the road along which the defendant had just earlier driven as he was fleeing the police. At trial, an officer testified to finding ammunition in the handgun's magazine. At trial, the two security guards, one of whom was a military veteran, testified that they saw the defendant holding a gun. Both testified that they were familiar with firearms.

At trial, the defendant challenged the sufficiency of the evidence that he possessed the gun, the sufficiency of the evidence that the ammunition in the gun met the statutory definition of "Ammunition," and argued that the trial court could not convict him of possessing both the firearm and the ammunition in the same proceeding.

Held: Affirmed in part, Reversed in part.

The Court agreed that the trier of fact could find that the defendant possessed a firearm. In addition, because the recovered handgun was loaded with a magazine that contained five bullets, the Court agreed that the trial court could reasonably infer that those projectiles described by the officer were in cartridges that contained primer or propellant, thus meeting the statutory definition of "ammunition" in § 18.2-308.2(D). The Court found that, based on the officer's descriptions of the bullets

and the evidence that the bullets were in a magazine and actually loaded in the handgun, a factfinder could reasonably infer that the projectiles were in cartridges that contained primer or propellant.

However, the Court then applied the *Groffel* and *Gregg* cases and again held that it was error for the trial court to impose two convictions and sentences for simultaneous possession of a firearm and possession of ammunition because doing so is a violation of the Double Jeopardy Clause. Therefore, the Court remanded this case to the trial court for the Commonwealth to elect only one conviction and sentence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1446183.pdf

Booth v. Commonwealth: February 4, 2020

Chesterfield: The defendant appeals his conviction for Possession of Ammunition by Felon on sufficiency of the evidence.

Facts: The defendant is a convicted felon. Officers executed a search warrant a residence where the defendant's mother, his brother, and another person were inside. The third party was the person on the lease. Inside a bedroom with two beds, officers found an empty gun holster in the nightstand as well as several boxes containing handgun ammunition of various calibers. Officers also found prescription medication, a valid debit card, and an expired school identification card, each item bearing the defendant's name

At trial, the Commonwealth presented testimony that officers observed a bill in the bedroom with the defendant's name on it; however, the Commonwealth did not introduce the bill itself into evidence or any information concerning its date or address. An officer also testified about finding a paper bag containing prescription medication bearing the defendant's name on top of the dresser. The officer could not recall the date of the medication, which was not admitted into evidence. No one was able to testify that they saw the defendant at the residence, and no testimony or documentary evidence was introduced establishing that he was ever present in the bedroom when the ammunition was there.

Held: Reversed. The Court held that the evidence failed to establish beyond a reasonable doubt that the defendant actually or constructively possessed the ammunition. The Court analogized this case to the *Cordon* case, pointing out that the defendant in this case did not give any statements at all regarding any ownership interest in the bedroom or that he was aware of the ammunition. The Court also noted that the ammunition was discovered in two plastic grocery bags and two boxes which, like the cooler in *Cordon*, were easily portable. The Court distinguished this case from *Hall* and *Shurabaji*.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0532192.pdf

Myers v. Commonwealth: January 2, 2020

Suffolk: Defendant appeals his conviction for Carrying a Concealed Firearm on sufficiency of the evidence.

Facts: The defendant carried a concealed handgun without a permit while driving his vehicle. During a traffic stop, officers discovered the gun in a backpack on the floorboard of the front passenger seat, within arm's reach of where the defendant was seated. At trial, the defendant argued that he was storing it in compliance with the exception contained in § 18.2-308(C)(8), which permits a person to carry a handgun without a permit while it is secured in a container or compartment in a personal, private motor vehicle or vessel.

Held: Affirmed. The Court found that the defendant's concealed handgun in the zipped backpack on the floorboard of the front passenger seat was not in a "secured container or compartment." The Court also agreed that the handgun was about the defendant's person when the defendant was sitting in the driver's seat and the handgun was in a backpack on the floorboard of the front passenger seat next to him. The Court reviewed the *Doulgerakis* and *Hodges* cases and concluded that, although a secured container would include, but would not necessarily be limited to, a gun safe or a carrying case for a firearm, the defendant's backpack clearly did not qualify as a compartment.

The Court also repeated that a firearm is "about the person" when it is "so accessible as to afford prompt and immediate use by the defendant while it was concealed."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1978181.pdf

Trace v. Commonwealth: October 2, 2019

Norfolk: Defendant appeals his conviction for Possession of a Firearm by Felon on sufficiency of the evidence.

Facts: The defendant, a convicted felon, robbed a man at gunpoint. During the robbery, the defendant produced a gun and, at close range, pointed it straight at the victim's chest and stomach. The victim struggled with the defendant and during the fight, the defendant dropped the gun and fled. No one recovered the firearm from the scene.

At trial, the victim testified that the firearm was a Glock handgun, based upon his observations and a comparison of those observations with a friend's Glock pistol. He was able to identify specific physical characteristics of the object he had seen in the defendant's hand which led him to his conclusion. He also described the sound made by the object when it hit the ground as like a "solid object" or a "block or . . . brick" being dropped. On cross-examination, the victim admitted that he did not know whether the object was a real gun or a BB gun.

Held: Affirmed. The Court held that, based upon the victim's identification of a Glock firearm and the defendant's conduct demonstrating an implied assertion that he possessed a firearm, a rational

trier of fact could have found that the defendant, a convicted felon, possessed a firearm when he confronted the victim.

The Court rejected the argument that a witness' familiarity with firearms is required to credit the witness' identification of a firearm. The Court likened this case to *Redd* and *Jordan*. While the Court agreed that the victim's identification alone would be insufficient to sustain a conviction for possession of a firearm by a convicted felon, in this case the Court noted that the victim's identification was corroborated by the defendant's conduct, which was "an implied assertion that the object he held was a firearm," i.e. "the object was a functioning weapon, being in fact the firearm that it appeared to be and possessing the power to kill."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0885181.pdf

Forgery & Uttering

Virginia Court of Appeals
Unpublished

Wilcox v. Commonwealth: April 14, 2020

Suffolk: Defendant appeals her convictions for Uttering on sufficiency of the evidence.

Facts: The defendant's co-conspirator stole checks from the co-conspirator's mother, forged them, and passed them repeatedly, along with another co-conspirator. The defendant was present when they cashed the first and the last fraudulent check. On the last occasion—the only check that was cashed in person—the other co-conspirator seemed unsure and looked to the defendant for help. The defendant guided the entire conversation with the bank teller and assisted in cashing the forged check., Two other fraudulent checks were made payable to the defendant and each was signed with a forged name on the back.

Held: Affirmed. The Court agreed that the evidence sufficiently demonstrated that the defendant took overt acts in furtherance of committing the crime or that she shared in her co-conspirator's criminal intent. The Court also concluded that the totality of the evidence supports the trial court's finding that the defendant was aware that the checks were forged and aware that the co-conspirator was fraudulently cashing them.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0853191.pdf

Gangs

Virginia Court of Appeals
Unpublished

Argueta-Diaz v. Commonwealth: November 5, 2019

Henrico: The defendant appeals his conviction for Gang Recruitment on Fifth Amendment, Expert Testimony, and sufficiency grounds.

Facts: The defendant, an MS-13 member, attacked a student from rival gang at school. Prior to the attack, police had interviewed the defendant about his gang affiliation at the school where the defendant was a student. The only officer in uniform was a school resource officer whose function at the interview was to translate. There was no physical restraint and the officer explained to the defendant "that he was not in trouble in any way, that it is not illegal to be a gang member in the United States." The defendant sat closest to the door and was positioned between the officer and the translator. No one threatened him or drew a weapon during the interview. At the time, the defendant was seventeen years, eight months old.

The defendant admitted that he wanted to fight the victim because he had "something to do with the 18th Street gang." The defendant referred to the drawing on the victim's hand with the Spanish word for 18. The defendant moved to suppress his statement to the police, but the trial court denied the motion.

At trial, an expert for the Commonwealth testified regarding two prior convictions of two previous MS-13 gang members. The defendant challenged the evidence about the prior conviction on the ground that the expert had been on the Gang Task Force for only two years and had not personally worked on the case resulting in the prior conviction. The defendant also argued that the evidence regarding the other prior conviction did not meet the definition of "criminal street gang" under § 18.2-46.1 because his conviction was the "same event" as the first conviction.

At trial, the expert for the Commonwealth testified as an expert on criminal street gang activity and gang culture, particularly the MS-13 gang. He explained how photos of the drawings on the defendant's hands and his name tag, his "grim reaper" shirt, and his Chicago Bulls cap, contained various indicia of MS-13 gang membership. The defendant objected to admission of those photos, but the trial court overruled the objection.

Held: Affirmed. The Court held that the trial court did not err in denying the motion to suppress, admitting the convictions of two MS-13 gang members, admitting evidence that established appellant was a member of MS-13, and finding the evidence sufficient to convict appellant of violating Code §§ 18.2-46.2 and 18.2-46.3:3.

The Court ruled that the defendant was not in custody during the interview. The Court pointed to four factors: First, there was no evidence as to the manner in which the defendant summoned by the police. Second, the interview took place at a more "neutral surrounding" than the police station, and the only officer in uniform was a school resource officer whose function at the interview was to translate.

Third, there was no physical restraint and the officer explained to the defendant "that he was not in trouble in any way." Fourth, the defendant had been free to leave throughout the interview. The Court specifically rejected the notion that *J.D.B*. always requires *Miranda* warnings when the police question a minor.

Regarding the prior convictions, the Court repeated that § 18.2-46.1 does not require that the defendant had been personally involved in the prior convictions. The Court also rejected the argument that a local law enforcement officer must have personal involvement in the investigation or prosecution of any crime committed anywhere in order to testify that the offense was a "predicate criminal act," explaining that such a requirement would violate legislative intent and "defy reason and logic."

The Court agreed that the expert's testimony and the federal conviction orders sufficiently established that both individuals named in the prior conviction orders were MS-13 gang members and had committed the requisite criminal acts. Therefore, the Court concluded that the trial court did not abuse its discretion in admitting the evidence to prove the existence of a "criminal street gang." The Court also agreed that the trial court properly admitted the exhibits used by the expert, finding that the expert's testimony connected the exhibits to the defendant's charges and sufficed to authorize their admission into evidence.

The Court did not gainsay the trial court's conclusion that the defendant was a member of MS-13, pointing to the various exhibits introduced by the Commonwealth and the expert testimony linking them to MS-13 membership. Based on the defendant's own statements, the Court lastly agreed that the assault and battery was shown to be for the benefit of, at the direction of, or in association with the MS-13 gang.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1141182.pdf

Hit & Run

Virginia Supreme Court

Butcher v. Commonwealth: February 27, 2020
Aff'd Pub'd Court of Appeals Opinion of November 6, 2018
Petersburg: Defendant appeals his conviction for Hit & Run on sufficiency of the evidence.

Facts: The defendant, angry with his girlfriend, waited after midnight for her to return home. When she saw him, she started to drive away, but he chased her at high speed chase and ran her off the road. As he approached her in her wrecked vehicle, he was yelling, banging on her car window, and "was in a rage." The victim drove away and escaped, notifying the police. An officer who responded soon after the attack testified that he never received a call from the defendant and that he never was provided the information required by the statute about the crash or the defendant's identity.

After the attack, the defendant called the victim's father on the phone. The defendant offered to pay for half of the damage to the car and expressed a desire to speak with the father about the

defendant's relationship with the victim. He did not provide any of the information required by the statute about the crash or his identity.

At trial, the defendant claimed that, because the victim and her father knew him already, his failure to provide the required information was moot. He argued that the victim made it impossible for him to share his information because she fled the scene. He also argued that the Commonwealth failed to negate the possibility that he contacted some law enforcement officer somewhere.

The Court of Appeals affirmed the conviction. In their opinion, the Court held that, to meet the statutory command in § 46.2-894, the defendant only needed to report forthwith the required information to one person described in the statutory list – i.e. either law enforcement or the victim of the offense.

Held: Affirmed. The Virginia Supreme Court agreed that the trial court, sitting as factfinder, could have reasonably concluded that the defendant had not complied with either of the two reporting requirements in § 46.2-894. However, the Court rejected the Court of Appeals' legal holding that limited the reporting requirements in § 46.2-894 and vacated that portion of the Court of Appeals' opinion. Instead, the Court refused to rule whether the requirements of § 46.2-894 should be read in the conjunctive or disjunctive, simply writing that "the attempt to untangle the language of Code § 46.2-894 involves no easy task and results in no confident consensus."

Justice McCollough filed a concurrence, and Justice Mims both joined it and also filed his own concurrence. Justice McCollough argued that the reporting requirements of § 46.2-894 should be read in the conjunctive, relying on *Banks*, a case that construed the previous version of that statute. Justice Mims, however, also wrote to "further highlight .. a need for urgent legislative action to clarify the statute." Justice Mims was concerned that the two drivers who amicably exchange their information following a minor collision, but who do not notify law enforcement, bear an "unacceptable risk" and are unaware "how easily they may engage in criminal conduct."

Justice Koontz filed a concurrence, in which Justice Powell joined, arguing that the reporting requirements of Code § 46.2-894 should be construed in the disjunctive rather than the conjunctive. Justice Koontz argued that § 46.2-894 permits minor accidents to be resolved by the parties, while assuring that in more serious ones involving injury or death or substantial property damage, the driver is required to notify law enforcement authorities so that possible criminal violations may be investigated and resolved.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1181608.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/0974162.pdf

Flanders v. Commonwealth: February 13, 2020
Aff'd Unpublished Ct. App. Ruling of July 10, 2018
Virginia Beach: The defendant appeals her convictions for Felony Homicide and Hit & Run on Double Jeopardy and sufficiency.

Facts: The defendant struck and killed a man and fled the scene. No witnesses saw the defendant hit the victim with her car. However, a few minutes after someone saw the victim walking by, the defendant drove up and said to witnesses: "it looked like someone had been run over" and "was bleeding to death." Police later found blood on the defendant's bumper, and yellow paint from the curb where he lay on the tires.

The defendant knew the victim well and had some animosity toward him. In fact, the defendant had tried to strike the victim with her car a few days before. The defendant admitted to police that she had been driving the vehicle and said that she "thought that [the victim] was going to make it." The victim's cell phone showed that the victim had called the defendant the morning of the crash.

At trial, the defendant argued that it would be double jeopardy to convict her of both Felony Murder and Hit & Run. The Court of Appeals affirmed, rejecting the defendant's double jeopardy claim. The Virginia Supreme Court accepted the case to consider whether felony hit and run may serve as a predicate offense for a felony-homicide conviction.

Held: Affirmed. The Court held that, because it is possible for felony hit and run to have been committed with malice and for the resulting death to fall within the res gestae of that offense, felony hit and run may serve as a predicate offense for felony homicide upon such facts. The Court concluded that the evidence in this case was sufficient to establish that malice could be implied from the defendant's actions and that the killing fell within the res gestae of that felony.

In this case, the Court noted that the defendant struck the victim, recognized that his injuries were severe enough to endanger his life, and fled the scene without providing aid, thus causing the victim's injuries and subsequent death four hours later. Thus, the Court agreed that the Commonwealth established that the defendant intentionally acted in a manner endangering the victim such that malice could be implied from her conduct, and that the victim's death was sufficiently related to the hit and run in time, place, and causal connection such that it was within the res gestae of the felony hit and run.

However, the Court cautioned that not every hit and run death may be charged as murder. The Court wrote: "Where the accident is unintentional—as is true in the vast majority of felony hit and run cases—it will not support a felony-homicide conviction. A conviction will require the fact finder to find that the defendant intentionally placed the victim in danger such that "the circumstances of the defendant's actions are 'so harmful that the law punishes the act as though malice did in fact exist.'"

In an extensive footnote, the Court criticized the Model Jury Instructions for requiring the Commonwealth to prove that the killing was accidental and that the defendant did not intend to kill. The Court explained: "If the absence of intent was a substantive element, an absurd situation would arise when evidence of the defendant's intent is in equipoise. In that situation, as Professors Bacigal & Lain have pointed out, '[a] regular second-degree conviction could not be had because intent was not proven beyond a reasonable doubt, but a felony homicide conviction could not be had because the absence of intent was not proven beyond a reasonable doubt.'"

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1181228.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/0486171.pdf

Virginia Court of Appeals
Unpublished

Cleaton v. Commonwealth: May 26, 2020

Brunswick: Defendant appeals her conviction for Felony Hit & Run on sufficiency of the evidence.

Facts: The defendant repeatedly assaulted several people with her car, striking another occupied car several times on purpose. Another defendant then drove another car into the group of bystanders, hopping the curb and stopping only after her car hit the apartment building. As a result, multiple bystanders were injured and taken to the hospital, including one bystander who had to be "med-flighted" to a hospital.

After crashing and escaping, the defendant stopped briefly to examine the damage to her car, and then exited the apartment complex and traveled to a nearby street before stopping about 100 yards away. At trial, the Commonwealth did not present any evidence establishing the cost of the property damage to the car that the defendant struck. Instead, the evidence proved that there was more than $1,000 in damage to the apartment building that the other defendant struck.

Held: Reversed. The Court ruled that the evidence was insufficient to establish the statutory $1,000 threshold for damage to property under § 46.2-894. The Court rejected the Commonwealth's argument that the trial court could have relied on the damage to the apartment building caused by the other defendant.

The Court first pointed out that the indictment in this case specifically alleged that the defendant committed felony hit and run with property damage as "the driver of a vehicle," rather than as a principal in the second degree by aiding and abetting the other defendant. Second, the Court explained that, to establish that the defendant acted as a principal in the second degree, the Commonwealth would have to prove that she was present and aided and abetted the other defendant in committing the elements of felony hit and run with respect to the damage caused by the other defendant to the building. However, the Court concluded that the plain language of the statute and the specific language of the indictment require that the defendant have acted as a driver.

The Court rejected the argument that the defendant was "involved" in the other defendant's crash. The Court repeated that, to be "involved" in an accident within the meaning of the hit and run statute, "there must be physical contact between the driver's vehicle and another vehicle, person, or object, or the driver of a motor vehicle must have been a proximate cause of an accident." However, the Court complained that the Commonwealth had not identified specific facts, beyond mere presence, to establish that the defendant was aiding and abetting the other defendant when the other defendant drove into the apartment building.

For example, the Court noted the lack of evidence that the defendant encouraged, countenanced, or otherwise approved of the commission of that crime. The Court also pointed to the

lack of evidence that the defendant somehow proximately caused the other defendant to drive into the building.

Regarding sufficiency for Hit & Run generally, however, the Court repeated that "[t]he hit-and-run statute clearly requires drivers to stop as close to the accident, or point of impact, as safety will permit." The Court pointed out that the defendant briefly stopped at the stop sign exiting the apartment building to check the damage to her car before travelling to the nearby street. The Court agreed that the nearby street where she finally stopped "was not the first safe place to park her car."

Thus, because the evidence sufficiently established every element of the lesser-included offense of misdemeanor hit and run under § 46.2-894, the Court remanded the case for trial under the misdemeanor.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0604192.pdf

McClard v. Commonwealth: December 27, 2019

Prince William: Defendant appeals his convictions for Hit & Run on sufficiency of the evidence.

Facts: The defendant entered the oncoming lane of traffic in an attempt to pass a truck. He side-swiped the truck, veered away from the truck, and continued accelerating in order to pass the truck. He attempted to cut in front of the truck and re-enter his lane of travel to avoid hitting oncoming traffic. Afterwards, he struck another car so forcefully that he pushed it onto the adjoining median. The defendant came to a stop approximately 100 feet away, changed a flat tire, and fled the scene.

At trial, the defendant argued that the facts established only one accident and, therefore, could support only one conviction for hit and run.

Held: Affirmed. The Court agreed that the collisions had separate causations and that there was a sufficient temporal interval between the two collisions. The Court held that for two collisions to constitute separate crashes, it must be true that (1) the collisions had separate causes and (2) there was a sufficient temporal interval between them. In a footnote, the Court explained that a sufficient temporal interval may also be indicative of separate causations, if it afforded the driver the opportunity to regain control of his vehicle and avoid the second collisions.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0009194.pdf

Homicide

Virginia Supreme Court

Watson-Scott v. Commonwealth: December 12, 2019

Aff'd Court of Appeals Ruling of December 4, 2019
835 S.E.2d 902 (2019)
Richmond: The defendant appeals his conviction for Second-Degree Murder on sufficiency of the evidence

Facts: The defendant, while shooting at another person, missed his target and killed a bystander who had been sitting in a car with her children and her mother. A witness saw that, immediately prior to the shooting, the defendant had been walking and talking with another man. The witness did not see anyone else in the area. Minutes later, the witness saw the defendant firing up the street. After the shooting, the witness no longer saw the other man, but heard the defendant curse.

At trial, the defendant argued that the Commonwealth failed to introduce evidence from which it could be inferred that he knew anyone was present in the direction in which he fired his gun. The Court of Appeals affirmed the conviction, applying the concept of "transferred intent."

Held: Affirmed. The Court ruled that the evidence demonstrated implied sufficient malice to support a conviction for second degree murder. Unlike the Court of Appeals, the Supreme Court did not consider the issue of "transferred intent." The Court found that the defendant engaged in an intentional course of wrongful conduct likely to cause death or great bodily harm. The Court observed that "there can be no doubt that intentionally firing multiple shots from a handgun down a city street is unlawful." Further, the Court observed that the defendant had no justification for his actions.

The Court wrote: "It is patently obvious that firing multiple shots from a handgun in the middle of a populous city is the very definition of an action flowing from a 'wicked and corrupt motive, done with an evil mind and purpose and wrongful intention, where the act has been attended with such circumstances as to carry in them the plain indication of a heart regardless of social duty and deliberately bent on mischief.'"

In a footnote, the Court rejected the defendant's argument that malice requires evidence of a cruel act committed by one individual "against another." The Court likened this case to the 1923 *Pierce* case, where the defendant had set up a "spring-gun" in his shop that inadvertently killed a police officer who had been checking on the building.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1190016.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1538172.pdf

Virginia Court of Appeals
Published

Jones v. Commonwealth: November 5, 2019
71 Va. App. 70, 833 S.E.2d 918 (2019)

Portsmouth: Defendant appeals his convictions for Murder and related offenses on denial of jury instructions for Manslaughter and Self Defense.

Facts: The defendant repeatedly shot and killed an unarmed man who had been standing outside of a grocery. A video recording captured the murder. On video, the victim was entirely focused on looking at his cell phone until the defendant shot him. At trial, the defendant testified that he was afraid and that he saw the victim reaching for his waistband. As a result, the defendant testified that he went into his car, got his gun, and shot the victim because he was scared. However, on the video, the victim never reached toward his waistband, did not have a weapon, and apparently was not even aware of the defendant's presence until the defendant shot him.

The victim had allegedly shot the defendant on a previous occasion. Prior to trial, the Commonwealth moved to exclude evidence the defendant sought to introduce to support his self-defense claim. The trial court excluded statements that the victim allegedly made before the incident threatening to shoot the defendant again.

The defendant sought jury instructions for manslaughter and self-defense, but the trial court refused the instructions.

Held: Affirmed. The Court agreed that there was no evidence of heat of passion or reasonable provocation warranting a manslaughter instruction. While the Court agreed that the defendant presented evidence that he acted out of fear, the Court repeated that fear alone is insufficient to show heat of passion. As a matter of law, then, even if the victim had reached toward his waistband and threatened the defendant, these Court ruled that those circumstances would not amount to heat of passion or reasonable provocation.

The Court also agreed that the defendant provoked the difficulty and had a duty to retreat. Because the defendant failed to retreat, he was not entitled to an excusable self-defense instruction.

The Court then found that the trial court's failure to admit the victim's alleged statements was harmless, even though the statement was relevant to the defendant's claim of self-defense. The Court explained that victim's alleged statements, if believed, would have increased the likelihood that the defendant's fear was reasonable. The statements were not offered to show that the victim was going to kill the defendant, the truth of the matter, but merely for its effect on the listener, the defendant, and therefore, the Court concluded that the trial court erred (albeit harmlessly) in finding that the statement was hearsay.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0730181.pdf

Court of Appeals
Unpublished

Glenn v. Commonwealth: April 28, 2020

Augusta: Defendant appeals his conviction for Involuntary Manslaughter on denial of a Jury Instruction on Accident.

Facts: The defendant fatally shot his thirteen-year-old son in the head at their home. The defendant claimed that it was an accident. At trial, the Laura Hollenbeck from DFS explained that it would have taken nearly six pounds of force pulling back on the trigger, as well as disengaging both the including a trigger safety and a grip safety, before the firearm would have discharged. Amy Tharp, the medical examiner, also opined that the physical evidence was inconsistent with the defendant's explanation.

At trial, the parties submitted the Virginia Model Jury Instruction on the various grades of Homicide, which included an instruction on Involuntary Manslaughter. The defendant also requested an instruction that stated:

> "Where the defense is that the killing was an accident, the defense is not required to prove this fact. The burden is on the Commonwealth to prove beyond a reasonable doubt that the killing was not accidental. If after considering all the evidence you have a reasonable doubt whether the killing was accidental or intentional, then you shall find [the defendant] not guilty."

However, the trial court refused the defendant's proposed instruction, noting "you can have an accident where there is a conviction and the way the instruction reads, if there's an accident, it's to be dismissed."

Held: Affirmed. The Court agreed with the trial court's reasoning, finding that it incorrectly stated the applicable law. The Court pointed out, however, that the instruction could have been proper if it specified that the accident defense did not require acquittal in the case of involuntary manslaughter. The Court also agreed that providing the defendant's instruction along with the model Homicide instruction would have confused the jury as the instructions contradicted each other.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0938193.pdf

Felony Murder

Virginia Supreme Court

Flanders v. Commonwealth: February 13, 2020
Aff'd Unpublished Ct. App. Ruling of July 10, 2018
Virginia Beach: The defendant appeals her convictions for Felony Homicide and Hit & Run on Double Jeopardy and sufficiency.

Facts: The defendant struck and killed a man and fled the scene. No witnesses saw the defendant hit the victim with her car. However, a few minutes after someone saw the victim walking by, the defendant drove up and said to witnesses: "it looked like someone had been run over" and "was

bleeding to death." Police later found blood on the defendant's bumper, and yellow paint from the curb where he lay on the tires.

The defendant knew the victim well and had some animosity toward him. In fact, the defendant had tried to strike the victim with her car a few days before. The defendant admitted to police that she had been driving the vehicle and said that she "thought that [the victim] was going to make it." The victim's cell phone showed that the victim had called the defendant the morning of the crash.

At trial, the defendant argued that it would be double jeopardy to convict her of both Felony Murder and Hit & Run. The Court of Appeals affirmed, rejecting the defendant's double jeopardy claim. The Virginia Supreme Court accepted the case to consider whether felony hit and run may serve as a predicate offense for a felony-homicide conviction.

Held: Affirmed. The Court held that, because it is possible for felony hit and run to have been committed with malice and for the resulting death to fall within the res gestae of that offense, felony hit and run may serve as a predicate offense for felony homicide upon such facts. The Court concluded that the evidence in this case was sufficient to establish that malice could be implied from the defendant's actions and that the killing fell within the res gestae of that felony.

In this case, the Court noted that the defendant struck the victim, recognized that his injuries were severe enough to endanger his life, and fled the scene without providing aid, thus causing the victim's injuries and subsequent death four hours later. Thus, the Court agreed that the Commonwealth established that the defendant intentionally acted in a manner endangering the victim such that malice could be implied from her conduct, and that the victim's death was sufficiently related to the hit and run in time, place, and causal connection such that it was within the res gestae of the felony hit and run.

However, the Court cautioned that not every hit and run death may be charged as murder. The Court wrote: "Where the accident is unintentional—as is true in the vast majority of felony hit and run cases—it will not support a felony-homicide conviction. A conviction will require the fact finder to find that the defendant intentionally placed the victim in danger such that "the circumstances of the defendant's actions are 'so harmful that the law punishes the act as though malice did in fact exist.'"

In an extensive footnote, the Court criticized the Model Jury Instructions for requiring the Commonwealth to prove that the killing was accidental and that the defendant did not intend to kill. The Court explained: "If the absence of intent was a substantive element, an absurd situation would arise when evidence of the defendant's intent is in equipoise. In that situation, as Professors Bacigal & Lain have pointed out, '[a] regular second-degree conviction could not be had because intent was not proven beyond a reasonable doubt, but a felony homicide conviction could not be had because the absence of intent was not proven beyond a reasonable doubt.'"

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1181228.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/0486171.pdf

Identity Theft

Virginia Supreme Court

Taylor v. Commonwealth: February 6, 2020
Aff'd unpublished Court of Appeals ruling of December 4, 2018
837 S.E.2d 674 (2020)
Hampton: Defendant appeals her conviction for Attempted Identity Theft on sufficiency of the evidence.

Facts: The defendant used checks belonging to the victim just hours after someone broke into the victim's home and stole the checks. The defendant entered a bank and signed the back of the check with her own name and presented her own identification to the bank teller. However, the bank teller discovered the fraud and contacted the victim and the police. The defendant fled while the police were responding.

The check bore the victim's name, bank account number, and forged signature. The defendant moved to strike, arguing that the General Assembly did not intend for the identity theft statute to apply because she did not misrepresent her identity when attempting to cash the check and therefore the evidence was insufficient as a matter of law to convict her of attempted identity theft. The trial court overruled the motion.

Held: Affirmed. The Court affirmed that one can commit attempted identity theft under § 18.2-186.3 when using his or her own identifying information to obtain money. The Court agreed that the defendant's unauthorized employment of the victim's identifying information, as defined by subsection (C) of the statute (her name and bank account number), with the intent to defraud in an attempt to obtain money, clearly fell within the plain language of the statute.

The Court rejected the defendant's proposed hypothetical situation, where the use of one's name alone, without the authorization or permission from the person who is the subject of the identifying information, to obtain money may violate the statute. The defendant's hypothetical had presented the potential for one, perhaps unwittingly, to commit identity theft under subsection (B) of §18.2-186.3 due to the absence of the requirement in subsection (B) that such unauthorized use also be combined with "the intent to defraud," as is present in subsection (A).

The Court rejected that hypothetical because the facts in this case fell under subsection (A) and not subsection (B). In addition, the Court noted that the defendant's hypothetical did not demonstrate that the statute is patently unworkable or that it yields a manifest absurdity. The Court therefore found that any question that subsection (B) may be susceptible to an application not intended by the General Assembly was not a question before this Court and instead was a question best addressed by and reserved for the General Assembly.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1181684.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1855171.pdf

Interdiction

Fourth Circuit Court of Appeals

Manning v. Caldwell: July 16, 2019
930 F. 3d 264 (2019)
Rev'd Panel Opinion of August 9, 2018
W.D.Va: Plaintiffs seek declaratory and injunctive relief to stop prosecutions against them as "Interdicted" habitual drunkards.

Facts: Plaintiffs, all homeless alcoholics, are "interdicted" persons in Richmond and Roanoke. A Circuit Court declared them all to be "habitual drunkards" and entered orders pursuant to § 4.1-333 prohibiting their possession or consumption of alcohol in their respective jurisdictions. In each case, a circuit court entered the order either *in absentia* or against the plaintiffs without counsel.

The plaintiffs filed a Federal Lawsuit seeking injunctions against two Commonwealth Attorneys from further prosecutions for violation of the Interdiction statute. In particular, they argued:

1. Enforcement of the Interdiction Statute results in cruel and unusual punishment because it punishes the status of being a homeless alcoholic.
2. Enforcement of the Interdiction Statute deprives them of due process because they lack counsel when interdicted, and because the interdiction proceedings do not require evidence beyond a reasonable doubt.
3. The Interdiction Statute is unconstitutionally vague.
4. Enforcement of the Interdiction Statute deprives them of equal protection.

The District Court dismissed the lawsuit on a 12(b)(6) motion for failure to adequately state a claim. A panel of the Fourth Circuit affirmed, writing: "If human behavior is viewed as something over which human beings lack control, and for which they are not responsible, the implications are boundless... For instance, child molesters could challenge their convictions on the basis that their criminal acts were the product of uncontrollable pedophilic urges and therefore beyond the purview of criminal law." The Fourth Circuit granted a rehearing *En Banc.*

Held: Reversed. In an 8 -7 ruling, the full Court held that the challenged Virginia statutory scheme is unconstitutionally vague, and further that, even assuming that the scheme could be limited to those suffering from alcoholism, the plaintiffs have stated an Eighth Amendment claim under both *Robinson* and *Powell*. In so holding, the Court expressly overruled its decision in *Fisher*. Having reinstated the plaintiff's claims, the Court remanded the case to the District Court to proceed to trial.

The Court first concluded that the term "habitual drunkard" as used in Virginia law is so vague as to offer no meaningful standard of conduct and is unconstitutionally vague. The Court applied the void-for-vagueness test, even though an interdiction proceeding is civil, on the grounds that laws that nominally impose only civil consequences warrant a "relatively strict test" for vagueness if the law is "quasi-criminal" and has a stigmatizing effect. The Court wrote: "Police officers, prosecutors, and even

state circuit court judges likely will have differing perceptions regarding what frequency of drunkenness exceeds the necessary threshold for a person to be considered an "habitual drunkard." The Court contrasted the lack of definition for "habitual drunkard" with the term "intoxicated," which is expressly defined in the Code.

The Court then concluded that — even assuming the term "habitual drunkard," as used in Virginia law, could be limited to alcoholics — the plaintiffs have alleged a viable claim for relief under the Eighth Amendment. The Court directed that the plaintiffs should be permitted to prove that the Virginia scheme targets them for special punishment for conduct that is both compelled by their illness and is otherwise lawful for all those of legal drinking age.

The Court adopted Justice White's concurring opinion in *Robinson* to explain its rejection of the distinction between an act and mere status. The Court expressed that the "thin distinction between "hav[ing] an irresistible compulsion" and "yield[ing] to such a compulsion" is not one of constitutional magnitude under *Robinson.*"

In doing so, the Court repeated its 1966 holding in *Driver* that enforcing a criminal public intoxication statute against a "chronic alcoholic" is unconstitutional. In a footnote, the Court indicated that its ruling in *Fisher* incorrectly stated that *Driver* was overruled. The Court favorably cited Justice White's argument that that "chronic alcoholics must drink and hence must drink somewhere," and while many chronic alcoholics "ha[d] homes, many others [did] not." The Court noted that if one could show both "that resisting drunkenness [was] impossible and that avoiding public places when intoxicated [was] also impossible," a statute banning public drunkenness would be unconstitutional as applied to them. In those circumstances, the statute would, in effect, "ban[] a single act for which [homeless alcoholics] may not be convicted under the Eighth Amendment — the act of getting drunk."

The Court wrote: "the many homeless citizens of Virginia who struggle with the effects of alcohol on their mental and physical health are entitled to guidance and fair notice under the law. They have not been given such direction in the current version of this statutory scheme. While necessary changes in the law may not alter the choices that they make or enhance the quality of their life, at least the government will not be compounding their problems by subjecting them to incarceration based on the arbitrary enforcement of ambiguous laws or, at best, the targeted criminalization of their illnesses."

The Court argued that the Eighth Amendment "cannot tolerate the targeted criminalization of otherwise legal behavior that is an involuntary manifestation of an illness." If "Virginia has in the challenged statutory scheme criminalized and punished otherwise legal behavior by them, and that behavior is an involuntary manifestation of their illness, then Virginia has imposed cruel and unusual punishment."

The Court claimed that its ruling will not unduly restrict the broad power of the State to regulate alcohol or drugs within its borders. "A state undoubtedly has the power to prosecute individuals, even those suffering from illnesses, for breaking laws that apply to the general population." The Court denied that its holding creates or supports the notion of a nonvolitional defense against generally applicable crimes. The Court wrote: "our analysis does not call into question substantive criminal laws, like penalties for underage drinking and prohibitions against driving while intoxicated, that do not involve conduct that is an involuntary manifestation of an illness."

The Court also maintained that is ruling will not implicate restrictions imposed after conviction of a crime, where courts may restrict an individual's liberty pursuant to a criminal sentence, and (in

some cases) may continue to do so after his formal sentence has concluded. The Court agreed that courts are entitled in appropriate cases to impose and enforce targeted restrictions as conditions of supervised release, probation, parole, or release from criminal custody, even on persons who suffer from "certain illnesses."

Writing in dissent, Judge Wilkinson sharply criticized the majority's ruling, warning: "The very day that a doctrine of this nature is announced, a court relinquishes control over its course. Many insidious principles seek innocuous entries, and the majority has no control over how its new rule will be applied." Contending that the majority substituted its policy judgments for the Virginia legislature, he wrote: "The majority thinks that because it invokes the word "constitution" it is empowered through that incantation to displace other branches and other levels of government with its own transcendent views of how best to regulate a species of conduct with which it has no expertise and over which it has no authority. Such a malleable constitution; such adjudicative power: Caesar Augustus would be envious."

Full Case At:
http://www.ca4.uscourts.gov/opinions/171320A.P.pdf
Original Panel Opinion At:
http://www.ca4.uscourts.gov/opinions/171320.P.pdf

The following information was provided to CASC by Michael Doucette, VACA Executive Director:

"On October 30, 2019, the United States District Court for the Western District of Virginia issued an order declaring Virginia Code Section 4.1-333, as that statute references the term "habitual drunkard," and Virginia Code Sections 4.1-305 and -322, as those statutes provide for the criminal prosecution of any person on the basis that such person has been interdicted as a "habitual drunkard pursuant to Virginia Code Section 4.1-333 (together, the "challenged statutory scheme"), unconstitutionally vague and thus facially void in violation of the Fifth and Fourteenth Amendments of the United States Constitution. The Court's Final Judgment and Order is consistent with the *en banc* Opinion and Judgment of the Fourth Circuit holding the challenged statutory scheme facially unconstitutional. "
Here is a link to download the District Court's order:
https://www.dropbox.com/s/d3r8ibk55o75f4u/2019%2010%2030%20Final%20Judgment%20and%20Order%20-%20ECF%2067.pdf?dl=0
Here is a link to the Fourth Circuit's *En Banc* Ruling, on which CASC reported in July:
http://www.ca4.uscourts.gov/opinions/171320A.P.pdf

"Also, on September 13, 2019, the Attorney General issued an Official Opinion recommending that Commonwealth's Attorneys undertake certain actions in light of the Fourth Circuit's decision. Along those lines, the District Court's October 30th Order required Defendants to disseminate to all Commonwealth Attorneys the AG Opinion.
Here is a link to that opinion:
https://www.oag.state.va.us/files/opinions/2019/19-048-McEachin-issued.pdf

Larceny

Virginia Court of Appeals
Unpublished

Lindow v. Commonwealth: November 13, 2019

Campbell: The defendant appeals her conviction for Grand Larceny on sufficiency of the evidence.

Facts: The defendant stole jewelry from her terminally ill boyfriend's mother and pawned the jewelry, without the victim's permission. When the victim discovered the offense, the defendant retrieved the jewelry from the pawn shop and returned the pawned items to the victim's mailbox.

At trial, the defendant, a convicted felon, testified that she believed that the victim had loaned the boyfriend the jewelry to be pawned for gas money. However, that testimony contradicted the victim's testimony and the defendant's own prior statement to police. The defendant argued that the evidence failed to prove that she intended to deprive the victim of her property.

Held: Affirmed. The Court repeated that the defendant's actions alone constituted a trespassory taking and thus permitted the trier of fact, absent countervailing evidence, to draw an inference that the defendant intended to permanently deprive the victim of the jewelry. The Court agreed that the defendant's inconsistent explanations provided affirmative evidence of her guilt and that the evidence was sufficient to prove that the defendant took the jewelry with the intent to permanently deprive the victim of the stolen items.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1259183.pdf

Lamp v. Commonwealth: July 16, 2019

Augusta: Defendant appeals his convictions for Burglary and Grand Larceny on sufficiency of the evidence.

Facts: The defendant and his co-defendant broke into a home and stole property. The co-defendant testified against the defendant at trial, explaining how they broke in through a window and stole jewelry and electronics.

At trial, the victim described the items that the defendant stole from her home but she did not testify regarding the value of the stolen items. Although she testified that she received $3,200 for her insurance claim based on the stolen property, she never testified to the current value, purchase price or market value of the stolen items. The co-defendant testified that the defendant sold some of the stolen items for $115.

Held: Affirmed regarding Burglary offense, reversed regarding Grand Larceny offense. Regarding the Burglary offense, the Court found that the co-defendant's testimony was not inherently incredible and it established each element of the offense. However, regarding the Grand Larceny offense, although the Court agreed that testimony established that three pieces of the stolen jewelry had some value, the Court ruled that the evidence failed to establish that the stolen items had a value of $200 or more.

The Court contended that the trial court was required to speculate regarding the method of valuation underlying the insurance claim, as the insurance company may have failed to consider the depreciation of the stolen items, or it may have paid the claim based on the replacement values of the items at issue. The Court pointed out that no "claim of loss" or other document was admitted into evidence showing any of the values that the victim may have placed on the stolen items.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0660183.pdf

Pollard v. Commonwealth: June 18, 2019
Wells v. Commonwealth: June 18, 2019

Appomattox County: Defendants appeal their convictions for Larceny on the single larceny doctrine, and one defendant appeals a conviction for Eluding on venue grounds.

Facts: The defendants and two others showed up at the victims' residence and stole items. Although the occupants initially ejected the defendants and their friends from the house, the thieves forced their way back into the house. Defendant Wells took several items from the living room and put them in a vehicle outside. Defendant Pollard then entered the house and confronted one of the victims in a bedroom. The victim had armed himself with a shotgun, but defendant Pollard and another thief disarmed the victim and stole his shotgun.

After a brief fight, the thieves fled to a vehicle and began to flee. As defendant Wells drove down the driveway, she almost immediately encountered a sheriff's deputy who was responding to a 911 call for help. The officer immediately activated his emergency lights and positioned his vehicle on the road in order to attempt to stop the vehicle. Defendant Wells instead drove onto the grassy shoulder of the road, traveled around the officer's vehicle, and fled at a high rate of speed.

At trial, the victims testified that the home was located in Appomattox County. The officer did not directly describe the roadways where the chase took place as being in Appomattox. However, when asked if the "back roads [were] . . . your typical back roads out in the county," the officer replied, "yes." Defendant Wells argued that the Commonwealth did not establish venue for the Eluding offense, but the trial court disagreed.

At trial, the defendants also argued that they were, at most, guilty of a single larceny offense for all of the items that they stole, under the "single larceny doctrine," as articulated by *Acey.* The trial court rejected that argument and found one distinct larceny occurred when defendant Wells removed electronics from the home, and a second distinct larceny occurred when defendant Pollard took the rifle from the victim in the bedroom

Held: Affirmed. Interpreting the "single larceny doctrine," the Court pointed out that, although the two incidents occurred in the same house, they occurred in different rooms of the house, by different people, and at different times. The Court also observed that each defendant differed in intent; the Court contrasted defendant Wells' intent to steal the items from the living room from defendant Pollard's intent to steal the rifle from the victim in the bedroom.

Regarding venue for defendant Wells' conviction for Eluding, the Court repeated that, as venue is not a substantive element of a crime, the Commonwealth is not required to prove where the crime occurred beyond a reasonable doubt. In this case, the Court pointed to the officer's testimony that he pursued the vehicle on "county" roads. The Court found that that evidence was sufficient to raise a "strong presumption" that defendant Wells' conduct was in Appomattox County and interfered with or endangered the operation of the law-enforcement vehicle or a person.

Full Cases At:
http://www.courts.state.va.us/opinions/opncavwp/1137182.pdf
and
http://www.courts.state.va.us/opinions/opncavwp/0896182.pdf

Obstruction of Justice

Virginia Court of Appeals
Published

Tanner v. Commonwealth: May 5, 2020

Charles City: Defendant appeals his conviction for Felony Obstruction of Justice on Venue and sufficiency grounds.

Facts: The defendant threated to set a woman and her house on fire, throwing gasoline toward her and the house and "flicking" his lighter. Police later arrested the defendant. The Commonwealth charged the defendant with attempted arson. While incarcerated, the defendant called the victim from the jail and told her "not to show up" for court. At trial, nothing in the record established whether the defendant's jail was located in Charles City County. Additionally, no evidence proved where the victim was at the time of the threat.

The trial court rejected the defendant's argument that venue was proper only where the defendant or the victim was located at the time of his telephone call attempting to dissuade her from testifying. The trial court also rejected the defendant's argument that interference with a prosecution for attempted arson was not a crime covered by the felony portion of the obstruction statute.

Held: Affirmed. The Court held that venue was proper in Charles City County, the jurisdiction of the court toward which the defendant directed his efforts to obstruct justice in violation of § 18.2-460(C). Additionally, the Court concluded that the language of the obstruction statute, when considered

in conjunction with the language of the statute that it incorporates by reference, § 17.1-805(C), reflects an intention by the legislature to proscribe "attempt" crimes.

Regarding venue, the Court found that the crime at issue was complete upon the defendant's attempt to intimidate the victim in an effort to obstruct or impede the administration of justice in the circuit court. As a result, the Court concluded the harm occurred in Charles City County, the jurisdiction in which the Commonwealth charged the defendant with the underlying crime (attempted arson), and the same jurisdiction in which the defendant attempted to prevent the victim from appearing in court and testifying against him. The Court noted that the fact that the defendant did not succeed in deterring the victim from testifying in Charles City County was of no import.

The Court directed that, when the crime of obstruction of justice is charged under the second clause of the statute, "knowingly attempting . . . to obstruct or impede the administration of justice in any court," a court considering the charge may reasonably conclude that the "direct and immediate result" occurred where the judicial process was affected. In a footnote, the Court declined to consider whether venue would have been proper in Charles City County under the first clause of Code § 18.2-460(C), to wit: "knowingly attempting to intimidate or impede a witness lawfully engaged in her duty."

The Court then turned to the defendant's argument that the felony obstruction statute does not include attempted crimes. The Court agreed that the incorporation of § 17.1-805(C) without limitation into Code § 18.2-460(C) rendered the scope of the crime of felony obstruction, as it relates to attempted violent felonies, ambiguous when viewed in conjunction with the rest of the language in that statute. However, the Court construed the language in § 18.2-460(C) referring to "the violation of or conspiracy to violate any [incorporated] violent felony offense," without any reference to attempts (crimes that are clearly included in Code § 17.1-805(C)), as a "simple redundancy" with regard to the conspiracy language, rather than an intentional exclusion of attempts.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1706182.pdf

Maldonado v. Commonwealth: July 16, 2019
70 Va. App. 554, 829 S.E.2d 570 (2019)
Northampton: Defendant appeals his conviction for Obstruction of Justice on sufficiency of the evidence.

Facts: The defendant's son drove the defendant's truck while intoxicated, crashed the truck on the side of the road, and then fled, abandoning it. Officers investigated and traced the vehicle back to the defendant, who claimed that someone had stolen it. Later, when officers located the defendant at his house, the defendant lied about his son's whereabouts, claiming that he was not at home when, in fact, he was inside the house. Officers later learned that the defendant had responded to the scene of the crash soon after it happened.

Held: Reversed. The Court agreed that the defendant's evasive answers and behavior frustrated the officers' investigation for a period of time, including when he lied to law enforcement officers concerning his son's presence in his home, thereby delaying his interview for approximately forty

minutes. However, the Court complained that the record did not reflect how this delay constituted a significant impediment to the investigation, nor did it reflect whether the officers informed the defendant that they suspected his son was the driver of the pickup truck or otherwise a suspect in a crime.

The Court contrasted this case with the *Thorne* case, where the defendant had obstructed officers during a lawful traffic stop. In this case, the Court noted that the defendant's conduct did not prevent or impede the officers from performing their duty since their duty to investigate any criminal offense was necessarily circumscribed by the Fourth Amendment's constitutional prohibition against a warrantless entry to a private home without consent or a judicially authorized warrant. Here, the officers had neither.

The Court wrote: "there is no statute or case law that stands for the proposition that lying to law enforcement officers during a consensual encounter, or failing to admit them to one's home on request, constitutes an obstruction of justice offense in the Commonwealth and as noted, to the extent similar actions have been criminalized, it has been done via other statutory offenses that have additional requirements and with which Maldonado was not charged."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0254181.pdf

Virginia Court of Appeals
Unpublished

Gibson v. Commonwealth: July 23, 2019

Alexandria: Defendant appeals her convictions for Contributing and False Report on sufficiency of the evidence.

Facts: During a contentious divorce and custody proceeding, the defendant convinced her five-year-old child to report false allegations that the child's father had sexually abused her to authorities.

The defendant took her daughter to the doctor's office, where the child made a report of sexual abuse by her father. After visiting the doctor, the defendant took her child to the CAC, where the defendant reported to a detective and a CPS investigator that, on the previous day, the child had told her that the father had touched her "private area" during a recent visit. The defendant also informed the detective that she and other family members had asked the child questions about the touching and video recorded parts of these conversations. The defendant provided these recordings to the police. Police found these conversations to be "very leading" and "very suggestive."

During the investigation, police obtained the defendant's phone for forensic examination. During the examination, police located a file that essentially constituted hypnotic instructions to the child, detailing fabricated abuse allegations that the defendant wanted the child to report to authorities. The forensic analyst was able to determine that a file was created a day prior to when the defendant alleged that her child had reported the abuse to her.

Police returned the defendant's phone to her and confronted her about the audio, which she denied she had ever used. She also claimed that she created the file after the child had reported the abuse. Police investigated further, obtaining the defendant's phone again for further forensic examination. A second examination of her phone revealed that several files had been deleted since the previous police examination. According to the forensic analyst, the deleted files included the "hypnosis files" as well as the three video-recorded family interviews that the defendant had provided to the police.

At trial, the detective noted that in the forensic interview, the child kept repeating, "Daddy touches my private part . . . put his finger in my private part," and that these "keywords" were the "exact words" in both the audio file and the forensic interview. The trial court convicted the defendant of Contributing to the Delinquency of a Minor under § 18.2-371(i), False Report of Child Abuse under § 63.2-1513, and False Report to Law Enforcement under § 18.2-461.

Held: Affirmed. Regarding the offense of Contributing to the Delinquency of a Minor, the Court agreed that it was proper to conclude that the defendant hypnotized her child using the audio file found on her cell phone and that her actions caused the child to falsely report sexual abuse, a criminal act under the laws of Virginia.

In a footnote, the Court rejected the defendant's argument that the common law defense of infancy precluded her actions from constituting the crime of contributing to the delinquency of a minor. The Court explained that the fact that the child was not legally culpable of the offense did not negate the fact that she actually carried out the act of making a false report of sexual abuse, a criminal offense in Virginia notwithstanding any legal defense available to her.

Regarding her false report, the Court agreed that § 63.2-1513(A) punishes an individual who either "makes or causes to be made" a false report of child abuse. The Court pointed out that, at the time when the defendant repeated her child's allegation to the detective, she knew that the report was false. Thus, the defendant herself knowingly gave a false report as to the commission of a crime to a law enforcement official with intent to mislead. The Court agreed that was also reasonable to infer that the defendant used the audio file and other methods to help her child provide a full account of the alleged child abuse to authorities.

The Court rejected the defendant's argument that she could not have committed the offense because the child was the one who reported the crime. Instead, the Court observed that the false report to law enforcement was the result of the defendant using her child as her innocent and unwitting agent. Because the defendant engaged in actions which caused the child to commit the crime as an innocent agent of the defendant, the Court agreed that was guilty of giving a false report to law enforcement as a principal in the first degree.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0986184.pdf

Disarming a Police Officer

Virginia Court of Appeals
Unpublished

Salley v. Commonwealth: November 19, 2019

Hampton: Defendant appeals his conviction for Attempted Disarming of a Law Enforcement Officer on sufficiency of the evidence.

Facts: The defendant crashed his vehicle and argued with police. Officers arrested him, but he requested to go to the hospital. When he arrived, he told the arresting officer "fight me, bitch" and tried to grab her firearm from the holster on her hip. After restraining the defendant, the officer accused him of trying to grab her weapon and he responded: "I did grab what you said I grabbed. I'm not going to lie."

At trial, the officer described the item that the defendant grabbed as her "service pistol" and her "state-issued firearm." The officer pointed out her firearm to the trial court, who observed it but did not admit it into evidence. The defendant argued that this evidence was insufficient to prove that the item, in fact, was a firearm as defined in § 18.2-308.1

Held: Affirmed. The Court ruled that the officer's testimony and the trial court's observation of the weapon support the trial court's finding that it was a firearm. In addition, the Court ruled that the defendant's confession and the officer's testimony about the struggle were sufficient to establish that the defendant intentionally grabbed the firearm with the intent to disarm the officer.

Regarding the firearm, the Court refused to define the term "firearm" under § 18.2-57.02. Instead, the Court simply explained that it had "no difficulty allowing trial courts to infer police officers are familiar with their own, department issued, firearms and to know that they are, indeed, firearms."

The Court wrote that, to accept the defendant's argument, "this Court would have to assume that the Hampton Police Department equipped Officer Bohner with something other than a real service pistol and that Officer Bohner, as a sworn law enforcement officer, with the training that entails, was unable to determine that she had been issued a fake firearm. The trial court was not required to accept such a fanciful proposition."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1339181.pdf

False Id to Law Enforcement

Virginia Court of Appeals
Unpublished

Kronemer v. Commonwealth: November 26, 2019

Roanoke: Defendant appeals his conviction for False ID to Law Enforcement on sufficiency of the evidence

Facts: Police responded to a call concerning the defendant, who was trespassing on property. Officers arrived in a marked patrol vehicle and approached the defendant wearing their uniforms and displaying their badges. As the officers approached, the person in charge of the property announced that the defendant was not permitted to be on the property. After accusing the defendant and his female companions of trespassing, officers repeatedly asked the defendant for his identifying information and asked him to stop. When the defendant initially failed to comply, an officer pursued him, repeating commands that he stop and identify himself.

Explaining to the defendant why he needed to stop and identify himself, the officer expressly told the defendant that the officers were investigating a trespassing complaint and that he was a suspect. The defendant provided a false name, date of birth, and address.

At trial, the court rejected the defendant's argument that he was not "lawfully detained" pursuant to § 19.2-82.1 because the encounter with the officers was consensual.

Held: Affirmed. The Court found that, in this case, a reasonable person would have believed that he had been detained and could not refuse to comply with the instructions. The Court concurred that, through words and actions, the officers conveyed the message to the defendant that he was being detained during this investigation and that his compliance was required. Accordingly, the trial court properly found that when the defendant stopped, turned around, and spoke to the officer, he had submitted to the show of authority and had been detained under § 19.2-82.1.

The Court construed the term "detained" in § 19.2-82.1 as having the same meaning that "detained" has in Fourth Amendment jurisprudence. Thus, the Court explained that an individual is "detained" by a law enforcement officer under § 19.2-82.1 when he or she has been "either physically restrained or has submitted to a show of authority" under a brief investigative detention based upon an officer's reasonable suspicion that crime is afoot.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1475183.pdf

Possession of Cellphone by Prisoner

Virginia Court of Appeals
Published

Jordan v. Commonwealth: April 14, 2020

Greensville: Defendant appeals his conviction for Possession of a Cellular Telephone by a Prisoner on sufficiency of the evidence.

Facts: The defendant is a prison inmate. Someone saw him hiding an item in his prison cell. Officers seized it and learned that it was a cellphone. No one tested or forensically examined the phone. At trial, three correctional officers identified it as a cell phone, and one officer testified that it was similar to cell phones he had previously recovered during prison searches. The Commonwealth introduced photographs and the item itself into evidence.

At trial, the defendant argued that there was insufficient evidence that the item seized in his prison cell was a "cellular telephone or other wireless telecommunications device" prohibited by § 18.2-431.1(B).

Held: Affirmed. The Court ruled that the Commonwealth was not required to produce expert testimony to identify the item as a cell phone nor demonstrate functionality or operability. The Court concluded that "actual functionality" is not required under a plain reading of § 18.2-431.1. After considering all the evidence, the Court agreed that the trial court properly concluded that the item seized from the defendant's cell was a cellular telephone prohibited under Code § 18.2-431.1(B).

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0413192.pdf

Probation Violation

U.S. Supreme Court

United States v. Haymond: June 26, 2019
588 U.S. ___ , 139 S. Ct. 2369; 204 L. Ed. 2d 897 (2019)
Certiorari to the 10th Circuit: Defendant appeals the revocation of his probation on Sixth Amendment *Apprendi* grounds.

Facts: After a jury found the defendant guilty of possessing child pornography, the trial court sentenced the defendant to a prison term of 38 months, followed by 10 years of supervised release. While on probation, the defendant possessed additional child pornography.

Under 18 U. S. C. §3583(e)(3), a district judge who finds that a defendant has violated the conditions of his supervised release normally may (but is not required to) impose a new prison term up to the maximum period of supervised release authorized by statute for the defendant's original crime of conviction, subject to certain limits (between zero and two years of incarceration). However, under §3583(k), if a judge finds by a preponderance of the evidence that a defendant on supervised release committed one of several enumerated offenses, including the possession of child pornography, the judge must impose an additional prison term of at least five years and up to life without regard to the length of the prison term authorized for the defendant's initial crime of conviction.

The defendant appealed. The 10th Circuit Court of Appeals ruled that, because this new prison term included a new and higher mandatory minimum resting only on facts found by a judge by a preponderance of the evidence, the court held, the statute violated the defendant's right to trial by jury.

Held: Revocation Reversed. In a divided ruling, four justices ruled that the statute violated the defendant's right to trial by jury. Justice Breyer joined those four justices to agree only that the particular provision at issue, 18 U. S. C. §3583(k), is unconstitutional. The Court remanded the case to the 10th Circuit, though, to craft an appropriate remedy, such an impaneling a jury, before simply declaring the statute unconstitutional.

The plurality noted that traditionally, probation and parole did not implicate the fifth or sixth amendments because the prison sentence a judge or parole board could impose for a parole or probation violation normally could not exceed the remaining balance of the term of imprisonment already authorized by the jury's verdict. The Court repeated that, under *Apprendi*, it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties. Thus, under *Alleyne*, when "a finding of fact alters the legally prescribed punishment so as to aggravate it," that finding must be made by a jury of the defendant's peers beyond a reasonable doubt.

The plurality explained that supervised release punishments arise from and are treated as part of the penalty for the initial offense. In such a case, a defendant receives a term of supervised release thanks to his initial offense, and whether that release is later revoked or sustained, it constitutes a part of the final sentence for his crime. The Court agreed that, as at the initial sentencing hearing, jury does not need to find every fact in a revocation hearing that may affect the judge's exercise of discretion within the range of punishments authorized by the jury's verdict. However, it does mean that a jury must find any facts that trigger a new mandatory minimum prison term.

The plurality cautioned that that its decision was limited to §3583(k) and that its decision did not mean that all supervised release proceedings fail to comport with *Apprendi*. Further, the Court expressed that its opinion would only cover cases that yield a term of imprisonment that exceeds the statutory maximum term of imprisonment the jury has authorized for the original crime of conviction.

Joining the four justices who wrote the plurality opinion, Justice Breyer reasoned that a violation of §3583(k) is less like an ordinary supervised-release revocation and more like punishment for a new offense, to which the jury right would typically attach. However, Justice Breyer did not go as far as the four other justices, reasoning that, because the role of the judge in a typical supervised-release proceeding is consistent with traditional parole and because Congress clearly did not intend the supervised release system to differ from parole in this respect, he would not transplant the *Apprendi* line of cases to the supervised-release context.

Four justices dissented, expressing concern about the "potentially revolutionary implications" of the plurality's opinion, which they found "appears to have been carefully crafted for the purpose of laying the groundwork for later decisions of much broader scope." Writing for the dissent, Justice Alito wrote: "if every supervised-release revocation proceeding is a criminal prosecution, as the plurality suggests, the whole concept of supervised release will come crashing down." "If the Court eventually takes the trip that this opinion proposes, the consequences will be far reaching and unfortunate."

Full Case At:
https://www.supremecourt.gov/opinions/18pdf/17-1672_5hek.pdf

Virginia Supreme Court

Cilwa v. Commonwealth: December 12, 2019
Aff'd Court of Appeals Ruling of June 26, 2018
836 S.E.2d 378 (2019)
Fairfax: Defendant appeals her Probation Revocation on jurisdictional grounds.

Facts: In March 2008, the trial court convicted the defendant of Grand Larceny. In August 2008, the trial court found the defendant in violation of probation, but rather than revoke her suspended sentence, the Court ordered that her probationary period be extended one year to August, 2009. In 2009, the defendant committed a new larceny offense. The defendant wrote a letter to the Court in which she waived counsel and requested that the Court extend her probation indefinitely. In September 2009, the trial court issued an order extending the defendant's probation indefinitely.

The defendant continued to violate probation. As a result, in December 2009 the trial court found the defendant in violation, revoked her suspended sentence, and re-suspended a portion of that sentence "indefinitely in order for [her] to complete residential drug treatment and aftercare." Although she completed a substance abuse treatment program in 2013, the defendant continued to violate probation.

In 2015, the trial court issued a warrant for the defendant's arrest, found her in violation, and revoked her suspended sentence. The trial court rejected the defendant's argument that, because no order extending the probation was entered prior to that date and the court did not provide notice or a hearing before entering the September 2009 order, her probation expired in August 2009. The defendant had also argued that, after she completed substance abuse treatment in 2013, her probation terminated automatically, and she was no longer on probation at the time of her December 2014 arrest.

The Court of Appeals dismissed the defendant's appeal as moot, but the Virginia Supreme Court reversed in an unpublished ruling in light of *Nelson v. Colorado*, as the defendant had a continuing obligation to pay fees, costs, and restitution. The Court of Appeals affirmed the revocation on remand.

[*Note: This case is different from the 2016 probation violation appeal by the same defendant, also from Fairfax*].

Held: Affirmed. The Court ruled that, because the trial court acted within its subject matter jurisdiction when it entered the September 2009 order, the defendant cannot collaterally attack that order as void *ab initio*. Therefore, the trial court did not err by entering later revocation orders predicated on the September 2009 order.

The Court explained that no time limitation in either §§ 19.2-304 or 19.2-306 implicates a court's subject matter jurisdiction to enter uncontested orders extending probation periods before or after their expiration. As a result, the parties are free to extend these deadlines, with the trial court's concurrence, even after their expiration. The Court ruled that a defendant may not rely upon statutory time limitations as a basis for a collateral attack on an earlier agreed-upon order.

The Court also disagreed with the defendant's argument that she extended her probation by forming a contract with the trial court that terminated upon her fulfillment of certain conditions subsequent — namely, the completion of her substance-abuse-treatment program in January 2013. In a footnote, the Court pointed out that claims, such as that a trial court violated Fourth Amendment rights,

misapplied the *Miranda* doctrine, scheduled a trial in violation of his statutory or constitutional speedy trial rights, conducted a bench trial instead of a requested jury trial, or admitted evidence at trial in violation of his right of confrontation, even if conceded to be valid, do not render the underlying judgment void *ab initio*.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180885.pdf
Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/0687154.pdf

Burnham v. Commonwealth: October 31, 2019

Hanover: The defendant appeals the revocation of his probation on jurisdictional grounds.

Facts: In 2008, the trial court convicted the defendant of felony drug possession and misdemeanor driving revoked. The defendant's felony sentence was three years in prison, suspended for a period of ten years. In 2009, based on a probation violation, the trial court revoked the entirety of the suspended sentences and then re-suspended all but sixty days of the possession of cocaine sentence. The court's 2009 order did not fix a period of suspension or a specific period of probation.

For the misdemeanor offense, the original sentencing order imposed a sentence of 90 days, with 80 days suspended for one year, and placed the defendant on supervised probation for a period of one year. In the 2009 order, the court revoked and re-suspended the suspended sentence in its entirety. That order, however, also did not specify a period of suspension or fix a definite period of probation.

In 2015, the defendant was convicted of new felony offenses. The trial court issued a show cause to revoke the felony and misdemeanor suspended sentences. The defendant argued that the court lacked jurisdiction to revoke any portion of his suspended sentence, contending that the 2009 order, by failing to mention a requirement of good behavior, eliminated that requirement altogether.

Held: Affirmed in part, reversed in part. The Court concluded that the trial court could revoke and re-suspend the defendant's felony sentence, but that the trial court erred in doing the same for his misdemeanor conviction.

For the felony offense, the Court held that the requirement of good behavior, implicit in every suspended sentence, does not disappear even if an earlier sentencing order contains an express requirement of good behavior and a subsequent order does not expressly carry over the good behavior requirement. Therefore, once the period of probation ended, the requirement of good behavior remained alongside the suspended sentence. However, the Court acknowledged that "the better practice is to expressly include that language in an order revoking and re-suspending a sentence. An expressly stated condition of good behavior provides additional notice to a defendant and minimizes the risk of confusion."

In this case, the Court agreed that, by committing new crimes, the defendant violated the long-established implicit condition of good behavior, writing: "Committing new felonies qualifies as "good

cause" by any measure." Consequently, the trial court possessed the authority to revoke his previously suspended felony sentence for crimes committed during the period of suspension.

However, regarding the misdemeanor sentence, the Court found that by 2016, the one-year period of suspension had long ended. The Court pointed out that the maximum punishment for driving revoked is one year. Therefore, by operation of § 19.2-306, the trial court could not revoke the misdemeanor portion of the defendant's suspended sentence revoked following its 2016 order to show cause.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1181096.pdf

Virginia Court of Appeals
Published

Jenkins v. Commonwealth: December 17, 2019
71 Va. App. 334, 835 S.E.2d 918 (2019)
Stafford: Defendant appeals his sentence for Probation Revocation on admission of hearsay testimony

Facts: Convicted of fraud, the defendant received a sentence that included twenty years of good behavior and an indefinite period of supervised probation. In 2010, the defendant tested positive for cocaine, committed new offenses, and absconded from probation. The defendant admitted to the violation in 2010 and the trial court revoked and resuspended a portion of the defendant's sentence. The defendant violated probation again in 2018. The defendant admitted to the 2018 violation and the trial court found him in violation. During sentencing, the trial court admitted the 2010 violation letter into evidence, over the defendant's hearsay objection.

Held: Affirmed. The Court held that the trial court properly admitted the 2010 probation violation report into evidence in the sentencing portion of the 2018 revocation proceeding. The Court pointed out that the record, including the fact that the defendant entered a guilty plea to the 2010 violation and that the layers of hearsay in the 2010 report were minimal, established that the report met the some-indicia-of-reliability test required to support the admission of hearsay in a sentencing hearing.

The Court also explained the legal standard for the admission of evidence at a probation violation sentencing hearing. The Court concluded that the standard for admitting hearsay in a revocation proceeding differs depending on whether the evidence is offered in what is essentially the assessment-of-wrongdoing (guilt) phase or the sentencing (penalty) phase. The Court held that the standard for the admissibility of hearsay during what is clearly the sentencing portion of a revocation hearing can be no higher than the standard for a sentencing directly following a criminal conviction, during the penalty phase of a trial. The Court explicitly dodged, however, whether the standards are the same or a lesser standard applies.

The Court ruled that, if the record does not reflect a clear division between the phases of the revocation proceeding, *Henderson* and its progeny set out the proper standard for the admissibility of testimonial hearsay. However, if the record makes clear that the revocation proceeding included a

separate penalty phase and the challenged evidence was considered only in that phase, the Court ruled that the applicable standard can be no higher than the standard for a sentencing directly following a criminal conviction, during the penalty phase of a trial.

The Court found that, although the defendant's 2010 acknowledgment of guilt was not necessarily a concession that he committed all three violations listed in the 2010 report, it was corroborating evidence that he committed at least one of them. The Court pointed out that, even applying the more stringent standard in *Henderson*, the defendant did not offer any evidence in the 2018 proceeding to dispute the contents of the 2010 report, nor did he request a continuance to permit him to do so.

The Court observed that the 2010 report included facts about which the probation officer had at least some personal knowledge and that the report reflects that the remaining evidence was collected by other probation office employees.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1428184.pdf

Lee v. Commonwealth: November 19, 2019
71 Va. App. 205, 834 S.E.2d 525 (2019)
Suffolk: Defendant appeals the revocation of his probation on jurisdictional grounds.

Facts: In January 2014, the trial court sentenced the defendant to multiple terms of incarceration with a portion of those sentences suspended for a period of three years. In its order, it provided that "The defendant shall be of good behavior for a period of three (3) years from the defendant's release from confinement…. The defendant is placed on probation on his release from incarceration, under the supervision of a Probation Officer for a period of three (3) years, or unless sooner released by the court or by the probation officer."

In December 2018, the trial court revoked the suspensions and reimposed a portion of the original sentences to be served. The trial court rejected the defendant's argument that the period of suspension of a suspended sentence must begin running upon the trial court's pronouncement of the suspension.

Held: Affirmed. Addressing the question of when the period of suspension begins to run, the Court found that neither statutory law nor case law supports the defendant's argument that the period of suspension of a suspended sentence must begin running upon pronouncement of the suspension of the sentence – and cannot begin running upon release from incarceration. Instead, reading the trial court's orders, the Court concluded that the trial court clearly intended for the period of suspension to begin upon the defendant's "release from confinement."

The Court found that the *Coffey* case controlled, emphasizing the distinction between a suspended sentence and a period of suspension of a suspended sentence. The Court explained that, while a sentence is suspended immediately upon pronouncement, the actual period of suspension may well begin running at a later time. However, a trial court's imposing of a period of suspension of a suspended sentence that begins upon release from incarceration does not mean that there is no

condition of good behavior until the period of suspension of the suspended sentence actually begins running. The Court distinguished the *Green* case, on which the defendant had relied.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0076191.pdf

Davis v. Commonwealth: October 8, 2019
70 Va. App. 722, 833 S.E.2d 87 (2019)
Sussex: Defendant appeals the revocation of his suspended sentence, alleging the revocation was untimely and on recusal grounds.

Facts: In 1995, the defendant was convicted of malicious wounding and robbery and received consecutive terms of twenty years' imprisonment on each charge, with fourteen years suspended on each charge. In 2006, the defendant murdered a woman; in 2017, the same trial judge convicted him of that offense. A year later, the same trial judge revoked the suspension of the defendant's sentences and imposed the entirety of the remaining twenty-eight years' imprisonment.

The defendant objected to the revocation of the sentence for malicious wounding, arguing it was untimely. The trial court had originally issued two separate sentencing orders in 1995 for the robbery and malicious wounding. Both orders provided that the suspended portion was suspended "for the maximum period required by law." The defendant argued that the default suspension provision applies and a proceeding to revoke the suspension could only be initiated within one year after the maximum potential sentence for malicious wounding, which is twenty years. However, the trial court concluded that—although it issued two sentencing orders—it intended to suspend the execution of both sentences for the maximum time permitted by law, which in this case was life.

The defendant also argued that the trial judge's familiarity with the evidence to be presented allowed his impartiality to "reasonably be questioned."

Held: Affirmed. The Court ruled that the trial court reasonably interpreted its own sentencing order to suspend the defendant's sentence for his entire life. Therefore, the trial court had authority to revoke the suspension of the defendant's sentence for the malicious wounding conviction.

The Court rejected the defendant's argument that the judge should have recused himself, noting that controlling precedent permits a judge to preside over a case despite having knowledge from other judicial proceedings of the defendant and his legal problems.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1193182.pdf

Virginia Court of Appeals
Unpublished

Hobbs v. Commonwealth: May 5, 2020

Suffolk: Defendant appeals his Probation Revocation on Violation of a Plea Agreement

Facts: In 2013, the defendant pled guilty to two offenses of Unauthorized Use of a Vehicle. At the time, the defendant already had approximately twenty-three previous felony convictions. The defendant's 2013 plea agreement provided, in part, that "[t]he Commonwealth will not seek a revocation relating to either conviction for Unauthorized Use of an Automobile." The defendant later violated probation. The defendant argued that this provision prohibited the Commonwealth from seeking to revoke his suspended sentences on the 2013 unauthorized use charges for any future probation violation. The trial court rejected the argument.

Held: Affirmed. The Court ruled that the trial court properly interpreted the plea agreement to allow the Commonwealth to seek prospective probation violations as a result of the defendant's 2013 convictions for unauthorized use of a motor vehicle. The Court examined the plea agreement and concluded that the section about not seeking a revocation related to the defendant's retroactive liability for other charges that he was already on probation for when he pleaded guilty in 2013 to the two unauthorized use charges.

The Court also refused to find any "miscarriage of justice," noting that the defendant had an extensive criminal history, continued to engage in the same criminal behavior for which he was originally sentenced in both 2013 and 2015, and failed to comply with mental health and drug treatment. The Court observed that, after finding that the defendant violated probation, the court was entitled to impose the entirety of the defendant's suspended sentences, if it found it appropriate.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0930191.pdf

McNair v. Commonwealth: February 4, 2020

Stafford: Defendant appeals the revocation of her probation on sufficiency of the evidence.

Facts: The defendant pled guilty to failure to appear, grand larceny, and obtaining money by false pretenses. At sentencing, the trial court sentenced her to two years' and seven months' imprisonment with two years and six months suspended. The trial court permitted to turn herself in later that day to the jail, explaining that she would receive credit for her time already served in jail and that she needed to report to the jail by 4:00 p.m. or the trial court would revoke the suspension of her sentence and the defendant would be required to serve active time:

The defendant never served her time at the jail. The court issued a show cause to revoke her suspended sentence. At the probation violation hearing, the defendant testified that she went to the jail but they directed her to pretrial services, who in turn directed her to probation. Her probation officer and pretrial officer confirmed that the defendant had reported on the day of sentencing. The defendant claimed that she thought she only needed to go for a time served calculation and did not need to actually be incarcerated at all.

The trial court stated it did not know if the defendant was truly confused about whether she completed her obligation to report or not, but "the standard in the Court is not a reasonable mistake, the standard in the Court is that she needed to report to the jail, that's the standard." The trial court found her in violation of the conditions of her probation, revoked the suspension of her sentence, and resuspended all but one month of active incarceration.

Held: Reversed. The Court held that the trial court erred by holding, in effect, that the defendant was strictly liable for her failure to comply with the condition of her probation requiring her to report to the jail. The Court reversed and remanded for reconsideration of the probation violation finding. In the circumstances of this case, the Court directed that the trial court may find the defendant in violation of the condition of her probation, and revoke the suspension of the sentence, only if it finds she willfully failed to report to the jail or her confusion or mistake in failing to report was unreasonable.

The Court observed that it and the Supreme Court have only permitted revocation of the suspension of a sentence in either of two circumstances: 1) the defendant is at fault for violating a condition, or 2) the revocation was to effectively implement a condition of the suspension that a change in circumstances rendered impossible to strictly fulfill. The Court further explained that, although a trial court has the authority to revoke the suspension of a sentence for the purpose of effectuating a condition of the suspension that has—through no fault of the defendant—become impossible to fulfill, it does not otherwise have the authority to find a defendant in violation of probation or revoke the suspension of a sentence without finding the defendant has some culpability with respect to a violated condition.

In a footnote, the Court explained that it need not resolve the exact mental state required to find a defendant culpable in violating a probation condition. The Court repeated that the standard for determining whether there is cause to find a defendant violated a probation condition is "reasonable cause." Thus, the exact mental state required for finding a violation depends on the specific condition violated. For example, the Court pointed out that finding a defendant has violated a restitution condition requires a willful refusal to pay.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0306194.pdf

Ruff v. Commonwealth: January 14, 2020

Portsmouth: The defendant appeals the revocation of his probation on sufficiency grounds.

Facts: The trial court convicted the defendant of larceny by false pretense, placing the defendant on probation and ordering payment of restitution to the victim of $15,398. The trial court did not enter a restitution plan; the law did not require a plan at the time. The defendant made sporadic payments until he lost his job and stopped paying. He made a few more payments after he received a rule to show cause for failure to pay restitution.

At the revocation hearing, the probation officer testified that he did not supervise the defendant, nor had they met previously, and that he had prepared the report and request to show cause

at the request of the Commonwealth. The defendant testified that he had lost his job, at which point he stopped making payments. He testified that he resumed payments shortly after regaining employment.

The trial court found the defendant in violation.

Held: Reversed. The Court ruled that the trial erred, as the defendant had not violated the terms of probation by failing to pay restitution for a conviction for which no restitution was ordered and because the record failed to demonstrate why his payments had been unreasonable based on the terms set forth in his sentencing order. The Court observed "the defendant had no other guidelines as to what was expected of him with respect to payment of restitution: he had not agreed to a payment plan with a probation officer; he did not even have a probation officer to consult."

In a footnote, the Court explained that the Commonwealth could have petitioned to modify the terms of probation to establish a payment plan without a probation violation, and that the circuit court could have also ordered that on its own motion.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1392181.pdf

Kelly v. Commonwealth: September 24, 2019

Accomack: Defendant appeals his revocation of his suspended sentence, arguing that the revocation was untimely.

Facts: In 2008, the trial court sentenced the defendant to ten years' incarceration on each of two counts of grand larceny, to run concurrently, suspending six years. The sentencing order did not provide for a term of supervised probation or impose and suspend a term of post-release supervision. The defendant committed new offenses in 2016 and 2017 and was found guilty of them in 2017. In 2018, the trial court revoked the defendant's previously-suspended sentences. The defendant argued that the revocation was untimely.

[*Note: See above for two other related cases with the same defendant, issued the same day*].

Held: Affirmed. The Court noted that § 19.2-306(A) provides that "a trial court may revoke the suspension for any cause the court deems sufficient that occurred within the maximum period for which the defendant might originally have been sentenced to be imprisoned." The Court then reasoned that the trial court convicted the defendant of grand larceny, for which the maximum punishment is twenty years in prison, and therefore the period during which the trial court could revoke the suspended sentences will expire in 2028. As the defendant committed the new offenses in 2016 and 2017 and was found guilty of them in 2017, the Court concluded that the revocation was well within the applicable twenty-year period.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1076181.pdf

Rape & Sexual Assault

Virginia Supreme Court

Davison v. Commonwealth: December 12, 2019
Aff'd Court of Appeals Opinion of October 22, 2018
Fredericksburg: Defendant appeals his convictions for Forcible Sodomy and Aggravated Sexual Battery on Jury Instruction issues.

Facts: The defendant sexually assaulted a highly intoxicated woman. The trial court gave jury instructions that required the jury to find that the defendant's acts were done against the victim's will by force, or through her physical helplessness, or through her mental incapacity. The defendant objected that the instructions improperly combined the alternative theories of force, mental incapacity, or physical helplessness as the means by which the sexual acts were committed against the victim's will, and therefore the instructions were confusing and could have resulted in a non-unanimous verdict. The trial court overruled the objection. The Court of Appeals affirmed.

Held: Affirmed. The Court simply adopted the Court of Appeals' ruling, noting that the Virginia Supreme Court had left this question open since the 2006 *Molina* case.

The Court of Appeals had explained that the means by which the victim's will was overcome is not an element of the offense that requires unanimity; rather, force, physical helplessness, and mental incapacity present "several possible sets of underlying facts" that determine whether the defendant overcame the victim's will. In this case, the Court of Appeals had noted that the means of force and incapacity were stated in the disjunctive in the instructions, and the jury was told it had to find that the evidence proved "each" of the given elements beyond a reasonable doubt.

As the evidence presented at trial sufficiently supported a finding that the defendant committed both sodomy and aggravated sexual battery against the victim's will by the means of force, her physical helplessness, or her mental incapacity, the Court of Appeals had concluded that the requirement of unanimity was satisfied "because, no matter which theory [the jury] accepted, all the jurors convicted under a theory supported by the evidence and all the jurors convicted the defendant of the same offense."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1181694.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/0633172.pdf

Virginia Court of Appeals
Published

Ferguson v. Commonwealth: February 25, 2020

Pittsylvania: Defendant appeals his conviction for Incest on Due Process grounds.

Facts: The defendant had a sexual relationship with his daughter. The trial court rejected the defendant's argument that § 18.2-366, because it criminalizes incest between a stepfather and his adult stepdaughter, was unconstitutional.

Held: Affirmed. The Court assumed without deciding that § 18.2-366 criminalizes incest between a stepfather and his adult stepdaughter regardless of the age of the stepchild. Even with that assumption, the Court ruled that the statute is not unconstitutional. The Court found that § 18.2-366's prohibition against incest between stepparents and stepchildren is rationally related to the Commonwealth's legitimate state interest in protecting the family unit and the marriage. The Court held that the defendant's sexual relationship with his eighteen-year-old stepdaughter was not protected by the liberty interest recognized in *Lawrence* or *Martin* because it falls into one of the categories of relationships specifically excluded by *Lawrence* – relationships where one party "might be injured or coerced" or "where consent might not easily be refused."

The Court refused to recognize a constitutional right to engage in sexual intercourse with an adult child. The Court observed that this relationship between a thirty-eight-year-old stepfather and his young stepdaughter, who just turned eighteen, was inherently coercive, even if she did just recently attain majority age, because of the influence a stepparent can exert in that role. For the Court, the coercive nature of this relationship distinguished this stepparent-stepchild relationship from the wholly consensual relationship of two adults who hold no sway over each other that was the situation in *Lawrence* and in *Martin*.

The Court also agreed that sexual relationships between stepparents and stepchildren are highly destructive to the stepparent's relationship with his or her spouse and to the maintenance of the broader family unit as a whole. Therefore, the Court concluded that § 18.2-366 is rationally related to a legitimate state interest and, consequently, was constitutional as applied to the defendant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0060193.pdf

Ele v. Commonwealth: July 16, 2019
70 Va. App. 543, 829 S.E.2d 564 (2019)
Newport News: Defendant appeals his convictions for Child Pornography and Indecent Liberties on sufficiency of the evidence.

Facts: The defendant committed a series of crimes, including filming himself masturbating on a nine-year-old child who was his daughter's friend. In the video, the defendant masturbated inches away from the child's face for an extended period of time. He touched her face and her foot with his penis and ejaculated into her hair and on her leg. The child was asleep during the period of time when the defendant was exposing himself to her and remained clothed. At trial, he argued that the evidence

failed to prove that he had created child pornography and failed to prove that he exposed himself to the child.

Held: Affirmed. Regarding the Child Pornography offense, the Court found that the visual material depicted the defendant engaging in sexual activity and had an identifiable minor as the subject. The Court pointed out that § 18.2-374.1 protects minors by criminalizing child exploitation resulting from the production of sexually explicit visual material "which utilizes or has as a subject" a child. However, the Court observed that to require child nudity for a conviction under § 18.2-374.1 would impermissibly rewrite the statute.

Regarding the Indecent Liberties offense, the Court repeated that the crime of Indecent Liberties with a child does not require that the offense occur in public. The Court contrasted exposure under § 18.2-370 from § 18.2-387, the statute prohibiting indecent exposure generally. the offense does not require that the child actually view a defendant's penis. The Court explained that, if there is a "reasonable probability" that a child may see a defendant's penis, the child's "actual perception of such a display" is immaterial. The Court noted that there was a reasonable probability that the child could have awakened and seen the defendant, especially given the defendant's actions.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1602181.pdf

Robinson v. Commonwealth: June 18, 2019 (*En Banc*)
70 Va. App. 509, 828 S.E.2d 269 (2019)
Rev'd Court of App. Ruling of January 15, 2019
Amelia: Defendant appeals his conviction for Sexual Battery on sufficiency of the evidence.

Facts: The defendant assaulted a tenant living in his home, grabbing her breasts right behind her nipples and twisting as hard as he could. The defendant held on to her in that manner for about a minute, according to the victim's sister, who was standing next to her, stunned. The victim told the defendant to "get off of her" and smacked his hands away. At trial, the defendant argued that the evidence was insufficient to prove sexual battery by force, in violation of § 18.2-67.4(A)(i), in light of the *Woodard* case. A panel of the Court of Appeals reversed, ruling that, while the evidence demonstrated that the defendant accomplished the battery "by surprise," it was insufficient to prove he committed sexual abuse by force.

Held: Conviction Affirmed, Panel Reversed. Addressing what constitutes force in the crime of sexual battery, the Court held that it was rational conclude that the defendant accomplished the touching "by force" because not only did he touch or grab the victim's breasts but he also "twisted as hard as he could" – and held on to her in that manner for about a minute.

The Court also examined its ruling in *Johnson*, which the defendant and the panel had cited extensively. The Court noted that in *Johnson*, the touching was accomplished against the will of the complaining witness as the child victim twice got up to try to get away from the defendant. In *Johnson*, the evidence showed that the defendant positioned himself on the bed behind the victim, and the

victim testified that the defendant "woke me up and was holding me real close to him" as the defendant fondled the child victim's genitals. The *en banc* Court concluded that, in that case as well, the sexual abuse performed against the will of the complaining witness was accomplished by force, including the defendant's lying down by the victim on the bed and pulling the victim "real close to him" at the time of the touching of the victim's genitals. Therefore, the *en banc* Court held that *Johnson* was wrongly decided and the Court explicitly overruled it.

Three Judges dissented from the ruling, defending the panel's decision in this case as well as the *Johnson* decision.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1679172.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1679172.pdf

Virginia Court of Appeals
Unpublished

Steggall v. Commonwealth: November 5, 2019

Henrico: The defendant appeals his conviction for Indecent Liberties on Sufficiency of the Evidence.

Facts: The defendant pulled down his pants and exposed himself to a mother and child at a shoe store. The defendant did so while looking at the child's mother. The defendant did not say anything, did not gesture, did not have an erection, and maintained a blank expression. When the child's mother screamed at the defendant, the defendant turned and exited the store. At trial, the defendant argued that the evidence was insufficient to prove that he had lascivious intent.

Held: Reversed. The Court likened this case to *Breeding* and *McKeon* and wrote: "it is clear that something more is required than simple exposure in a public place, which is all that transpired here." Thus, the Court concluded, a reasonable finder of fact could not conclude beyond a reasonable doubt that the defendant possessed lascivious intent. As potential evidence of lascivious intent, the Court pointed to facts of cases like *Simon* and *Viney*, such as: "(1) that the defendant was sexually aroused; (2) that the defendant made gestures toward himself or to the child; (3) that the defendant made improper remarks to the child; or (4) that the defendant asked the child to do something wrong."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1903182.pdf

Sex Trafficking

Virginia Court of Appeals
Published

Lambert v. Commonwealth: October 15, 2019
70 Va. App. 740, 833 S.E.2d 468 (2019)
Chesterfield: Defendant appeals his convictions for Pandering, Possession with Intent to Distribute, and Possession of a Firearm on Admission of Gang Evidence and Limitation of Cross Examination

Facts: The defendant, an armed drug dealer and Bloods member, coerced a woman into prostitution. Police discovered the offense and arrested the defendant, who had tried to escape by fleeing out of his hotel room window. They searched the defendant's hotel room and found drugs, a firearm, and gang-related documents and paraphernalia. At trial, the victim testified that she feared the defendant would beat or kill her if she crossed him, partially because of his gang membership. She understood him tell her that he had underlings in the organization who would do his bidding, and that he might beat her or have her killed if she didn't continue to prostitute herself at his demand.

Over the defendant's objection, an expert testified about gang culture and the intimidation. He explained that the Bloods in the Richmond area engage in narcotics distribution, robberies, witness intimidation, and prostitution. He identified the documents found in the hotel room as a handwritten history of the Bloods which "Blood members are supposed to know" and "also the 31 rules, the gang rules." He also explained how the Bloods used intimidation and violence to keep their members in line.

At trial, the jury learned that the victim had been convicted of felony possession of heroin, that she was a heroin addict, that she still had a suspended sentence hanging over her head, and that she, by her own admission, had been in the hotel room with the drugs. At trial, the defendant sought to introduce evidence that the victim had previously engaged in drug dealing to prove that she was doing so in this instance and needed to lie to throw the blame on the defendant. However, the trial court excluded that evidence.

In addition to the drug and firearm offenses, for which he was convicted, the defendant faced charges of sex trafficking through "force, intimidation, or deception" in violation of § 18.2-357.1(B). The jury convicted appellant of the lesser-included offences of sex trafficking in violation of § 18.2-357.1(A).

[*Great job by Barbara Cooke and Temple Roach, who tried this case. – EJC].*

Held: Affirmed. The Court first agreed that the defendant's membership in the Bloods gang was relevant to establishing his use of intimidation to coerce the victim into commercial sexual transactions. The Court pointed out that, under § 18.2-357.1, the Commonwealth needed to prove that appellant "use[d] . . . intimidation," not just that J.C. was intimidated. In the Court's view, the expert explained how the documents found in the hotel room related to the gang and how intimidation works within the Bloods. In addition, the expert's testimony provided the necessary context to show that the defendant knew that claiming to be a "general" in the Bloods would be intimidating— i.e., that he "use[d] . . . intimidation."

Although there may have been some prejudice inherent in permitting the Commonwealth to introduce evidence of the defendant's membership in the Bloods, the Court found that the evidence

was directly relevant to an essential element of the offense charged. Moreover, the Court noted, the trial court gave a cautionary instruction, one that it presumed the jury followed.

The Court rejected the argument that the Commonwealth could have proved the element in another fashion, repeating that the defendant "does not get to dictate how the Commonwealth presents its case" and "the Commonwealth was not obliged to have faith that the jury would be satisfied with any particular one or more of the items of proof. Therefore, it was entitled to utilize its entire arsenal."

The Court also agreed that trial court did not abuse its discretion in limiting cross-examination of the victim about having dealt drugs before meeting the defendant, because the probative value of that cross-examination was substantially outweighed by the undue prejudicial effect. The Court wrote that this evidence was "the core of what is prohibited by Rule of Evidence 2:404." The Court explained that the danger of unfair prejudice remains high when admitting prior bad act evidence to prove that an individual acted in a similar fashion at a later time. Moreover, evidence that the victim had dealt drugs in the past could "arouse the jury's hostility" against her, potentially confusing the issues properly pending at trial.

Likewise, the Court agreed that the trial court did not abuse its discretion in preventing the defendant from cross-examining the victim about having engaged in prostitution previously because that evidence was irrelevant. The Court expressed concern that introducing evidence of prior commercial sexual activity could confuse the jury into thinking that the Commonwealth needed to prove that the defendant caused the victim to engage in commercial sexual activity for the first time. Instead, the Court emphasized that the question is whether the defendant caused her, through intimidation, to engage in the commercial sex acts at issue.

The Court found that the defendant's argument erroneously assumed that once a woman voluntarily engages in a single commercial sex act, every later commercial sex act is also voluntary. In a footnote, the Court acknowledged that it is not uncommon for victims of sex trafficking to have engaged in commercial sex acts prior to their exploitation and enslavement at the hands of traffickers.

Lastly, the Court agreed that the evidence was sufficient. Although the Court pointed out that the victim's testimony alone was sufficient to support the convictions, the Court also noted that the defendant "provided powerful confirmation he was involved in the sale of the drugs when he jumped out of a third story window" to evade police. The Court rejected the defendant's argument that the victim's testimony was insufficient due to police failure to check for fingerprints, DNA or contents of a computer at the scene.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0773182.pdf

Unauthorized Use of a Vehicle

Virginia Court of Appeals
Published

Otley v. Commonwealth: April 7, 2020

New Kent: The defendant appeals his conviction for Unauthorized Use of a Vehicle on sufficiency of the evidence.

Facts: The victim gave his vehicle to the defendant to repair the brakes. The victim and the defendant did not have any written agreement regarding the repair. The defendant used the victim's vehicle to tow the defendant's personal vehicle dozens of miles away, out of state, and in the process severely damaged the victim's vehicle. When the victim returned to find his own vehicle, he learned that the vehicle was broken down, out of state, and had to be towed back to Virginia. The defendant argued that, since the victim did not place a specific limit on the period of his possession, his use was not unauthorized.

At trial, the victim testified without objection that, as the owner, he thought that the value of the vehicle was $5,000. The defendant also argued that the victim not provide an admissible foundation for his testimony and therefore the evidence of value was insufficient.

Held: Affirmed. The Court found that the victim's consent to let the defendant possess the vehicle to fix the brakes did not extend to allowing the defendant to use the vehicle to tow his own vehicle. The Court explained: "Regardless of whether he did tow it or was simply on the way, permission to use a vehicle for one purpose is not implied consent to take the vehicle to an unknown destination for a purpose not beneficial to the owner and unrelated to the purpose for which possession of the vehicle was given." The Court rejected the defendant's argument that the victim did not place express limitations on the defendant's possession of the vehicle.

Regarding sufficiency of value, the Court emphasized that, as the owner, the victim was qualified to give an estimate of value. Thus, the trial court was permitted to consider the testimony in determining whether the value of the vehicle exceeded the statutory amount.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0556192.pdf

DEFENSES

Claim of Right

Virginia Court of Appeals
Published

Pinedo v. Commonwealth: 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.

Held: Affirmed. The Court agreed that there was not more than a scintilla of evidence of a good faith claim of right to support an instruction to that effect for the jury. The Court held that one cannot have a good faith belief that one has a legal right to recover contraband or the fruits of a crime.

The Court acknowledged that taking property under a bona fide claim of right, as under a claim of ownership, or in a bona fide attempt to enforce payment of a debt, is not robbery, though the taking be accompanied by violence or putting in fear. The Court noted, though, that although the defendant had a subjective belief that he was entitled to reclaim the stolen money, the stolen money was the proceeds of the defendant's illegal drug distribution operation. The Court explained that to instruct the jury on the claim of right defense, when the property sought to be reclaimed was the fruits of criminal transactions, would be to assist the participant in an illegal act in benefitting from their criminal activities.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0515193.pdf

Insanity

Virginia Supreme Court

Schmuhl v. Commonwealth: November 7, 2019 (Unpublished)
Aff'd Court of Appeals Ruling of September 11, 2018
Fairfax: Defendant appeals his convictions for offenses of Abduction, Malicious Wounding, and related offenses on refusal to permit an "involuntary intoxication" defense.

Facts: The defendant and his wife, both attorneys, forced their way into a home belonging to the wife's former managing partner. Using a taser and a firearm, the defendant bound and restrained the partner and his wife, interrogated them about many strange and unrelated topics, and searched the partner's emails. The defendant then cut the man's throat and shot his wife in the head. After stabbing both the victims, the defendant left them for dead and poured gasoline on the floor. However, the victims were able to alert 911 and police responded. The defendant and his wife escaped briefly before police captured them.

Prior to trial, the defendant indicated that he intended to show that he was suffering from "a medication-induced delirium," in order to argue "temporary insanity." The defendant insisted that his notice was "an involuntary intoxication notice . . . not an insanity notice." The trial court, however, ruled that such evidence was not admissible under the defendant's proposed "involuntary intoxication" defense because the defendant did not argue that he was insane and had not complied with the statutory requirements for an insanity plea.

In particular, the trial court did not allow the defendant's expert witness to use words like "delirium," "psychosis," "dissociation," and "delusions." The trial court also redacted statements relating to the defendant's psychiatric history from the defendant's medical records, which were admitted at trial. During argument on jury instructions, the trial court refused the defendant's jury instruction defining and describing "unconsciousness," finding that the instruction on involuntary intoxication adequately covered the defense of unconsciousness. The trial court also refused the defendant's jury instruction defining "intoxication," which the court found to be a word of common usage, and instead permitted the parties to argue the meaning of the word "intoxication" before the jury.

The Court of Appeals affirmed the judgment.

Held: Affirmed. The Court simply issued an order affirming the judgment for the reasons stated in the opinion of the Court of Appeals.

The Court of Appeals had reaffirmed that the Commonwealth's common law history as a M'Naghten jurisdiction and the Supreme Court's holding in Stamper prevent a defendant from offering evidence of his mental state to negate mens rea for an involuntary intoxication defense, unless the defendant properly notifies the Court, as required by statute, that his involuntary intoxication caused him to cross the legal threshold to insanity at the time he committed the offense. In this case, the Court of Appeals had agreed that the defendant was actually offering an insanity defense, despite not following the required statutory procedures for doing so under the Code and despite the defendant's protests to the contrary, when the defendant intended to rely on expert evidence to show his mental state at the time he committed the charged offenses.

The Court of Appeals also had agreed that it was not error to exclude the defendant's proposed jury instruction on "unconsciousness" because the instruction on unconsciousness was an inaccurate statement of the law. For example, it did not indicate that unconsciousness cannot be self-induced by voluntarily taking drugs or medication and it failed to state that unconsciousness is caused by "some voluntary or involuntary agency rendering persons unaware of their acts."

Finally, the Court of Appeals had affirmed the trial court's exclusion of the defendant's proposed jury instruction on the word "intoxication" (and in simply allowing both counsel to argue the meaning of

the word before the jury) because "intoxication" is a word of common usage and there is neither a model jury instruction nor a statute defining the term.

In a footnote, the Court of Appeals had also rejected the defendant's claim that the two Fentanyl patches that he claimed he had been wearing at the time of the offense supported his defense. The Court of Appeals wrote that "given the extraordinary amount of fentanyl that appellant claims was on him at the time of the offenses (and the fact that the amount far exceeded his prescribed dosage), the defense of unconsciousness would simply not be available to appellant, even if he had been unconscious (which the evidence shows he was not), because any supposed unconsciousness would have been self-induced."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1181596.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/1572164.pdf

Self-Defense

Virginia Court of Appeals
Published

Jones v. Commonwealth: November 5, 2019
71 Va. App. 70, 833 S.E.2d 918 (2019)
Portsmouth: Defendant appeals his convictions for Murder and related offenses on denial of jury instructions for Manslaughter and Self Defense.

Facts: The defendant repeatedly shot and killed an unarmed man who had been standing outside of a grocery. A video recording captured the murder. On video, the victim was entirely focused on looking at his cell phone until the defendant shot him. At trial, the defendant testified that he was afraid and that he saw the victim reaching for his waistband. As a result, the defendant testified that he went into his car, got his gun, and shot the victim because he was scared. However, on the video, the victim never reached toward his waistband, did not have a weapon, and apparently was not even aware of the defendant's presence until the defendant shot him.

The victim had allegedly shot the defendant on a previous occasion. Prior to trial, the Commonwealth moved to exclude evidence the defendant sought to introduce to support his self-defense claim. The trial court excluded statements that the victim allegedly made before the incident threatening to shoot the defendant again.

The defendant sought jury instructions for manslaughter and self-defense, but the trial court refused the instructions.

Held: Affirmed. The Court agreed that there was no evidence of heat of passion or reasonable provocation warranting a manslaughter instruction. While the Court agreed that the defendant

presented evidence that he acted out of fear, the Court repeated that fear alone is insufficient to show heat of passion. As a matter of law, then, even if the victim had reached toward his waistband and threatened the defendant, these Court ruled that those circumstances would not amount to heat of passion or reasonable provocation.

The Court also agreed that the defendant provoked the difficulty and had a duty to retreat. Because the defendant failed to retreat, he was not entitled to an excusable self-defense instruction.

The Court then found that the trial court's failure to admit the victim's alleged statements was harmless, even though the statement was relevant to the defendant's claim of self-defense. The Court explained that victim's alleged statements, if believed, would have increased the likelihood that the defendant's fear was reasonable. The statements were not offered to show that the victim was going to kill the defendant, the truth of the matter, but merely for its effect on the listener, the defendant, and therefore, the Court concluded that the trial court erred (albeit harmlessly) in finding that the statement was hearsay.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0730181.pdf

Virginia Court of Appeals
Unpublished

Givens v. Commonwealth: February 11, 2020

Norfolk: Defendant appeals his conviction for Murder and Use of a Firearm on refusal to admit his statement and the victim's prior bad acts and criminal history.

Facts: The defendant ambushed a man, shooting him repeatedly until the man fell to the ground. The defendant then walked up to the man and continued shooting the victim while the victim was laying on the ground until the gun was empty. The defendant confessed to police in a recorded statement, claiming self-defense. In his recorded statement, the defendant described a previous incident in which the defendant claimed that he personally witnessed the victim leave his home, cock his gun, and walk in the direction of a young man. Moments later the defendant heard gunshots, leading him to believe that the victim shot the young man.

At trial, the trial court permitted the defendant to introduce into evidence events and conduct regarding the victim's propensity for violence about which he had first-hand knowledge. However, the trial court did not allow the defendant to introduce the portion of his recorded statement where he claimed that the victim had shot the other young man in the past.

The court also allowed the defendant to admit evidence of most of the victim's prior violent felony convictions. However, the trial court disallowed five convictions from 1991-1996, ruling that they were "too remote" in time. The trial court also excluded the portion of the defendant's recorded statement where he stated that he knew that the victim had been recently released from serving

seventeen years in prison. The trial court ruled that the fact that the victim had recently been released after serving seventeen years in prison was not relevant to the victim's current propensity for violence.

Held: Affirmed. The Court concluded that the trial court did not abuse its discretion either by refusing to allow the entirety of the defendant's recorded statement into evidence, or by refusing to admit into evidence all of the defendant's evidence in support of the victim's alleged propensity for violence, including all of the victim's prior convictions.

The Court first concluded that Virginia Rule of Evidence 2:106 did not mandate that the defendant's entire statement be introduced into evidence after the Commonwealth introduced portions of the statement, because those portions of the recorded statement that were not admitted contained inadmissible hearsay. Because the excluded portions of the statement were not personal observations, the Court found that the defendant had not carried his burden of proving an exception to the hearsay rule to permit admission of the statement in its entirety.

Regarding the victim's past, the Court applied Virginia Rule of Evidence 2:404(a)(2). The Court reaffirmed that a trial court does not abuse its discretion by limiting a victim's charges and convictions entered into evidence to only those charges and convictions that are relevant to a defendant's self-defense claim.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1654181.pdf

Snipes v. Commonwealth: October 8, 2019

Danville: Defendant appeals his conviction for Murder on denial of a Self-Defense instruction

Facts: The defendant had a long-running dispute over the boundary line between his property and the victim's property. The defendant claimed that the victim had been picking on him and harassing him for years. He described how the victim would sic his two dogs on the defendant while the defendant was mowing the grass. Once, the victim and three men waited for the defendant outside of his home and the police had to be called to resolve the dispute. At trial, the defendant testified that he saw the victim carrying and handling guns on several occasions, and he also described hearing gunshots in the alley outside of his house late at night. He never saw the victim shooting in the alley, but he testified that he knew it was the victim from "common sense."

One day, the victim stood on the sidewalk taunting the defendant and laughing at him. The defendant felt threatened, though he did not see a gun or other weapon. The defendant grabbed his rifle from inside his front door while the victim was walking away and toward his own house. When the victim saw the gun, he started walking faster toward his house. The defendant shot the victim as the victim opened the front door of his home.

At trial, the defendant requested a self-defense instruction. The defendant argued that the victim's retreat to his home was a sufficient overt act because the police later located loaded guns near the doorway in the victim's home and he thought the victim was going to get a gun. The trial court refused the instruction, finding there was no evidence to support it.

Held: Affirmed. The Court agreed that there was no evidence of an overt act in the record and that the self-defense instruction was not appropriate. The Court pointed out that the defendant did not know at the time of the shooting that there were loaded weapons in the home and that simply moving towards a location where there may be weapons is not a sufficient overt act to justify homicide.

The Court reaffirmed that generalized fear of the victim is not sufficient to warrant a self-defense instruction. In this case, at the time of the shooting, the Court noted that the evidence demonstrated that the victim was moving away and that the defendant was in a relative position of safety and had the immediate ability to retreat into his home had he felt threatened.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1525183.pdf

EVIDENCE

Authentication

Virginia Court of Appeals
Published

Church v. Commonwealth: November 12, 2019
71 Va. App. 107, 834 S.E.2d 477 (2019)
Richmond: The defendant appeals his conviction for Child Sexual Assault on *Brady* discovery issues and admission of DNA evidence.

Facts: The defendant sexually assaulted his own daughter, who was eleven years old at the time. The Commonwealth disclosed shortly before trial the fact that the victim's stepmother noticed nothing amiss when she checked on the victim upon returning home from work at around midnight on the date of the offense. At trial, the defendant called the stepmother as a defense witness. The trial court denied the defendant's motion to dismiss due to the alleged failure to timely disclose exculpatory evidence.

On the first day of trial, the victim testified that the defendant had made her put her mouth on his penis and threatened her sister; the victim had not made those disclosures before. On the second day of trial, the prosecutor reported that the victim had also newly mentioned that the defendant asked her for sex on the morning after the sexual abuse. The court provided the defendant with the opportunity to cross-examine the victim further regarding the purportedly inconsistent statements, but the defendant did not recall the victim, nor did he request a recess or continuance to review his strategy in light of that information.

The defendant moved to dismiss on this issue as well, arguing that the Commonwealth did not timely reveal the victim's claims that (1) the incidents included oral sex, (2) the defendant had threatened to sexually abuse her sister, and (3) the defendant asked her for sex again the morning after the incident.

A detective had collected a pair of the victim's underwear less than two days after the offenses occurred from a laundry pile with the victim's other clothing that she wore on the night of the assaults. The pair of underwear was the victim's size, and the only other child in the house was the victim's sister, who wore underwear four sizes smaller. An analyst found a mixture of genetic material to which both the defendant and the victim contributed on the crotch of the underwear.

At trial, the victim could not specifically identify the underwear analyzed as the underwear she wore the night of the assault. The defendant challenged the inference that the underwear belonged to the victim or that she wore it on the night of the assaults based on the possibility that the DNA was transferred to the underwear from other clothing in the laundry pile.

Held: Affirmed. The Court held that the alleged late disclosures of evidence did not violate the requirements of *Brady*. The Court noted that, regarding the victim's alleged inconsistent statements, the defendant had the opportunity to make effective use of the evidence of the statements at trial and chose not to do so, and pointed out that he also failed to request a recess or continuance in order to

consider whether his trial strategy should be altered in light of the complete information. Consequently, the Court concluded that no *Brady* violation occurred.

Regarding the stepmother's statements, the Court repeated that evidence is not suppressed for *Brady* purposes when the Commonwealth discloses it in time for effective use by the defense at trial. The Court agreed that, for purposes of a *Brady* analysis, the evidence failed to demonstrate that the Commonwealth suppressed the purportedly inconsistent statements made by the victim or the stepmother's report that she noticed nothing wrong on the night of the offenses.

The Court also held that the victim's inability to identify the underwear was not exculpatory.

The Court also held that the trial court did not err in admitting the underwear and related DNA evidence. The Court concluded that the Commonwealth met its burden of proving by a preponderance of the evidence that the underwear belonged to the victim and was worn by her on the night of the assaults. The Court found that the evidence tended to prove that the victim wore the underwear on the night of the offenses and the defendant's DNA was transferred to her body.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0264182.pdf

Chain of Custody

Virginia Court of Appeals
Unpublished

Warner v. Commonwealth: November 26, 2019

Fairfax: Defendant appeals his conviction for Drug Possession on Fourth Amendment and Chain of Custody grounds.

Facts: Officers observed the defendant weaving and making an un-signaled lane change. Based on his driving behavior, they stopped his vehicle. Upon arriving at the defendant's window to request his driver's license and conduct his investigation regarding a possibly DWI charge, an officer smelled air freshener, which, in his experience, often is used to attempt to mask the smell of illegal drugs. Then, when the officer returned to his cruiser to conduct the type of license and warrant checks, another officer detected the smell of unburnt marijuana.

The officers searched the defendant's car and found drugs. Prior to trial, the defendant moved to suppress the stop. The video of the traffic stop did not record any of the improper driving. During the hearing, the officers admitted that their stop was "pretextual," that is, that they were looking for a reason to stop the defendant in order to investigate possible drug activity. The defendant argued that the scope of the initial stop exceeded what was permissible under *Rodriguez*, and that, since his behavior was not visible on video, the trial court should not believe the officers. The trial court denied the motion.

At trial, the officer who discovered the suspected drugs testified that he handed the drugs to another officer, who placed the case inside a plastic bag and locked the bag inside the police car. Upon returning to the station, the officer unlocked the police car, retrieved the suspected drugs, and delivered them to a third officer, who packaged them in plastic evidence bags, sealed them with tape, initialed the tape, and filled out a state laboratory sheet.

At trial, the property officer identified the drugs and indicated that he did not alter or tamper with the evidence in any way. After he packaged the evidence, he gave it back to the original officer. Later, an evidence technician retrieved the drugs, stored them in a secured evidence locker within the property evidence room. At trial, he testified that he did not tamper with or alter the evidence in any way.

Finally, a narcotics officer transported the items to the DFS lab in Northern Virginia and delivered the items to a receiving technician there. However, the lab ultimately analyzed the drugs in Richmond. At trial, the DFS expert testified that she personally received the evidence bags from an evidence technician in Richmond and identified the drugs at trial. No one testified about the transfer of drugs from Northern Virginia to Richmond.

At trial, the defendant challenged the admission into evidence of the exhibits related to the drugs recovered from his van and the chemical analysis of those drugs. Specifically, the defendant argued that there was no evidence about how the narcotics were transported from the Northern Virginia lab to the Richmond lab where the DFS expert tested the evidence.

Held: Affirmed. The Court first ruled that the length of the stop did not violate the Fourth Amendment. The Court noted that the *Rodriguez* approves of license and wanted checks, and the odor of marijuana gave the officer probable cause independent of the traffic stop to detain the defendant and search both him and his van for marijuana.

Regarding the lack of video evidence, although the Court agreed that the absence of video evidence should be considered by a factfinder and could lead a reasonable factfinder to conclude that the events testified to by the officers did not occur, the Court did not find it dispositive.

Regarding chain of custody, based on the witness testimony and the evidence being in signed and sealed evidence bags at the critical points in the chain, the Court agreed that the trial court reasonably concluded that the Commonwealth had made the necessary showing for the drugs to be admitted into evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0871184.pdf

Closing Argument

Virginia Court of Appeals
Published

Castillo v. Commonwealth: June 4, 2019

70 Va. App. 394, 827 S.E.2d 790 (2019)
Loudoun: Defendant appeals his convictions for Murder, Burglary, and Violation of a Protective Order on grounds including: Joinder/Severance, Refusal to Strike Jurors for Cause, Admission of Cadaver Dog Evidence, Denial of a Mistrial, Closed-Circuit Testimony by a Child, Denial of Cross-Examination, *Brady* and discovery grounds.

Facts: The defendant murdered his wife after she sought a divorce from him and had obtained a protective order. The defendant suffocated her and then set up her body to make it appear that she had killed herself. The protective order had granted the victim the exclusive possession of the marital residence and ordered the defendant to "stay away" from the property. Eight days after the victim's death, the defendant filed a motion to dissolve the divorce. Having survived the victim, the defendant became sole owner of the marital estate, the value of which was estimated at between $2.6 and $3.6 million.

Prior to her death, the victim had plans to travel and to engage in athletic activities. Two of the defendant's friends and his adult son identified the defendant from security footage where he approached the victim's home on the night of her death. Another of the defendant's sons testified that he had seen the defendant in the victim's home the night of the killing. Additionally, the defendant's DNA was identified from bloodstains found in the victim's bedroom and on the victim's sweatshirt after the defendant had been barred from the residence pursuant to a protective order for over a year. The medical examiner opined that the victim was strangled and suffocated and that her death was inconsistent with suicide.

Two weeks after police discovered the victim's body, police used a "cadaver dog" to examine the victim's residence. The cadaver dog, trained to alert to the odor of human decomposition and dried blood, alerted to an area in the victim's bedroom, as well to the bathroom where her body was found. An expert testified that the odor of human decomposition is "very persistent" over time. At trial, the handler testified to the dog's training and experience and his own training and experience working with the dog. He opined that "to a reasonable degree of scientific certainty" that his dog alerted to human decomposition.

Prior to trial, the Court joined the three offenses of Murder, Burglary, and Violation of a Protective Order over the defendant's objection. The Court refused the defendant's motion to sever the Protective Order Violation.

During jury selection, one juror revealed that his neighbor had committed suicide in a manner similar to how the defense alleged the victim had killed herself. That juror affirmed that he would be able to separate his past experience from the current case, stating: "I think I can listen fairly and make a judgment based on what was presented." The trial court denied the defendant's motion to strike the juror for cause.

During the trial, after the jury heard testimony from one of the defendant's children, a juror began "crying to the extent of howling" outside the courtroom and the sheriff had to separate her from other jurors. However, on examination by the trial court, the juror unequivocally stated that she could wait to form an opinion until all the evidence was presented.

Prior to trial, the trial court granted the Commonwealth's motion prohibiting any questioning regarding an investigating deputy's work history. The defendant had sought to cross-examine the

deputy on his employment performance history based on the fact that he had not been re-sworn by the sheriff. However, the evidence was that the sheriff had no issues with respect to the deputy's truthfulness, veracity, or integrity; instead, the new sheriff did not re-swear in the deputy due to the deputy's support for another candidate during the primary campaign for sheriff.

Prior to trial, the trial court granted the Commonwealth's motion to permit one of the children to testify by closed-circuit testimony. The Court rejected the defendant's arguments that § 18.2-67.9 is unconstitutional and that it is limited to child abuse cases only. Based on testimony by the child's clinician, the trial court made specific findings pursuant to § 18.2-67.9. The trial court found that the child would be traumatized, not by the courtroom generally, but by the presence of the defendant and that his emotional distress would be more than mere nervousness or excitement or reluctance to testify.

Prior to trial, the Commonwealth informed the defense of several inconsistent statements that the children made during pre-trial meetings. During the meetings, the Commonwealth had met with the children, along with a Doctor, who took notes and then turned the notes over the Commonwealth. The Commonwealth indicated that the meeting was for witness preparation, not for investigation. The defense moved to examine the notes, but the Commonwealth asserted that the notes were attorney-work product. The trial court denied the defendant's request.

During the trial, the defendant claimed that one of the children made a statement that he had not been aware of. The defendant again demanded to compel the Commonwealth to turn the notes over to counsel. The Commonwealth responded that child's statements were a result of new questions and were not inconsistent with his prior statements. The trial court refused to review the notes *in camera* and refused to order their production.

During the trial, the defendant made two motions for a mistrial, but the trial court denied both. In the first, he complained that during closing argument, the Commonwealth commented that the "greatest part" of the judicial system was the jury's ability to decide the case according to the law, "no matter how many lawyers you have, no matter how many lawyers you pay to sit . . . ," In the second motion for a mistrial, the defendant complained after the Commonwealth's mentioned to the jury that the defendant's alibi notice "gives notice that he 'may' introduce evidence of an alibi, and said: "'May?' Or may not?" The court promptly instructed the jury to disregard the Commonwealth's statement.

The defendant also complained that, during closing argument, the Commonwealth referred to the fact that he had paid his "high-priced" experts. On cross-examination, the Commonwealth had elicited testimony from the defendant's experts on how much they had been paid for their involvement in the case. The trial court found that the statement regarding the experts was "fair argument."

After trial, the defendant moved to set aside the verdict and to dismiss due to government misconduct. He claimed that the Commonwealth had failed to disclose the fact that, in an unrelated case, the deputy who testified in this case wrote an incorrect statement in a report about the other case that he had met with an ACA and she declined prosecution. The defendant argued that the evidence that the deputy had made a false statement on a police report would have damaged his credibility in his trial and thus could have been used as impeachment evidence under Rule 2:607(a)(viii).

Held: Affirmed. In a highly detailed, 66-page opinion, the Court of Appeals examined and rejected each of the defendant's grounds for appeal.

Regarding the issues of joinder and severance, the Court ruled that the charged offenses met the requirement of Rule 3A:6(b) and justice did not require separate trials, and that the joinder requirements of Rule 3A:10(c) were met. Regarding joinder, the Court ruled that the case met Rule 3A:6(b)'s requirements for joinder because all three offenses were clearly "based on the same act or transaction." The Court pointed out that the defendant broke into the victim's house in violation of the protective order with the intent to murder her, he did not leave the residence until he had committed the murder, and each offense took place at the same location and at the same time.

Regarding the defendant's motion to sever the Protective Order Violation, the Court agreed that the protective order would have been admissible in both the Murder and Burglary trials as it was relevant to an issue or element in each of those cases. In the Burglary case, the Court explained that the protective order demonstrated that the defendant acted without authority in entering the home. Thus, the protective order was relevant "to establish guilty knowledge or to negate good faith."

In the Murder case, the Court reasoned that the protective order was admissible to prove the defendant's opportunity to commit the murder. The Court noted that the protective order showed that it was unlikely he had entered the residence prior to the night of the murder, and thus tended to prove that his DNA found in the bedroom was a result of his presence in the victim's bedroom the night of her death. Because the protective order was relevant to show that there was no reasonable explanation for the presence of the defendant's DNA on the victim's clothing and bedding other than his presence in her bedroom on the night of the murder, it served a purpose "other than to show a mere propensity or disposition on the part of the defendant to commit the crime."

Regarding the "cadaver dog" testimony, the Court held that expert testimony relating to a dog's reaction to the odor of human decomposition is admissible after a proper foundation has been laid to show that the handler was qualified to work with the dog and to interpret its responses, that the dog was sufficiently trained in the detection of human decomposition odor, and that the circumstances surrounding the identification were conducive to a dependable scent identification by the animal.

The Court explained that cadaver dog evidence does not require a scientific foundation for its admission; rather, the cadaver dog evidence must be shown to be reliable from experience, which can be met through the testimony of the cadaver dog handler. The Court concluded that it did not need to consider whether the science underlying the expert testimony concerning the cadaver dog evidence was reliable. Instead, it explained that it only needed to determine whether a proper foundation was laid for the admission of the evidence. Thus, as with dog trailing evidence in *Pelletier*, the Court agreed that a trial court may admit cadaver dog evidence without a showing of its precise scientific basis.

In this case, the Court held that the court did not err in admitting the expert testimony regarding the cadaver dog evidence. The Court found that the record contains evidence that the handler was qualified to work with the dog and to interpret his responses. The Court then concluded that the evidence demonstrated that the dog was sufficiently trained in detecting the odor of human decomposition. Finally, the Court agreed that there was evidence showing that the circumstances surrounding the identification were conducive to dependable scent identification by the dog.

Regarding the "cadaver dog" testimony, the also Court observed in a footnote that the handler's opinion was derived from his personal observation of the dog the day of the search and from his prior training with the dog. Thus, the Court concluded that the Commonwealth had provided a proper foundation for the expert testimony and that the evidence did not violate Rule 2:703(b). The Court

explained that the arguments relating to the likelihood that the dog falsely alerted or alerted to a presence other than the victim's body went only to the weight of the evidence, not its admissibility.

Regarding the juror issues, the Court agreed that the trial court properly refused to strike the juror who had given the "I think" statement, finding that the statement was not too equivocal to ensure his impartiality. The Court also agreed that the juror who had become emotional could impartially continue her service on the jury.

Regarding the child's closed-circuit testimony, the Court found that the record supported the trial court's findings. The Court also rejected the argument that § 18.2-67.9 is unconstitutional and found that the trial court complied with *Craig*. The Court specifically rejected the argument the language of *Craig* is limited to child abuse cases.

Regarding the defendant's motions for mistrial, the Court found that the challenged statements in both mistrial motions did not create indelible prejudice against the defendant as to require a new trial. The Court also agreed that the fact that the experts that testified for the defense were paid was a fact in evidence and constituted a proper subject for closing argument.

Regarding the defendant's cross-examination of the deputy, the Court ruled that the trial court did not abuse its discretion by denying the defendant the opportunity to cross-examine the deputy about his employment history because there was no evidence before it that his employment history, or the fact that he was not re-sworn, was relevant to a material issue at trial.

Regarding the deputy's allegedly false statement, the Court ruled that the defendant failed to satisfy the first prong of *Brady* because he did not establish that the evidence would have been favorable to him. Therefore, the Court concluded that no *Brady* violation occurred by virtue of the Commonwealth's failure to disclose the deputy's alleged false statement on the report prior to trial. The Court noted that the defendant attempted to attack the deputy's credibility based upon one specific act of conduct; However, Rule 2:608(b) explicitly limits the application of Rule 2:607(a)(i) by providing that "specific instances of the conduct of a witness" may neither be "used to attack or support credibility" nor "proved by extrinsic evidence," and here the Court pointed out that the alleged false statement in the police report was inadmissible to prove the deputy's general untruthfulness, because even if his statement that he had consulted with the ACA was untrue, it was only a specific act of untruthfulness regarding an extrinsic matter.

Regarding the Doctor's notes on the prosecutor's interviews with the children, the Court ruled that the trial court properly exercised its discretion in declining to review the Dr.'s notes *in camera*. The Court repeated that the mere possibility or speculation that the evidence sought "might contain 'potentially exculpatory evidence' imposes neither a duty of disclosure upon the Commonwealth, nor a duty of inspection in camera by the court.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0140174.pdf

Virginia Court of Appeals
Unpublished

Whitaker v. Commonwealth: December 10, 2019

Portsmouth: Defendant appeals his convictions for Forgery, objecting to Special Grand Jury proceedings and on Closing Argument.

Facts: The defendant, the CEO of a credit union, forged loan documents in someone else's name without that person's permission. The Commonwealth investigated using a special grand jury; the order convening the special grand jury also appointed three law enforcement officers to assist the grand jury. The grand jury returned an indictment against the defendant. It did not issue any written report.

The defendant moved to quash the indictments, arguing that the Commonwealth improperly arranged the appointment of the investigators, instead of permitting the special grand jury to select its own investigators. The defendant also moved to quash on the grounds that the special grand jury failed to issue a written report pursuant to § 19.2-213. The trial court denied the motions.

At trial, the defendant's brother testified. He identified letters were that were signed by the board of the credit union. The defendant was a board member of the credit union as well as its CEO. The letters were addressed to the defendant as Chairperson of the credit union board, and his signature was written above the line designated for the "Board Chairperson." The defendant's brother testified that he was present when the defendant had personally signed loan documents in this case that the Commonwealth admitted into evidence.

In closing argument, the Commonwealth told the jury that it could compare the signature on the defendant's loan documents, a forged signature card, and the letters with the signatures on the forged loan applications. The defendant objected that there was no evidence in the record to establish that any of the documents contained the defendant's genuine signature, but the trial court overruled the objection.

Held: Affirmed. Regarding the special grand jury, assuming without deciding that the trial court erred in granting the special prosecutor's request to appoint the special personnel (thereby allegedly tainting the grand jury's finding of probable cause), the Court concluded that any possible error was cured by the defendant's later trial and the return of that different jury's verdict that the defendant was guilty beyond a reasonable doubt. Regarding the lack of a report, the Court found that the plain language of § 19.2-213 does not contain a requirement that a report be prepared when the special grand jury is impaneled at the request of the Attorney for the Commonwealth.

Regarding the closing argument, the Court ruled that the trial court did not err in allowing the Commonwealth to argue in its closing statement that the jury should compare the defendant's actual signature on his loan documents with the signatures on the documents at issue. The Court found that the defendant's brother's testimony was sufficient to establish that the signature on those documents was actually the defendant's signature. The Court explained that the jury was permitted to compare the handwritten signature on the defendant's loan documents with the handwritten purported signature of the victim on the fraudulently signed documents. Therefore, the Court concluded that the Commonwealth did not argue facts that were not already in evidence.

In a footnote, the Court also rejected the argument that the forged loans were not "to the prejudice" of the victim. The Court noted that the relevant question is whether the forged document

could have prejudiced the victim at the time it was made. Although the loan ultimately was paid off by individuals and entities other than the victim, the Court pointed out that the loans and membership with the credit union could have negatively impacted the victim's financial welfare at the time they were created and while the loans were still outstanding.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1686181.pdf

Cross-Examination

Virginia Court of Appeals
Published

Lambert v. Commonwealth: October 15, 2019
70 Va. App. 740, 833 S.E.2d 468 (2019)
Chesterfield: Defendant appeals his convictions for Pandering, Possession with Intent to Distribute, and Possession of a Firearm on Admission of Gang Evidence and Limitation of Cross Examination

Facts: The defendant, an armed drug dealer and Bloods member, coerced a woman into prostitution. Police discovered the offense and arrested the defendant, who had tried to escape by fleeing out of his hotel room window. They searched the defendant's hotel room and found drugs, a firearm, and gang-related documents and paraphernalia. At trial, the victim testified that she feared the defendant would beat or kill her if she crossed him, partially because of his gang membership. She understood him tell her that he had underlings in the organization who would do his bidding, and that he might beat her or have her killed if she didn't continue to prostitute herself at his demand.

Over the defendant's objection, an expert testified about gang culture and the intimidation. He explained that the Bloods in the Richmond area engage in narcotics distribution, robberies, witness intimidation, and prostitution. He identified the documents found in the hotel room as a handwritten history of the Bloods which "Blood members are supposed to know" and "also the 31 rules, the gang rules." He also explained how the Bloods used intimidation and violence to keep their members in line.

At trial, the jury learned that the victim had been convicted of felony possession of heroin, that she was a heroin addict, that she still had a suspended sentence hanging over her head, and that she, by her own admission, had been in the hotel room with the drugs. At trial, the defendant sought to introduce evidence that the victim had previously engaged in drug dealing to prove that she was doing so in this instance and needed to lie to throw the blame on the defendant. However, the trial court excluded that evidence.

In addition to the drug and firearm offenses, for which he was convicted, the defendant faced charges of sex trafficking through "force, intimidation, or deception" in violation of § 18.2-357.1(B). The jury convicted appellant of the lesser-included offences of sex trafficking in violation of § 18.2-357.1(A).

[*Great job by Barbara Cooke and Temple Roach, who tried this case. – EJC].*

Held: Affirmed. The Court first agreed that the defendant's membership in the Bloods gang was relevant to establishing his use of intimidation to coerce the victim into commercial sexual transactions. The Court pointed out that, under § 18.2-357.1, the Commonwealth needed to prove that appellant "use[d] . . . intimidation," not just that J.C. was intimidated. In the Court's view, the expert explained how the documents found in the hotel room related to the gang and how intimidation works within the Bloods. In addition, the expert's testimony provided the necessary context to show that the defendant knew that claiming to be a "general" in the Bloods would be intimidating— i.e., that he "use[d] . . . intimidation."

Although there may have been some prejudice inherent in permitting the Commonwealth to introduce evidence of the defendant's membership in the Bloods, the Court found that the evidence was directly relevant to an essential element of the offense charged. Moreover, the Court noted, the trial court gave a cautionary instruction, one that it presumed the jury followed.

The Court rejected the argument that the Commonwealth could have proved the element in another fashion, repeating that the defendant "does not get to dictate how the Commonwealth presents its case" and "the Commonwealth was not obliged to have faith that the jury would be satisfied with any particular one or more of the items of proof. Therefore, it was entitled to utilize its entire arsenal."

The Court also agreed that trial court did not abuse its discretion in limiting cross-examination of the victim about having dealt drugs before meeting the defendant, because the probative value of that cross-examination was substantially outweighed by the undue prejudicial effect. The Court wrote that this evidence was "the core of what is prohibited by Rule of Evidence 2:404." The Court explained that the danger of unfair prejudice remains high when admitting prior bad act evidence to prove that an individual acted in a similar fashion at a later time. Moreover, evidence that the victim had dealt drugs in the past could "arouse the jury's hostility" against her, potentially confusing the issues properly pending at trial.

Likewise, the Court agreed that the trial court did not abuse its discretion in preventing the defendant from cross-examining the victim about having engaged in prostitution previously because that evidence was irrelevant. The Court expressed concern that introducing evidence of prior commercial sexual activity could confuse the jury into thinking that the Commonwealth needed to prove that the defendant caused the victim to engage in commercial sexual activity for the first time. Instead, the Court emphasized that the question is whether the defendant caused her, through intimidation, to engage in the commercial sex acts at issue.

The Court found that the defendant's argument erroneously assumed that once a woman voluntarily engages in a single commercial sex act, every later commercial sex act is also voluntary. In a footnote, the Court acknowledged that it is not uncommon for victims of sex trafficking to have engaged in commercial sex acts prior to their exploitation and enslavement at the hands of traffickers.

Lastly, the Court agreed that the evidence was sufficient. Although the Court pointed out that the victim's testimony alone was sufficient to support the convictions, the Court also noted that the defendant "provided powerful confirmation he was involved in the sale of the drugs when he jumped out of a third story window" to evade police. The Court rejected the defendant's argument that the victim's testimony was insufficient due to police failure to check for fingerprints, DNA or contents of a computer at the scene.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0773182.pdf

Castillo v. Commonwealth: June 4, 2019
70 Va. App. 394, 827 S.E.2d 790 (2019)
Loudoun: Defendant appeals his convictions for Murder, Burglary, and Violation of a Protective Order on grounds including: Joinder/Severance, Refusal to Strike Jurors for Cause, Admission of Cadaver Dog Evidence, Denial of a Mistrial, Closed-Circuit Testimony by a Child, Denial of Cross-Examination, *Brady* and discovery grounds.

Facts: The defendant murdered his wife after she sought a divorce from him and had obtained a protective order. The defendant suffocated her and then set up her body to make it appear that she had killed herself. The protective order had granted the victim the exclusive possession of the marital residence and ordered the defendant to "stay away" from the property. Eight days after the victim's death, the defendant filed a motion to dissolve the divorce. Having survived the victim, the defendant became sole owner of the marital estate, the value of which was estimated at between $2.6 and $3.6 million.

Prior to her death, the victim had plans to travel and to engage in athletic activities. Two of the defendant's friends and his adult son identified the defendant from security footage where he approached the victim's home on the night of her death. Another of the defendant's sons testified that he had seen the defendant in the victim's home the night of the killing. Additionally, the defendant's DNA was identified from bloodstains found in the victim's bedroom and on the victim's sweatshirt after the defendant had been barred from the residence pursuant to a protective order for over a year. The medical examiner opined that the victim was strangled and suffocated and that her death was inconsistent with suicide.

Two weeks after police discovered the victim's body, police used a "cadaver dog" to examine the victim's residence. The cadaver dog, trained to alert to the odor of human decomposition and dried blood, alerted to an area in the victim's bedroom, as well to the bathroom where her body was found. An expert testified that the odor of human decomposition is "very persistent" over time. At trial, the handler testified to the dog's training and experience and his own training and experience working with the dog. He opined that "to a reasonable degree of scientific certainty" that his dog alerted to human decomposition.

Prior to trial, the Court joined the three offenses of Murder, Burglary, and Violation of a Protective Order over the defendant's objection. The Court refused the defendant's motion to sever the Protective Order Violation.

During jury selection, one juror revealed that his neighbor had committed suicide in a manner similar to how the defense alleged the victim had killed herself. That juror affirmed that he would be able to separate his past experience from the current case, stating: "I think I can listen fairly and make a judgment based on what was presented." The trial court denied the defendant's motion to strike the juror for cause.

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Prior to trial, the trial court granted the Commonwealth's motion prohibiting any questioning regarding an investigating deputy's work history. The defendant had sought to cross-examine the deputy on his employment performance history based on the fact that he had not been re-sworn by the sheriff. However, the evidence was that the sheriff had no issues with respect to the deputy's truthfulness, veracity, or integrity; instead, the new sheriff did not re-swear in the deputy due to the deputy's support for another candidate during the primary campaign for sheriff.

Prior to trial, the trial court granted the Commonwealth's motion to permit one of the children to testify by closed-circuit testimony. The Court rejected the defendant's arguments that § 18.2-67.9 is unconstitutional and that it is limited to child abuse cases only. Based on testimony by the child's clinician, the trial court made specific findings pursuant to § 18.2-67.9. The trial court found that the child would be traumatized, not by the courtroom generally, but by the presence of the defendant and that his emotional distress would be more than mere nervousness or excitement or reluctance to testify.

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During the trial, the defendant made two motions for a mistrial, but the trial court denied both. In the first, he complained that during closing argument, the Commonwealth commented that the "greatest part" of the judicial system was the jury's ability to decide the case according to the law, "no matter how many lawyers you have, no matter how many lawyers you pay to sit . . . ," In the second motion for a mistrial, the defendant complained after the Commonwealth's mentioned to the jury that the defendant's alibi notice "gives notice that he 'may' introduce evidence of an alibi, and said: "'May?' Or may not?" The court promptly instructed the jury to disregard the Commonwealth's statement.

The defendant also complained that, during closing argument, the Commonwealth referred to the fact that he had paid his "high-priced" experts. On cross-examination, the Commonwealth had elicited testimony from the defendant's experts on how much they had been paid for their involvement in the case. The trial court found that the statement regarding the experts was "fair argument."

After trial, the defendant moved to set aside the verdict and to dismiss due to government misconduct. He claimed that the Commonwealth had failed to disclose the fact that, in an unrelated case, the deputy who testified in this case wrote an incorrect statement in a report about the other case that he had met with an ACA and she declined prosecution. The defendant argued that the evidence

that the deputy had made a false statement on a police report would have damaged his credibility in his trial and thus could have been used as impeachment evidence under Rule 2:607(a)(viii).

Held: Affirmed. In a highly detailed, 66-page opinion, the Court of Appeals examined and rejected each of the defendant's grounds for appeal.

Regarding the issues of joinder and severance, the Court ruled that the charged offenses met the requirement of Rule 3A:6(b) and justice did not require separate trials, and that the joinder requirements of Rule 3A:10(c) were met. Regarding joinder, the Court ruled that the case met Rule 3A:6(b)'s requirements for joinder because all three offenses were clearly "based on the same act or transaction." The Court pointed out that the defendant broke into the victim's house in violation of the protective order with the intent to murder her, he did not leave the residence until he had committed the murder, and each offense took place at the same location and at the same time.

Regarding the defendant's motion to sever the Protective Order Violation, the Court agreed that the protective order would have been admissible in both the Murder and Burglary trials as it was relevant to an issue or element in each of those cases. In the Burglary case, the Court explained that the protective order demonstrated that the defendant acted without authority in entering the home. Thus, the protective order was relevant "to establish guilty knowledge or to negate good faith."

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In this case, the Court held that the court did not err in admitting the expert testimony regarding the cadaver dog evidence. The Court found that the record contains evidence that the handler was qualified to work with the dog and to interpret his responses. The Court then concluded that the evidence demonstrated that the dog was sufficiently trained in detecting the odor of human

decomposition. Finally, the Court agreed that there was evidence showing that the circumstances surrounding the identification were conducive to dependable scent identification by the dog.

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Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/0140174.pdf

Virginia Court of Appeals
Unpublished

Hall v. Commonwealth: July 16, 2019

Alexandria: Defendant appeals his conviction for Rape and Sodomy on Fifth Amendment and Cross-Examination (Rape Shield) grounds.

Facts: The defendant raped the victim at knifepoint after inviting her to his home as an "escort." Although the victim went to the defendant's apartment to have sex with him, the defendant forced himself upon her when she asked for an agreed-upon "donation" of $200. The defendant raped and sodomized her at knifepoint against her will. The next day, the victim reported the assault to the police.

Police obtained a search warrant for the defendant's apartment. They executed it at gunpoint and handcuffed the defendant while officers performed a protective sweep of the premises. After the initial show of force, the police released him, readmitted him to his apartment, and assured him that he was not under arrest. A detective asked whether the defendant would come to the police station to discuss the matter, making clear that the defendant was free to refuse, and was under no obligation to speak to him. The defendant accepted an offer of transportation to the police station, and spoke to the detective in the interview room.

While at the station, the defendant stated that he wished to leave. The detective honored the defendant's request, ended the interview, and left the room to arrange transportation for him. When he returned, the detective executed a search warrant for DNA evidence and, after the detective obtained the sample, the defendant asked about taking a polygraph. The officer explained that could take a while. The conversation resumed and the defendant admitted that he had sex with the victim at knifepoint because he did not want to pay her the "donation."

Prior to trial, the defendant filed a motion to cross-examine the victim about her report of a previous sexual assault several years before. In both the prior attack and this one, the assailant used the same phrase, "this is the way it's going to go." The defendant intended to argue that the victim was not a credible witness because she had twice alleged that an attacker said the same thing to her in the course of committing the offense. The trial court excluded the evidence on "Rape Shield" grounds.

Held: Affirmed. Regarding the *Miranda* issue, the Court found that a reasonable person in the defendant's situation would have believed he was free to leave. The Court noted that there was no evidence of any restraint imposed by the police preventing the defendant from leaving the interview room, his freedom was never restricted to the degree associated with a formal arrest and the police did not prevent the defendant from leaving, either before or after obtaining the DNA sample.

Regarding the Rape Shield issue, the Court ruled that § 18.2-67.7 did not require exclusion of the testimony and the trial court erred in limiting the defendant's cross-examination on the rape shield law ground. The Court repeated that, under *Brown*, evidence of prior testimony by the complainant in an

unrelated rape prosecution when it is "offered to show its substantial similarity for the purpose of testing the credibility of the witness." However, the Court determined beyond a reasonable doubt that there was no reasonable probability that the exclusion of the testimony contributed to the defendant's convictions. Therefore, the error was harmless.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1001184.pdf

Consciousness of Guilt

Virginia Court of Appeals
Unpublished

Powell v. Commonwealth: November 19, 2019

Norfolk: Defendant appeals his conviction for Receiving Stolen Property on sufficiency of the evidence.

Facts: Someone stole a truck from the victim's driveway. Five days later, an officer located the truck with a license plate reader. He tried to stop the defendant, who was driving the truck. The defendant fled from the vehicle, but the officer apprehended him later. The defendant claimed that "he got the vehicle from an old friend name Sean AKA 'Little Sean'" and that he "gave Sean $40 for it" so he could "ride around" for his birthday. At trial, the defendant argued that the evidence was not sufficient to prove that he knew the truck he was operating had been stolen.

Held: Affirmed. In view of the defendant's possession of the recently stolen truck, his "unreasonable" account of events, and his flight from the scene, the Court held that the trial court did not err in finding the evidence sufficient to support the conviction. Agreeing that the defendant's possession of recently stolen goods established a prima facie case, the Court found that the defendant failed to rebut the Commonwealth's prima facie inference of guilty knowledge, pointing out that the defendant failed to provide any identifying information about "Little Sean" other than a first name.

Although the defendant contended that his flight was because he did not have a license and had an outstanding warrant for his arrest, the Court noted that the trial court was free to draw the reasonable inference that his explanation was made falsely in an effort to conceal his guilt

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1548181.pdf

Electronic Evidence

Fourth Circuit Court of Appeals

Hupp v. Cook: July 25, 2019
931 F. 3d 307 (2019)
W.Va.: Plaintiffs appeal the dismissal of their lawsuit against the police for False Arrest and violation of their Fourth Amendment rights.

Facts: State troopers responded to the plaintiff's residence to investigate a complaint from a neighbor that a dog at the plaintiff's residence was "vicious and had killed several of their cats and had chased the children." When a trooper encountered the dog, the dog threatened the officer and the trooper drew his gun. The plaintiff then ran to the trooper, with her arms to her side and her hands empty, after he pulled his gun on the dog.

The parties dispute the facts of what happened next. In particular, they dispute to whether the plaintiff refused to comply with the trooper's orders for her to move or whether she was instead attempting to obey his order to control her dog. There is also a dispute as to whether the plaintiff was cursing at the trooper. The trooper maintains that the plaintiff refused to comply with his orders to "step aside," began cursing at him, "raised her hands towards" him before he grabbed her arm, and then grabbed at him and "began cursing" after he grabbed her arm. The plaintiff and the trooper struggled until the trooper arrested the plaintiff.

The plaintiff's husband recorded the incident with his cell phone from inside the home. As the police arrested the plaintiff, she asked her husband, "Did you get that on video?" He answered, "Don't worry, babe. I've got that shit." The trooper later testified that he understood that statement to mean that the husband "was glad he had" the video and "wouldn't get rid of it for his—his possession of it."

After her husband video-recorded the incident, the state trooper entered the family's home, without consent and without a warrant, and seized several of the family's electronic devices. The trooper testified that his regular practice is to seize any video recording that he believes to contain evidence of a crime he is investigating.

At trial, a jury acquitted her of Obstruction of Justice. The plaintiff, her minor son, and her father-in-law filed suit against the state trooper, asserting various claims, including violations of the Fourth Amendment under 42 U.S.C. § 1983. The district court granted summary judgment to the state trooper and denied the plaintiff's motion for partial summary judgment. Regarding the Fourth Amendment claim, the district court concluded that exigent circumstances justified the search of the home and the seizure of the electronic devices because an objectively reasonable officer would have believed that the family members would destroy or conceal the video evidence before a warrant could be obtained.

Held: Affirmed in part, reversed in part. The Court ruled that the district court erred in granting summary judgment to the trooper on the false arrest, excessive force, malicious prosecution, and unlawful entry and seizure claims. However, the Court agreed that the district court properly denied the plaintiff's summary judgment on the unlawful entry and seizure-of-devices claims.

Regarding the False Arrest claim, the Court concluded that the district court erred in granting summary judgment to the trooper on qualified immunity grounds. The Court pointed out that the plaintiff did not appear to pose an immediate threat to the safety of the officer or others and that there

was disputed evidence of the plaintiff's resistance to arrest. The Court also noted that it had already held that a reasonable officer could not believe that the "initial act of pulling [one's] arm away" when an officer grabs a person without warning or explanation justifies the officer's decision to throw the person to the ground.

Regarding the Malicious Prosecution claims, the Court found that questions of fact exist that must first be resolved before a court can determine that a reasonable officer believed that probable cause existed for the arrest and prosecution. Therefore, the Court ruled that the trooper was not entitled to immunity on the malicious prosecution claim and reversed the district court's grant of summary judgment.

Regarding the Fourth Amendment claim, which was based on the entry into the home and the seizure of devices, the Court expressed concern that the district court's reasoning "would convert exigency from an exception to the rule." Instead, the Court found that the question of whether the trooper's belief that the video was likely to be concealed before a warrant could issue was reasonable under the circumstances must be submitted to a factfinder.

The Court rejected a uniform exigent circumstances exception for all video evidence, writing: "Such a rule would allow officers to seize as a matter of course video-recording devices from not just those involved in an incident, but also from neighbors and other curious bystanders who happen to record the events as they transpire. Under this view, police officers would lawfully be permitted to enter the home of every person living nearby who stands in her doorway or window recording an arrest, to seize her recording device, and to do so without a warrant or her consent—simply because video evidence, by its nature, can be easily deleted."

The Court explained that, while video evidence contained in a cell phone can be easily deleted or concealed, it is not merely the ease with which evidence may be destroyed or concealed that dictates exigency. Instead, an officer must also have reason to believe that the evidence will be destroyed or concealed. In this case, the Court pointed out that the evidence suggested that the level of urgency to obtain the video was not high and there did not appear to have been any danger to the troopers. The Court also complained that there was no evidence regarding the time needed to secure a warrant.

In particular, the Court emphasized that the trooper believed that the plaintiff's husband was glad to have the evidence and would not want to part with it. The Court wrote: "this case is unlike the 'vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, [where] the reason for the destruction is fear that the evidence will fall into the hands of law enforcement.'" Therefore, because the Court could not say as a matter of law that an officer would reasonably have believed that the video evidence would be concealed or destroyed before a warrant for the video's seizure could be obtained, the Court ruled that the trooper was not entitled to qualified immunity on the search and seizure claims.

However, the Court agreed that a jury could nonetheless find that the trooper reasonably believed that the video was at risk of being deleted or concealed. Therefore, the Court declined to find that the trooper's entry into the plaintiffs' home and his seizure of the electronic devices were unreasonable as a matter of law. Instead, the Court remanded the case for a trial to determine whether the trooper's actions were reasonable.

Full Case At:

http://www.ca4.uscourts.gov/opinions/181845.P.pdf

Experts

Virginia Supreme Court

Wakeman v. Commonwealth: March 12, 2020
Aff'd Ct. App. Opinion of November 27, 2018
Shenandoah: Defendant appeals his conviction for rape on admission of SANE expert testimony

Facts: The defendant raped a child. At trial, a forensic nurse, Raymer Balciunas, testified for the Commonwealth as an expert in "sexual assault forensic examination." The nurse had an extensive nursing background and additional education and training regarding the performance of forensic examinations, including completing all of the training necessary to obtain SANE certification. She also had extensive experience, having served in the hospital's forensic nursing program for years.

The defendant objected to her qualification on the grounds that the nurse had never taken the SANE certification examination, and therefore, did not carry the formal certification of a SANE. The trial court overruled the objection. The Court of Appeals affirmed.

Held: Affirmed. In a *per curiam* order, the Supreme Court simply agreed with the Court of Appeals' opinion.

The Court of Appeals had ruled that the expert was qualified to give expert testimony regarding forensic examinations in sexual assault cases. The Court of Appeals had found that Rule 2:702(a) governs whether a nurse should be qualified as an expert on the subject. The Court of Appeals had observed that the nurse possessed relevant expertise and that such expertise stemmed from her "knowledge, skill, experience, training, or education" as required by Virginia Rule of Evidence 2:702(a)(i).

The Court of Appeals had rejected the defendant's argument that there was any special requirement to qualify a SANE nurse, noting that the General Assembly has not enacted any statute regarding the qualifications of nurses to testify as experts about forensic examinations in sexual assault cases.

In a footnote, the Court of Appeals had also pointed out that even if the nurse was not an expert, none of her testimony as a fact witness, including her discussions with the victim, what she observed, and what she did (including the performance of the PERK) would be subject to being stricken.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1181680.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/1631174.pdf

Watson v. Commonwealth: December 12, 2019
835 S.E.2d 906 (2019)

Virginia Beach: The defendant appeals his convictions for Murder, Robbery, and related charges on Admission of Expert Testimony and Jury Instruction issues.

Facts: The defendant, along with a few other men, attacked, shot, and robbed several individuals, killing one of them. After the attack, a witness identified his attackers on a surveillance video, but the defendant's face was obscured on the video. A few days later, the witness identified the assailants in a photo array, but said he was only "eighty-five percent to ninety" percent confident in his identification of the defendant. The witness later identified the defendant at preliminary hearing.

At trial, the defendant sought to introduce expert testimony from Dr. Brian Cutler, an expert in matters concerning eyewitness identifications. The defendant first sought to use the expert's testimony to introduce factors that he believed negatively affected the witness' eyewitness identification and thus reduced his reliability. However, during a proffer, the expert acknowledged that, based on his review of the case materials, he didn't see evidence of "confidence-increasing feedback" and was not aware of any "direct feedback" given to witness. The expert concluded in his report that, without a more explicit and descriptive statement of eyewitness's confidence at the time of the lineup, there was no way of knowing whether "confidence inflation" occurred.

The defendant also sought to introduce the expert's testimony on "unconscious transference", which he explained occurs when a witness mistakenly identifies a familiar person for a perpetrator. However, during the proffer, the expert acknowledged that there was nothing about the photo array process that would increase the likelihood of unconscious transference.

The trial court admitted the expert's testimony regarding the effects of stress on eyewitnesses, eyewitnesses' tendency to focus on weapons, and the attention-dividing effects of multiple perpetrators, but excluded the testimony on unconscious transference, eyewitness confidence, confidence feedback, and confidence inflation. The trial court overruled the defendant's objection that those issues are "highly specialized and counterintuitive," rendering them beyond the jury's common knowledge.

After the close of evidence, the defendant proffered a model jury instruction, Instruction 2.800, on the subject of eyewitness identification testimony. Although he argued that the instruction was an accurate statement of the law and the evidence supported giving it, the trial court refused the instruction. The Court of Appeals denied the appeal in a *per curiam* order.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in excluding the expert's testimony regarding matters of eyewitness confidence because it fell within the jury's common knowledge. The Court acknowledged that the Court of Appeals, in Currie, recognized that unconscious transference is among the narrow circumstances in which expert testimony may be useful to a jury, but noted that, in this case, the expert had acknowledged that there was no indication that unconscious transference occurred and thus the trial court properly excluded the expert testimony regarding unconscious transference as irrelevant.

The Court observed that the defendant had the opportunity to argue the identification issues to the jury in cross-examination and during closing arguments. Thus, even without the expert testimony, the Court concluded that the jury had the opportunity to consider these concepts in evaluating the credibility of the witness' identification testimony and whether his identification was reliable. The Court

also pointed out that the defendant thoroughly cross-examined the witness and in doing so presented the jury with information it could have relied upon to find his testimony implausible.
The Court also held that the trial court properly acted within its discretion in refusing the defendant's proffered jury instruction because the principles of law contained in the proffered instruction were fully and fairly covered by other instructions addressing witness credibility.

Justice McCullough wrote a concurrence to "highlight the need for thoughtful consideration of expert testimony and/or jury instructions with respect to eyewitness testimony" and commended the "rigor and thoughtfulness by the trial judge in handling the issue" in this case.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1181569.pdf

Virginia Court of Appeals
Published

Murray v. Commonwealth: January 14, 2020
71 Va. App. 449, 837 S.E.2d 85 (2020)
Hampton: Defendant appeals her conviction for Possession of a Firearm by Felon on admission of expert testimony, refusal to admit her statement, and sufficiency of the evidence.

Facts: The defendant, a convicted felon, carried a firearm in her car in a backpack. When police stopped her for a traffic violation, she fled on foot. While she ran, she dropped a loaded magazine compatible with the firearm found in the vehicle she was driving. She later told police that she knew that the firearm was in the vehicle, but claimed that she was returning the gun to its original owner.

At trial, the officer testified that the gun he found was "designed to propel a missile by an action of explosion by any combustible." The defendant objected, arguing that the officer's opinion about the design and operability of the firearm was inadmissible expert testimony, but the trial court overruled the objection.

At trial, another officer also testified that the defendant stated that she knew there was a gun in the backpack. The defendant requested that the trial court admit the defendant's entire statement under Rule 2:106(a), arguing that "the jury deserves to hear all [of] these things." However, the defendant did not proffer the contents of the video she sought to introduce and the trial court denied the request.

Held: Affirmed. Regarding the officer's firearm testimony, the Court found that the officer was not required to be qualified as an expert in order to testify about the nature of the weapon he discovered because his opinion was a valid lay opinion under Rule 2:701. The Court explained "Given a general constitutional right to keep and bear them, firearms are generally not so exotic that it requires extensive or specialized expertise for a great many lay persons with familiarity with them to correctly identify a firearm as such."

The Court then rejected the defendant's complaint regarding the trial court's refusal to admit her statement under Rule 2:106(a). The Court found that her proffer of the remainder of her statement

was inadequate to determine whether it was admissible under the doctrine of completeness, memorialized as Rule 2:106(a), or whether, under that rule, "such additional portions are inadmissible under the Rules of Evidence." For example, the Court agreed that the defendant's statement that she was returning the gun to its original owner would be an irrelevant explanation of her motive for illegally exercising dominion and control over the firearm.

The Court also agreed that the evidence was sufficient.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1226181.pdf

Castillo v. Commonwealth: June 4, 2019
70 Va. App. 394, 827 S.E.2d 790 (2019)
Loudoun: Defendant appeals his convictions for Murder, Burglary, and Violation of a Protective Order on grounds including: Joinder/Severance, Refusal to Strike Jurors for Cause, Admission of Cadaver Dog Evidence, Denial of a Mistrial, Closed-Circuit Testimony by a Child, Denial of Cross-Examination, *Brady* and discovery grounds.

Facts: The defendant murdered his wife after she sought a divorce from him and had obtained a protective order. The defendant suffocated her and then set up her body to make it appear that she had killed herself. The protective order had granted the victim the exclusive possession of the marital residence and ordered the defendant to "stay away" from the property. Eight days after the victim's death, the defendant filed a motion to dissolve the divorce. Having survived the victim, the defendant became sole owner of the marital estate, the value of which was estimated at between $2.6 and $3.6 million.

Prior to her death, the victim had plans to travel and to engage in athletic activities. Two of the defendant's friends and his adult son identified the defendant from security footage where he approached the victim's home on the night of her death. Another of the defendant's sons testified that he had seen the defendant in the victim's home the night of the killing. Additionally, the defendant's DNA was identified from bloodstains found in the victim's bedroom and on the victim's sweatshirt after the defendant had been barred from the residence pursuant to a protective order for over a year. The medical examiner opined that the victim was strangled and suffocated and that her death was inconsistent with suicide.

Two weeks after police discovered the victim's body, police used a "cadaver dog" to examine the victim's residence. The cadaver dog, trained to alert to the odor of human decomposition and dried blood, alerted to an area in the victim's bedroom, as well to the bathroom where her body was found. An expert testified that the odor of human decomposition is "very persistent" over time. At trial, the handler testified to the dog's training and experience and his own training and experience working with the dog. He opined that "to a reasonable degree of scientific certainty" that his dog alerted to human decomposition.

Prior to trial, the Court joined the three offenses of Murder, Burglary, and Violation of a Protective Order over the defendant's objection. The Court refused the defendant's motion to sever the Protective Order Violation.

During jury selection, one juror revealed that his neighbor had committed suicide in a manner similar to how the defense alleged the victim had killed herself. That juror affirmed that he would be able to separate his past experience from the current case, stating: "I think I can listen fairly and make a judgment based on what was presented." The trial court denied the defendant's motion to strike the juror for cause.

During the trial, after the jury heard testimony from one of the defendant's children, a juror began "crying to the extent of howling" outside the courtroom and the sheriff had to separate her from other jurors. However, on examination by the trial court, the juror unequivocally stated that she could wait to form an opinion until all the evidence was presented.

Prior to trial, the trial court granted the Commonwealth's motion prohibiting any questioning regarding an investigating deputy's work history. The defendant had sought to cross-examine the deputy on his employment performance history based on the fact that he had not been re-sworn by the sheriff. However, the evidence was that the sheriff had no issues with respect to the deputy's truthfulness, veracity, or integrity; instead, the new sheriff did not re-swear in the deputy due to the deputy's support for another candidate during the primary campaign for sheriff.

Prior to trial, the trial court granted the Commonwealth's motion to permit one of the children to testify by closed-circuit testimony. The Court rejected the defendant's arguments that § 18.2-67.9 is unconstitutional and that it is limited to child abuse cases only. Based on testimony by the child's clinician, the trial court made specific findings pursuant to § 18.2-67.9. The trial court found that the child would be traumatized, not by the courtroom generally, but by the presence of the defendant and that his emotional distress would be more than mere nervousness or excitement or reluctance to testify.

Prior to trial, the Commonwealth informed the defense of several inconsistent statements that the children made during pre-trial meetings. During the meetings, the Commonwealth had met with the children, along with a Doctor, who took notes and then turned the notes over the Commonwealth. The Commonwealth indicated that the meeting was for witness preparation, not for investigation. The defense moved to examine the notes, but the Commonwealth asserted that the notes were attorney-work product. The trial court denied the defendant's request.

During the trial, the defendant claimed that one of the children made a statement that he had not been aware of. The defendant again demanded to compel the Commonwealth to turn the notes over to counsel. The Commonwealth responded that child's statements were a result of new questions and were not inconsistent with his prior statements. The trial court refused to review the notes *in camera* and refused to order their production.

During the trial, the defendant made two motions for a mistrial, but the trial court denied both. In the first, he complained that during closing argument, the Commonwealth commented that the "greatest part" of the judicial system was the jury's ability to decide the case according to the law, "no matter how many lawyers you have, no matter how many lawyers you pay to sit . . . ," In the second motion for a mistrial, the defendant complained after the Commonwealth's mentioned to the jury that the defendant's alibi notice "gives notice that he 'may' introduce evidence of an alibi, and said: "'May?' Or may not?" The court promptly instructed the jury to disregard the Commonwealth's statement.

The defendant also complained that, during closing argument, the Commonwealth referred to the fact that he had paid his "high-priced" experts. On cross-examination, the Commonwealth had

elicited testimony from the defendant's experts on how much they had been paid for their involvement in the case. The trial court found that the statement regarding the experts was "fair argument."

After trial, the defendant moved to set aside the verdict and to dismiss due to government misconduct. He claimed that the Commonwealth had failed to disclose the fact that, in an unrelated case, the deputy who testified in this case wrote an incorrect statement in a report about the other case that he had met with an ACA and she declined prosecution. The defendant argued that the evidence that the deputy had made a false statement on a police report would have damaged his credibility in his trial and thus could have been used as impeachment evidence under Rule 2:607(a)(viii).

Held: Affirmed. In a highly detailed, 66-page opinion, the Court of Appeals examined and rejected each of the defendant's grounds for appeal.

Regarding the issues of joinder and severance, the Court ruled that the charged offenses met the requirement of Rule 3A:6(b) and justice did not require separate trials, and that the joinder requirements of Rule 3A:10(c) were met. Regarding joinder, the Court ruled that the case met Rule 3A:6(b)'s requirements for joinder because all three offenses were clearly "based on the same act or transaction." The Court pointed out that the defendant broke into the victim's house in violation of the protective order with the intent to murder her, he did not leave the residence until he had committed the murder, and each offense took place at the same location and at the same time.

Regarding the defendant's motion to sever the Protective Order Violation, the Court agreed that the protective order would have been admissible in both the Murder and Burglary trials as it was relevant to an issue or element in each of those cases. In the Burglary case, the Court explained that the protective order demonstrated that the defendant acted without authority in entering the home. Thus, the protective order was relevant "to establish guilty knowledge or to negate good faith."

In the Murder case, the Court reasoned that the protective order was admissible to prove the defendant's opportunity to commit the murder. The Court noted that the protective order showed that it was unlikely he had entered the residence prior to the night of the murder, and thus tended to prove that his DNA found in the bedroom was a result of his presence in the victim's bedroom the night of her death. Because the protective order was relevant to show that there was no reasonable explanation for the presence of the defendant's DNA on the victim's clothing and bedding other than his presence in her bedroom on the night of the murder, it served a purpose "other than to show a mere propensity or disposition on the part of the defendant to commit the crime."

Regarding the "cadaver dog" testimony, the Court held that expert testimony relating to a dog's reaction to the odor of human decomposition is admissible after a proper foundation has been laid to show that the handler was qualified to work with the dog and to interpret its responses, that the dog was sufficiently trained in the detection of human decomposition odor, and that the circumstances surrounding the identification were conducive to a dependable scent identification by the animal.

The Court explained that cadaver dog evidence does not require a scientific foundation for its admission; rather, the cadaver dog evidence must be shown to be reliable from experience, which can be met through the testimony of the cadaver dog handler. The Court concluded that it did not need to consider whether the science underlying the expert testimony concerning the cadaver dog evidence was reliable. Instead, it explained that it only needed to determine whether a proper foundation was laid for

the admission of the evidence. Thus, as with dog trailing evidence in *Pelletier*, the Court agreed that a trial court may admit cadaver dog evidence without a showing of its precise scientific basis.

In this case, the Court held that the court did not err in admitting the expert testimony regarding the cadaver dog evidence. The Court found that the record contains evidence that the handler was qualified to work with the dog and to interpret his responses. The Court then concluded that the evidence demonstrated that the dog was sufficiently trained in detecting the odor of human decomposition. Finally, the Court agreed that there was evidence showing that the circumstances surrounding the identification were conducive to dependable scent identification by the dog.

Regarding the "cadaver dog" testimony, the also Court observed in a footnote that the handler's opinion was derived from his personal observation of the dog the day of the search and from his prior training with the dog. Thus, the Court concluded that the Commonwealth had provided a proper foundation for the expert testimony and that the evidence did not violate Rule 2:703(b). The Court explained that the arguments relating to the likelihood that the dog falsely alerted or alerted to a presence other than the victim's body went only to the weight of the evidence, not its admissibility.

Regarding the juror issues, the Court agreed that the trial court properly refused to strike the juror who had given the "I think" statement, finding that the statement was not too equivocal to ensure his impartiality. The Court also agreed that the juror who had become emotional could impartially continue her service on the jury.

Regarding the child's closed-circuit testimony, the Court found that the record supported the trial court's findings. The Court also rejected the argument that § 18.2-67.9 is unconstitutional and found that the trial court complied with *Craig*. The Court specifically rejected the argument the language of *Craig* is limited to child abuse cases.

Regarding the defendant's motions for mistrial, the Court found that the challenged statements in both mistrial motions did not create indelible prejudice against the defendant as to require a new trial. The Court also agreed that the fact that the experts that testified for the defense were paid was a fact in evidence and constituted a proper subject for closing argument.

Regarding the defendant's cross-examination of the deputy, the Court ruled that the trial court did not abuse its discretion by denying the defendant the opportunity to cross-examine the deputy about his employment history because there was no evidence before it that his employment history, or the fact that he was not re-sworn, was relevant to a material issue at trial.

Regarding the deputy's allegedly false statement, the Court ruled that the defendant failed to satisfy the first prong of *Brady* because he did not establish that the evidence would have been favorable to him. Therefore, the Court concluded that no *Brady* violation occurred by virtue of the Commonwealth's failure to disclose the deputy's alleged false statement on the report prior to trial. The Court noted that the defendant attempted to attack the deputy's credibility based upon one specific act of conduct; However, Rule 2:608(b) explicitly limits the application of Rule 2:607(a)(i) by providing that "specific instances of the conduct of a witness" may neither be "used to attack or support credibility" nor "proved by extrinsic evidence," and here the Court pointed out that the alleged false statement in the police report was inadmissible to prove the deputy's general untruthfulness, because even if his statement that he had consulted with the ACA was untrue, it was only a specific act of untruthfulness regarding an extrinsic matter.

Regarding the Doctor's notes on the prosecutor's interviews with the children, the Court ruled that the trial court properly exercised its discretion in declining to review the Dr.'s notes *in camera*. The Court repeated that the mere possibility or speculation that the evidence sought "might contain 'potentially exculpatory evidence' imposes neither a duty of disclosure upon the Commonwealth, nor a duty of inspection in camera by the court.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0140174.pdf

Virginia Court of Appeals
Unpublished

Merlino v. Commonwealth: September 25, 2019

Virginia Beach: Defendant appeals his conviction for Murder on Denial of a Continuance and Expert Testimony issues

Facts: The defendant murdered the mother of his child on Valentine's Day using cyanide. Prior to trial, the defendant sent encrypted letters from the jail in attempts to intimidate witnesses for the Commonwealth to change their testimony. Eight months after indictment and following multiple continuances, the defendant's counsel moved for a continuance the day before trial, claiming that the defendant was weak due to a two-month hunger strike and that the defendant had just provided him with a list of potential witnesses. The trial court denied the continuance.

On the first day of trial, the defendant acknowledged that he had had enough time to discuss the case and any possible defenses with his attorneys. He further stated that he had provided the names of his witnesses to his attorneys and that they were present. However, he indicated that he was not entirely satisfied with his attorneys, claiming that they had not spent sufficient time reviewing the case with him. Defense counsel renewed his motion to continue, arguing that he needed more time to prepare. The trial court denied the motion again.

At trial, the Commonwealth presented computer forensic evidence through an expert witness in the field of "digital forensics, particularly computer examinations." The witness testified regarding his examination of the defendant's computer. The witness identified the software, Internet Evidence Finder (IEF) and Forensic Toolkit (FTK), that he used to copy the original hard drive so that he would make no changes to it. The witness reported those findings.

The defendant objected to the introduction of the expert's testimony because he did not create the IEF or FTK software programs. The defendant claimed that it was outside the expert's expertise to testify that the programs were reliable. In response to questioning by the trial court, the expert specifically explained how IEF and FTK searched through information on the computer for particular types of data stored there, and then reported the findings. The witness testified that he obtained consistent findings from the defendant's computer using both software programs. The witness testified that IEF and FTK were relied upon by numerous law enforcement agencies. The trial court overruled the defendant's objection and admitted the expert's testimony.

[*Thank you to Mario Lorello, who tried this case and provided a copy of the ruling to us – it is not available online. A link to download the opinion from CASC is below – EJC*].

Held: Affirmed. Regarding the continuance, the Court complained that the defendant failed to identify additional evidence he would have been able to present if granted a continuance and failed to show a specific need for additional investigation to prepare a defense. The Court pointed out that it was the defendant's own decision to delay providing the names of witnesses to his attorney and that he voluntarily engaged in a hunger strike, further complicating his participation in the case. The Court agreed that the circumstances suggested that he was manipulating the situation to delay his trial and attempting to influence witness testimony.

Regarding the expert's testimony, the Court found no abuse of discretion in the trial court's decision to admit the expert's testimony about his forensic examination of the defendant's computer. The Court noted that the witness demonstrated his expertise, testified that both IEF and FTK were widely used as tools for law enforcement, and testified that he received consistent results using both programs.

Full Case At:
https://www.dropbox.com/s/2auvk9ym725ldly/merlino%20expert%20ruling%20va%20beach.pdf?dl=0

Cipolla v. Commonwealth: June 18, 2019

Chesterfield: Defendant appeals his convictions for Child Sexual Assault on jury selection and expert testimony issues.

Facts: The defendant sexually assaulted a child for five years, until the child reached the sixth grade. During voir dire, the defendant asked the venire whether any of their family members, their friends, or colleagues had been affected by unwanted sexual contact. One juror stated that, about fifty years ago, her two sisters had experienced unwanted sexual contact from their foster parents and their father. In answer to a question from the defendant, the juror expressed that she could not be certain that hearing similar evidence would not cause her to "relive her sisters' experiences."

Another juror stated that his sister's daughter had been abused and that the matter was still pending in a court in North Carolina. The defendant then asked, "Do you think hearing something like this will make you relive the events that your niece might be talking about, or experiencing?" The juror said, "Potentially." The defendant did not ask the jurors whether the experiences of their family members would affect their ability to be fair and impartial in the case.

The defendant moved to strike the two jurors for cause, arguing that their voir dire responses established that they could not serve as impartial jurors who were indifferent to the cause. The trial court denied the motions.

During the guilt phase, the defendant offered an expert witness, who had conducted psychosexual tests on the defendant, to testify that the defendant did not show "any paraphilic tendencies" and did not fit the profile of individuals who engaged in "abhorrent sexual behavior." The defendant contends that the proffered evidence would tend to establish the improbability that he

sexually abused the victim but would leave to the jury's determination whether, in fact, he committed the abuse. The trial court sustained the Commonwealth's objection to that testimony.

Held: Affirmed. Regarding the jurors, the Court observed that nothing in the jurors' responses indicated that they would be unable to hear the case impartially or that they would have a bias toward one side or the other.

Regarding the proffered expert testimony, the Court noted that evidence that the defendant did not exhibit "paraphilic tendencies" was not relevant to show that he lacked the requisite state of mind to commit the offenses because evidence of a defendant's mental state is irrelevant to the issue of guilt unless an insanity defense is raised or such evidence is permitted by statute. In addition, the Court found that the expert's testimony was not admissible because it concerned the ultimate issue in this case—whether the defendant committed the charged offenses against the victim. Therefore, the expert's opinion would have invaded the province of the jury in determining the defendant's guilt or innocence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1976172.pdf

Hearsay

Virginia Court of Appeals
Published

Chenevert v. Commonwealth: April 21, 2020

Chesapeake: Defendant appeals his convictions for Child Sexual Assault on Hearsay grounds.

Facts: The defendant repeatedly sexually assaulted an eight-year-old child. The child revealed the assault to her mother in a hand-written letter. The child later disclosed the assaults during a videotaped forensic interview, during which she drew pictures depicting the assaults.

Before trial, the Commonwealth filed a motion, pursuant to § 19.2-268.3, to admit the letter the victim wrote to her mother, the drawings she made during her forensic interview, and a video of the forensic interview itself. The defendant argued that the victim's letter was not a "statement" within the meaning of § 19.2-268.3, the "Tender Years" exception, arguing that exception only includes statements made during a forensic interview. The defendant also argued that the drawings were not "statements" within the meaning of the § 19.2-268.3 hearsay exception.

The victim testified at trial. The trial court admitted the victim's forensic interview video, her letter, and her drawings.

Held: Affirmed. The Court ruled that both the letter that the victim wrote to her mother and the drawings she made during the forensic interview were statements within the meaning of § 19.2-268.3.

Thus, they were admissible under the statute once the trial court found them inherently trustworthy and the victim testified.

Regarding the victim's letter, the Court declared that the "Tender Years" statute applies broadly to all statements made by a child victim "describing any act directed against the child relating to" the offense against the child. The only limitations on the admissibility of these statements are the ones the General Assembly explicitly included in the statute: that the trial court find the statements "inherently trustworthy," and that the child either testifies or corroborating evidence be admitted when the child is "unavailable." Thus, the Court found that the victim's letter was admissible as a hearsay statement by a victim of a crime against a child, despite the fact that it was not created during a forensic interview.

Regarding the victim's drawings, the Court considered the Common Law meaning of "statement" and the meaning of that term under Rule 2:801(a). The Court concluded that the General Assembly intended the word "statement" in § 19.2-268.3 to carry the same meaning it carries in hearsay law generally.

The Court cautioned that not every drawing will contain an assertion. Instead, drawings that can be understood to make a factual claim, i.e. an assertion, can be a statement. In this case, the Court observed that the victim's drawing of two stick figures in a bed with lines from one figure's mouth to the other figure's midsection described—in the context of the forensic interview in which it was drawn—how the assaults occurred. The Court concluded that, regardless of whether the drawing was a "written assertion" or the record of a "nonverbal conduct . . . intended as an assertion," the drawings in this case fit the definition of a "statement" under the hearsay rules and, therefore, were admissible under § 19.2-268.3.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0028191.pdf

Jones v. Commonwealth: March 10, 2020

Roanoke: Defendant appeals his conviction for Aggravated Sexual Battery on Hearsay grounds.

Facts: The defendant sexually assaulted his sixteen-year-old stepdaughter. The daughter's stepmother later confronted the defendant and brought her child with her. The stepmother told the victim to tell the defendant what he did to her. In response, the defendant gave his version of events. The stepmother recorded the conversation.

Prior to trial, the defendant moved in limine to exclude the recording. The trial court denied the defendant's motion and admitted a redacted version of the recording, one that included both the victim's statement and the defendant's response.

Held: Affirmed. The Court held that the victim's statements on the edited recording were admissible as non-hearsay to give context to the defendant's admissions. The Court found that the defendant's own statements in the recording were admissible as party admissions, under Rule 2:803(0). The Court then found that the victim's statements to him which are at issue here were admissible in order to provide context to those admissions, as in *Swain*.

http://www.courts.state.va.us/opinions/opncavwp/1929183.pdf

Logan v. Commonwealth: March 3, 2020

Norfolk: Defendant appeals his conviction for Attempting to Obtain a Firearm while Subject to a Protective Order on Sixth Amendment Confrontation grounds.

Facts: The defendant tried to purchase a firearm, claiming that he was not subject to a protective order. The protective order had been personally served on him six days before he tried to buy the firearms by showing him the statements in the return of service. The defendant claimed that he never received personal service.

At trial, the petitioner for the protective order testified that she was never served with the order even though the return of service states that she was. In the return, the deputy purports to have served both the petitioner and the defendant at the same time, one minute before he filed the return with the court.

At trial, the Commonwealth entered the protective order and the proof of service as a certified record. The defendant objected that he had no opportunity to cross-examine the deputy who created the statements in the service returns portion of the PPO; accordingly, he contended that his right to confrontation was violated. The trial court overruled the objection.

Held: Affirmed. The Court held that statements contained in service returns on protective orders are not testimonial. The Court ruled that the defendant had no right to confront the deputy who made them, and the trial court did not err in admitting the challenged statements into evidence. The Court explained that the statements were not created primarily to prove past events potentially relevant to later prosecution, and therefore the challenged statements were not testimonial. Instead, the Court found that the statements were primarily created to comply with statutory provisions and, therefore, enable the entity to administer its affairs—a non-prosecutorial purpose.

Justice Huff filed a dissent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1735181.pdf

Murray v. Commonwealth: January 14, 2020
71 Va. App. 449, 837 S.E.2d 85 (2020)
Hampton: Defendant appeals her conviction for Possession of a Firearm by Felon on admission of expert testimony, refusal to admit her statement, and sufficiency of the evidence.

Facts: The defendant, a convicted felon, carried a firearm in her car in a backpack. When police stopped her for a traffic violation, she fled on foot. While she ran, she dropped a loaded magazine compatible with the firearm found in the vehicle she was driving. She later told police that she knew that the firearm was in the vehicle, but claimed that she was returning the gun to its original owner.

At trial, the officer testified that the gun he found was "designed to propel a missile by an action of explosion by any combustible." The defendant objected, arguing that the officer's opinion about the design and operability of the firearm was inadmissible expert testimony, but the trial court overruled the objection.

At trial, another officer also testified that the defendant stated that she knew there was a gun in the backpack. The defendant requested that the trial court admit the defendant's entire statement under Rule 2:106(a), arguing that "the jury deserves to hear all [of] these things." However, the defendant did not proffer the contents of the video she sought to introduce and the trial court denied the request.

Held: Affirmed. Regarding the officer's firearm testimony, the Court found that the officer was not required to be qualified as an expert in order to testify about the nature of the weapon he discovered because his opinion was a valid lay opinion under Rule 2:701. The Court explained "Given a general constitutional right to keep and bear them, firearms are generally not so exotic that it requires extensive or specialized expertise for a great many lay persons with familiarity with them to correctly identify a firearm as such."

The Court then rejected the defendant's complaint regarding the trial court's refusal to admit her statement under Rule 2:106(a). The Court found that her proffer of the remainder of her statement was inadequate to determine whether it was admissible under the doctrine of completeness, memorialized as Rule 2:106(a), or whether, under that rule, "such additional portions are inadmissible under the Rules of Evidence." For example, the Court agreed that the defendant's statement that she was returning the gun to its original owner would be an irrelevant explanation of her motive for illegally exercising dominion and control over the firearm.

The Court also agreed that the evidence was sufficient.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1226181.pdf

Palmer v. Commonwealth: November 26, 2019
71 Va. App. 225, 835 S.E.2d 80 (2019)
Virginia Beach: Defendant appeals his conviction for Aggravated Malicious Wounding on admission of the victim's prior testimony and sufficiency.

Facts: After the defendant and the victim had an argument, the defendant left the apartment and returned an hour or two later armed with two knives which he used to stab her fourteen times, injuring her to the point that she was unable to walk for three weeks. After stabbing the victim, the defendant told the couple's young daughter that he would kill the victim if his daughter sought help for her mother.

At trial, before taking the stand, the victim stated, "Judge, I plead the Fifth." Despite her declaration, the witness took the stand and was sworn in as a witness. Because of her marriage to the defendant, the trial court granted the Commonwealth's motion for her to be declared an adverse witness. In response to questioning by the Commonwealth's Attorney, the victim introduced herself and

testified that she had been married to the defendant for a year. When asked to direct her attention to the date of the incident, the victim repeatedly stated, "I plead the Fifth."

The Commonwealth proffered that the victim had charges pending against her for felony child abuse/neglect and that individuals involved in possibly prosecuting her on those charges, including another prosecutor and a City Attorney, were present in the courtroom for the purpose of observing her testimony. Over the defendant's objection, the trial court admitted the victim's testimony from the preliminary hearing transcript based on the victim's unavailability to testify at trial.

At trial, the defendant argued that he had been acting out of heat of passion, noting that the argument concerned the victim's alleged affair and that he was allegedly crying while stabbing the victim repeatedly.

Held: Affirmed. The Court ruled that the trial court properly allowed the victim to plead the Fifth Amendment, that it did not err in deeming her unavailable to testify at trial and, consequently, did not err in admitting the transcript of her testimony from the preliminary hearing. The Court distinguished *Sapp*, noting that, in this case, the attorneys involved in a potential future prosecution were present for trial, suggesting that the victim's testimony about the night of the attack could be used to incriminate her in the child abuse/neglect case.

In an extensive footnote, the Court cautioned that allowing a witness to make a blanket assertion of the privilege is generally not permitted. Instead, the Court explained that, once a witness asserts his fifth amendment right, some investigative questioning must be allowed. However, in this case, the Court found it conceivable that some things about the nature of the "turbulent relationship" could have assisted with the prosecution for the pending child abuse/ neglect charges, permitting the victim to take the Fifth Amendment was in keeping with the principle that the guarantee against testimonial compulsion must be liberally construed. In this situation, the Court expressed concern that requiring the victim to say more would require her "to prove the hazard in the sense in which a claim is usually required to be established in court" and compel her to surrender the very protection which the privilege is designed to guarantee.

The Court also agreed that there was sufficient evidence of malice to convict the defendant of aggravated malicious wounding. The Court noted that the argument between the victim and the defendant was "words alone," that two hours passed after the argument, and that he used a deadly weapon in the attack.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1294181.pdf

Saucedo v. Commonwealth: October 29, 2019
71 Va. App. 31, 833 S.E.2d 900 (2019)
Rockingham: Defendant appeals his conviction for Forcible Sodomy of a Child on Fifth Amendment and sufficiency grounds.

Facts: The defendant sexually assaulted a six-year-old child. The child disclosed soon thereafter, but quickly recanted, only to report the offense again when she was ten years old. During the

investigation, the defendant went to the police station voluntarily for the polygraph examination. He was not handcuffed or restrained; the officer assured the defendant that he could leave at any time and demonstrated that the door to the polygraph suite was not locked. The single officer was the only law enforcement officer in the room with the defendant. The defendant appeared "relaxed" throughout the interview. However, the officer remarked that if the defendant touched the child's vagina with his tongue, he "needed to get up and walk out of the room now." The defendant continued to speak with the officer and eventually confessed.

The defendant later moved to suppress his statement, arguing that the interview became custodial due to the officer's comment advising the defendant to "walk out of the room" if he was guilty. The defendant contended that this statement constituted a "verbal handcuff [that] invalidated the otherwise consensual nature of the encounter" and rendered the interview a custodial interrogation. The trial court rejected his argument.

During her videotaped forensic interview, the victim stated that the defendant "open[ed]" her vagina and "lick[ed] around all of [her] vagina." She also gestured to a picture of a vagina on the table when she was indicating where the defendant touched her. At trial, the victim testified that the defendant touched her vagina with his tongue. Although she admitted that she did not know the meaning of the terms "labia majora" or "vulva," she described the area where the defendant touched her as her "private area."

At trial, the victim could not remember the forensic interview, other than "going to a place where [she] sat in a blue chair to talk with a video." The defendant cross-examined the victim about her inability to remember the interview. The Commonwealth introduced the child's forensic interview as evidence. To authenticate the recording, the Commonwealth offered testimony from the interviewer, who told the jury that the video was a "true and accurate copy and depiction of [her] interview."

The defendant objected to the admission of the victim's forensic interview at trial, arguing that it was not sufficiently authenticated and that the victim did not "testify" as required by § 19.2-268.3(B)(2)(a) because she could not recall the forensic interview. The trial court overruled the objections.

Held: Affirmed. The Court first rejected the defendant's argument that he was in "custody" under the Fifth Amendment. The Court found that, although the defendant may have felt psychological pressure to confess after the officer's comment, that alone did not amount to a restraint that rendered the interview a custodial interrogation.

The Court then found that the trial court did not err by admitting the forensic interview into evidence. As in *Campos*, the Court rejected the defendant's arguments that the child's faulty memory voided the hearsay exception in § 19.2-268.3(B) for prior statements by juvenile victims. The Court explained that the defendant's opportunity to question the victim about her faulty memory and attack her credibility satisfied the Confrontation Clause guarantee of effective cross-examination.

The Court also agreed that the interviewer's testimony met the requirements for admission into evidence under Rule 2:901.

Regarding sufficiency, the Court found that the evidence proved that the defendant penetrated not only the victim's vulva, but also specifically her vagina, in violation of § 18.2-67.1(A)(1), forcible sodomy by cunnilingus. The Court distinguished the *Moore* and *Ashby* cases on their facts.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1440183.pdf

Virginia Court of Appeals
Unpublished

Givens v. Commonwealth: February 11, 2020

Norfolk: Defendant appeals his conviction for Murder and Use of a Firearm on refusal to admit his statement and the victim's prior bad acts and criminal history.

Facts: The defendant ambushed a man, shooting him repeatedly until the man fell to the ground. The defendant then walked up to the man and continued shooting the victim while the victim was laying on the ground until the gun was empty. The defendant confessed to police in a recorded statement, claiming self-defense. In his recorded statement, the defendant described a previous incident in which the defendant claimed that he personally witnessed the victim leave his home, cock his gun, and walk in the direction of a young man. Moments later the defendant heard gunshots, leading him to believe that the victim shot the young man.

At trial, the trial court permitted the defendant to introduce into evidence events and conduct regarding the victim's propensity for violence about which he had first-hand knowledge. However, the trial court did not allow the defendant to introduce the portion of his recorded statement where he claimed that the victim had shot the other young man in the past.

The court also allowed the defendant to admit evidence of most of the victim's prior violent felony convictions. However, the trial court disallowed five convictions from 1991-1996, ruling that they were "too remote" in time. The trial court also excluded the portion of the defendant's recorded statement where he stated that he knew that the victim had been recently released from serving seventeen years in prison. The trial court ruled that the fact that the victim had recently been released after serving seventeen years in prison was not relevant to the victim's current propensity for violence.

Held: Affirmed. The Court concluded that the trial court did not abuse its discretion either by refusing to allow the entirety of the defendant's recorded statement into evidence, or by refusing to admit into evidence all of the defendant's evidence in support of the victim's alleged propensity for violence, including all of the victim's prior convictions.

The Court first concluded that Virginia Rule of Evidence 2:106 did not mandate that the defendant's entire statement be introduced into evidence after the Commonwealth introduced portions of the statement, because those portions of the recorded statement that were not admitted contained inadmissible hearsay. Because the excluded portions of the statement were not personal observations, the Court found that the defendant had not carried his burden of proving an exception to the hearsay rule to permit admission of the statement in its entirety.

Regarding the victim's past, the Court applied Virginia Rule of Evidence 2:404(a)(2). The Court reaffirmed that a trial court does not abuse its discretion by limiting a victim's charges and convictions

entered into evidence to only those charges and convictions that are relevant to a defendant's self-defense claim.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1654181.pdf

Marsh v. Commonwealth: October 15, 2019

Virginia Beach: Defendant appeals his convictions for Child Sexual Assault on Sixth Amendment grounds.

Facts: The defendant sexually assaulted a child. Pursuant to § 19.2-268.3(C), the so-called "tender years" statute, the Commonwealth filed a pretrial notice of intent to offer oral and written statements made by the victim during two forensic interviews conducted at the hospital. The defendant objected on Sixth Amendment confrontation grounds. Both parties stipulated that the child would have testified at trial. The trial court overruled the defendant's objection and the defendant entered a conditional guilty plea.

[*Great job by Kate Aicher, who prosecuted this case. – EJC].*

Held: Affirmed. The Court held that the trial court did not err in its determination that § 19.2-268.3 did not violate the defendant's Sixth Amendment right to confrontation. The Court restricted its ruling to whether § 19.2-268.3 was constitutional as applied to the defendant's circumstances; the Court refused to consider whether the statute would be constitutional regardless of whether or not the child testified.

The Court assumed, without deciding, that the statements that the child made during two forensic interviews conducted at the hospital constituted testimonial hearsay for Confrontation Clause purposes. Because the child would have testified at trial, the Court found that § 19.2-268.3, as applied to the defendant, would not have violated his Confrontation Clause right, as the declarant of the out-of-court statements would have been present at trial and subject to cross-examination.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1117181.pdf

Identification

Jones v. Commonwealth: April 7, 2020

Norfolk: Defendant appeals his conviction for Robbery, Carjacking, and Conspiracy on sufficiency of the evidence.

Facts: The defendant and his confederates beat and robbed the victim. The victim positively recognized the defendant as one of the robbers in a Facebook photo on the day of the incident. He also

identified the defendant six weeks later in a photo lineup, at the preliminary hearing, and at trial. The victim based the identification on specific details he observed while "chest-to-chest" with the defendant, looking directly into his face, and displayed a high degree of attention. Other evidence corroborated the identifications.

Held: Affirmed. The Court found that evidence was sufficient to establish the defendant's guilt.

The Court noted that the defendant did not challenge the admissibility of any of the victim's in-court or out-of-court identifications. Instead, in a footnote, the Court noted that the defendant relied on the factors articulated in *Neil v. Biggers* in his sufficiency argument. The Court cautioned that those factors were not designed to guide an analysis of whether the evidence presented at trial was sufficient to establish the identity of a defendant as the perpetrator beyond a reasonable doubt. The Court also pointed out that admissibility challenges are distinct from sufficiency challenges. Nevertheless, the Court acknowledged that it had applied the *Biggers* factors to reverse a conviction in the 1992 *Smallwood* case. The Court explained that it lacked the authority, sitting as a panel, to overrule *Smallwood*, and therefore applied the *Biggers* factors in this case. Nevertheless, the Court affirmed the convictions.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0426191.pdf

Impeachment

Virginia Court of Appeals
Published

Hicks v. Commonwealth: December 3, 2019
71 Va. App. 255, 835 S.E.2d 95 (2019)
Mecklenburg: Defendant appeals his conviction for Child Sexual Assault on Denial of Cross-Examination.

Facts: The defendant repeatedly raped his twelve-year-old cousin. At trial, the defendant proffered the testimony of a witness who claimed that the victim had made prior false accusations of sexual conduct. She described the victim's complaints of sexual misconduct against the witness, the witness' friend, the witness' son, her brother, and a third party. The witness elaborated that after the victim reported that the third party "was raping her," the victim "switched it and said it was [the defendant]." According to the witness, DSS investigated the complaints against everyone but the third party and "threw out" the complaints "because [the victim] was found not to be truthful."

The trial court requested that DSS appear and testify about the alleged reports. The DSS director who searched the agency's records testified that no investigation was conducted and no such report existed. The court sustained the Commonwealth's objection to the proffered testimony. The trial court ruled that the witness' claims with regard to others were hearsay and double hearsay because the

record provided no basis for how she knew those things. The trial court also pointed to the witness' criminal record and her status as a family member of the defendant.

Held: Affirmed. The Court concluded that the evidence supported the trial court's finding that the defendant did not establish an adequate foundation for the admissibility of the excluded testimony. The Court found that it was not error to exclude the proffered testimony that the complaining witness had made prior false allegations of sexual abuse, given that the defendant failed to make threshold showings that such allegations were made and were false.

The Court explained that the trial court was not required to accept the witness' self-serving testimony that the victim previously falsely accused the witness of sexual abuse, repeating that "mere denial testimony" by an alleged offender is inherently self-serving and does not, by itself, establish falsity. The Court agreed that the defendant did not provide adequate evidence to establish the witness' basis of knowledge for her claims that the victim's alleged reports about third parties were false.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1543182.pdf

Haas v. Commonwealth: October 29, 2019
71 Va. App. 1, 833 S.E.2d 886 (2019)
Chesterfield: The defendant appeals his convictions for Child Sexual Assault on denial of Impeachment Evidence and Admission of Refusal to Comply with a Court Order

Facts: The defendant raped and sexually assaulted a child. Police obtained a warrant for the defendant's DNA. The defendant, who was in custody, refused to comply. Because the judge was not aware of the warrant, he told the defendant that he did not "have to volunteer." When the detective attempted to collect buccal swabs pursuant to the warrant that day, the defendant refused.

The police obtained a second warrant and the defendant again refused to comply. The Court ordered the defendant to comply, but he refused. The police obtained a third warrant. The defendant again refused to comply. The Court ordered the defendant to comply again. This time, the officers physically restrained him and forcibly took buccal swab DNA samples.

At trial, the court did not allow the Commonwealth to elicit testimony about the defendant's first refusal. However, the court ruled that the defendant's second refusals were admissible because the court discussed the existence of the warrant issued by the magistrate and entered an order compelling the defendant's compliance.

At trial, the defendant attempted to introduce testimony from the defendant's new wife, who was also the victim's aunt. She stated that during a dispute, the victim had once stated: "If you don't let my mom do what she wants to do, then I'll just go and say that [the defendant] put his hands on me [or touched me]." The aunt said that she asked the victim why she would "tell a lie like that to the police" and the victim responded, "Well, I've done it before. I'll do it again." The aunt also stated that the victim said, regarding her report of sexual assault by the defendant: "if I did lie, I'm getting away with it." The Commonwealth objected and the trial court excluded the statement.

Held: Affirmed. The Court first held that the trial court did not err by excluding the aunt's proffered testimony. The Court pointed to Rule 2:608, which provides: "(1) specific instances of the conduct of a witness may not be used to attack or support credibility; and (2) specific instances of the conduct of a witness may not be proved by extrinsic evidence." The Court allowed that Rule 2:608 provides exceptions permitting admission under certain circumstances, but found that those exceptions did not apply here.

The Court also noted that the evidence did not qualify as reputation evidence under Rule 2:608. The Court lastly pointed out that impeachment by contradiction requires that the contradictory evidence must be independently admissible and not collateral to the material issues in the case under Rule 2:607(a)(vii). The Court observed that the victim's alleged statement demonstrated at most a willingness to lie rather than a bias or motive for doing so.

The Court also held that the trial court did not err by admitting evidence of the defendant's two refusals to cooperate with a search warrant for his DNA. The Court agreed that the defendant's refusal to comply with a search warrant provided circumstantial evidence of the defendant's awareness that the test results were likely to implicate him in the charged crimes.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0621182.pdf

Virginia Court of Appeals
Unpublished

Cutler v. Commonwealth: December 17, 2019

Richmond: Defendant appeals his convictions for Murder, Malicious Wounding, and Use of a Firearm on refusal to admit Evidence of Third-Party Guilt and allowing the Commonwealth to Impeach its Own Witness

Facts: The defendant shot several people at a party, killing one of them. One of the attendees chased the defendant and his companions away, shooting and killing one of the defendant's companions. The Commonwealth did not charge that man, finding that he acted in self-defense.

Prior to trial, the trial court granted the Commonwealth's motion *in limine*, over the defendant's objection, and excluded evidence that the attendee was not prosecuted for killing the defendant's companion. The defendant had wanted to argue that his own companion shot the victims.

At trial, one of the Commonwealth's witnesses denied having seen part of the shooting. After asking the witness if he remembered previously discussing the case, the Commonwealth was able to elicit testimony from him relating generally to the events that occurred at the party. The trial court overruled the defendant's objection that the Commonwealth was impeaching its own witness. However, the witness's testimony was cumulative of other testimony of the evening's events already given by other witnesses.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in refusing to admit evidence of third-party guilt. The Court found that the evidence was not relevant to the incident for which the defendant was on trial; Instead, the proffered evidence was only probative of a separate incident that was not a part of the offenses at trial.

The Court concluded that the evidence that the armed attendee was not prosecuted for killing the defendant's companion only tended to prove that the defendant's companion may have had a firearm outside of the apartment building when he was killed. In the Court's analysis, this evidence, at most, merely suggested or insinuated that the defendant's companion may have committed the offenses in the instant case. Because such evidence is inadmissible to prove third-party guilt, the Court held that the trial court did not abuse its discretion in excluding the proffered evidence.

Regarding the Commonwealth's impeachment of its own witness, the Court ruled that the trial court erred in allowing the Commonwealth to impeach its own witness. The Court repeated that, in order to impeach one's own witness, it is not sufficient merely that the witness gave a contradictory statement on a prior occasion. Rather, the testimony offered must be injurious or damaging to the case of the party who called the witness. In this case, the Court found that the witness' testimony was neither damaging nor injurious to the Commonwealth's case and could not have helped the jury determine the defendant's guilt or innocence. Therefore, the Court found that the trial court erred when it allowed the Commonwealth to impeach the witness with his prior inconsistent statement.

However, the Court then found that the error was harmless. The Court found that the witness' testimony did not influence the jury, or if it did, it had only a slight effect.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1261182.pdf

Prior Bad Acts

Virginia Court of Appeals
Published

Kenner v. Commonwealth: December 3, 2019
71 Va. App. 279, 835 S.E.2d 107 (2019)
Northhampton: Defendant appeals his convictions for Child Sexual Assault on Admission of Prior Bad Acts, Refusal of a Motion to Withdraw, and Refusal to Poll the Jury

Facts: The defendant sexually assaulted a six-year-old child while he was living with the child and the child's cousin. The defendant showed the child adult pornography on his computer while assaulting her. Police executed a search warrant on the defendant's computer and found child pornography on the computer that the defendant had used to show the victim adult pornography. The titles of those videos described sex with young children or teaching young children to have sex. A forensic analysis revealed that the videos were either downloaded or attempted to be downloaded during the time frame that the victim lived with the defendant.

Prior to trial, the Commonwealth filed a motion in limine asking the court to allow it to introduce evidence of the child pornography found on the computer. The trial court granted the Commonwealth's motion over the defendant's objection, specifically allowing it to introduce images or evidence of child pornography from the computer as well as evidence that the computer had been used to download or attempt to download certain files. The Court did not permit the Commonwealth to admit the videos or photos themselves.

Just prior to trial, defense counsel moved to withdraw. Defense counsel cited the possibility that he could be called as a witness because it appeared that a potential defense witness's testimony had changed and now might prove adverse to the defendant. Defense counsel also noted that his client appeared to have filed a bar complaint against him. The trial court denied the motion.

The jury found the defendant guilty. The clerk asked the jurors if the verdict was their verdict by asking "so say you all," to which they verbally agreed. However, during the sentencing phase, the defendant asked the court to poll the jury on their verdict. The trial court refused the request.

Held: Affirmed. Regarding the admission of child pornography, the Court ruled that, in addition to showing the defendant's specific intent, the other crimes evidence in this case was also relevant to show the defendant's conduct or attitude toward the victim, to corroborate the victim's allegations, and establish the relationship between the defendant and the victim, and was connected with and led up to the offense for which the defendant was on trial, all of which the Court found to be proper uses of other crimes evidence under *Kirkpatrick* and its progeny. The Court also pointed out that the defendant failed to request that the jury be instructed that it could consider the evidence only for the limited purposes discussed above.

The Court reasoned that, while the evidence of child pornography introduced might have improperly shown the defendant's propensity to engage in sexual acts with a minor, the evidence was not admitted for that purpose. Instead, the evidence was relevant to show the defendant's conduct or attitude toward the victim, to prove motive or method of committing the sexual assaults, as evidence of the defendant's specific intent to engage in sex with a minor, and to corroborate her allegations. The Court also pointed out that, because the videos were found on the same computer and because the videos were either downloaded or attempted to be downloaded during the time frame that the victim lived with the victim, the child pornography evidence found in the defendant's apartment related to and led up to the offense for which he was on trial.

The Court specifically addressed the *Blaylock* case, which reached a contrary conclusion. To the extent that *Blaylock* conflicted with the *Ortiz* approach to the admission of other crimes evidence, the Court concluded that *Blaylock* was improperly decided, contrary to the Virginia Supreme Court's prior holdings in *Moore,* and/or was implicitly overruled by that Court's subsequent decision in *Ortiz*. The Court explained that, provided a cautionary instruction is given if requested, other crimes evidence is admissible to show the conduct or attitude of the accused toward his victim, his specific intent, and any other relevant issue. The Court criticized *Blaylock*, which had held that, unless the defendant concedes that he committed the acts alleged but did so without the relevant specific intent, he has not "genuinely disputed" intent and the Commonwealth may not admit other crimes evidence relevant to intent despite the fact that intent is at issue in every specific intent offense because the Commonwealth is required to prove that element.

Regarding the refusal to permit defense counsel to withdraw, the Court found that the trial court did not abuse its discretion in denying the motion to withdraw based on a conflict of interest because an actual conflict had not yet ripened. When trial counsel moved to withdraw from the case, no actual conflict existed. The Court repeated that the mere possibility that a witness may prove adverse is insufficient to create a conflict of interest that deprives the defendant of his Sixth Amendment right to counsel. Similarly, the Court concluded that the filing of a formal bar complaint against defense counsel did not create a per se conflict of interest, complaining that the defendant had neither alleged any prejudice nor that the complaint had any foundation

Regarding the refusal to poll the jury, the Court noted that any motion to poll the jury on their verdict during each phase of a bifurcated trial must be made before the conclusion of that phase. However, the Court complained that here, after the jury returned a verdict of guilty on all counts, the defendant failed to timely exercise his right under Rule 3A:17(d) to poll the jury regarding its guilty verdict and therefore his motion was untimely.

Judge Malveaux wrote an extensive dissent concerning the admission of prior bad acts, concluding that the evidence of the presence of child pornography on the defendant's computer did not tend to prove any issue at trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0934181.pdf

Cousett v. Commonwealth: November 6, 2019
71 Va. App. 49, 833 S.E.2d 908 (2019)
Virginia Beach: The defendant appeals his convictions for Rape, Burglary, and related charges on Joinder issues.

Facts: The defendant entered a woman's apartment through an unlocked front door and raped her. Within two hours, the defendant attempted to enter a second woman's unlocked apartment a short distance away, again through an unlocked front door, but fled during the attempt. Both victims and several witnesses provided nearly the identical description of the assailant, including a description of his clothing and a bag that he was carrying. Over the defendant's objection, the trial court joined both cases for trial.

Held: Affirmed. The Court held that, although the trial court erred in refusing the motion to sever, the resulting error was harmless under the facts of this case. The Court pointed out that the time, location, and description and other details provided by the second victim regarding her assault and assailant were relevant and admissible under Virginia Rule of Evidence 2:404(b) to corroborate the identity of the first victim's rapist.

Addressing joinder, the Court concluded that, while connected in time and place, there were insufficient commonalities in the "means of commission" to support a common plan. The Court found that the methods employed in each offense were not unusual, and the transactions were not "connected" within the meaning of Rule 3A:6(b). The Court wrote: "The purpose of a joint trial is not to

bypass the requirement of presenting evidence establishing the identity of the perpetrator for each offense as may be done with other crimes evidence under Virginia Rule of Evidence 2:404(b)."

However, the Court emphasized that an erroneous refusal to sever is harmless unless there is clear evidence on the record that the trial court either considered inadmissible evidence from one case in convicting the defendant in the other case.

In this case, the Court explained that, while the method of entering the two apartments was insufficient to warrant joinder of the offenses as a common scheme, the facts of each case would have been admissible as "other crimes" evidence of identity had there been separate trials. In an extensive footnote, the Court complained that the Supreme Court Rule regarding joinder and the caselaw are in inherent conflict, writing:

"We recognize that there appears to be an anomalous inconsistency between the Supreme Court's Rule 3A:10(c) that limits the consideration of other crimes evidence for the purpose of joinder and that Court's precedent permitting the admission of other crimes evidence to establish various facts in issue that necessarily renders harmless any error in a judgment permitting joinder where the evidence would be admissible in any event in a separate trial…. Though the purpose of judicial economy without a risk of unfair prejudice would undoubtedly be served by a joint trial whenever the evidence would be admissible in separate trials in any event, the plain language of the Rule does not currently allow it."

Nevertheless, the Court explained, "absent affirmative evidence rebutting the presumption of regularity that trial judges and juries follow the law regarding how "other crimes" evidence may be properly considered, there is no unfair prejudice if evidence would have otherwise been admissible and thus any error in joinder is rendered harmless."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0967181.pdf

Lambert v. Commonwealth: October 15, 2019
70 Va. App. 740, 833 S.E.2d 468 (2019)
Chesterfield: Defendant appeals his convictions for Pandering, Possession with Intent to Distribute, and Possession of a Firearm on Admission of Gang Evidence and Limitation of Cross Examination

Facts: The defendant, an armed drug dealer and Bloods member, coerced a woman into prostitution. Police discovered the offense and arrested the defendant, who had tried to escape by fleeing out of his hotel room window. They searched the defendant's hotel room and found drugs, a firearm, and gang-related documents and paraphernalia. At trial, the victim testified that she feared the defendant would beat or kill her if she crossed him, partially because of his gang membership. She understood him tell her that he had underlings in the organization who would do his bidding, and that he might beat her or have her killed if she didn't continue to prostitute herself at his demand.

Over the defendant's objection, an expert testified about gang culture and the intimidation. He explained that the Bloods in the Richmond area engage in narcotics distribution, robberies, witness intimidation, and prostitution. He identified the documents found in the hotel room as a handwritten

history of the Bloods which "Blood members are supposed to know" and "also the 31 rules, the gang rules." He also explained how the Bloods used intimidation and violence to keep their members in line.

At trial, the jury learned that the victim had been convicted of felony possession of heroin, that she was a heroin addict, that she still had a suspended sentence hanging over her head, and that she, by her own admission, had been in the hotel room with the drugs. At trial, the defendant sought to introduce evidence that the victim had previously engaged in drug dealing to prove that she was doing so in this instance and needed to lie to throw the blame on the defendant. However, the trial court excluded that evidence.

In addition to the drug and firearm offenses, for which he was convicted, the defendant faced charges of sex trafficking through "force, intimidation, or deception" in violation of § 18.2-357.1(B). The jury convicted appellant of the lesser-included offences of sex trafficking in violation of § 18.2-357.1(A).

[*Great job by Barbara Cooke and Temple Roach, who tried this case. – EJC].*

Held: Affirmed. The Court first agreed that the defendant's membership in the Bloods gang was relevant to establishing his use of intimidation to coerce the victim into commercial sexual transactions. The Court pointed out that, under § 18.2-357.1, the Commonwealth needed to prove that appellant "use[d] . . . intimidation," not just that J.C. was intimidated. In the Court's view, the expert explained how the documents found in the hotel room related to the gang and how intimidation works within the Bloods. In addition, the expert's testimony provided the necessary context to show that the defendant knew that claiming to be a "general" in the Bloods would be intimidating— i.e., that he "use[d] . . . intimidation."

Although there may have been some prejudice inherent in permitting the Commonwealth to introduce evidence of the defendant's membership in the Bloods, the Court found that the evidence was directly relevant to an essential element of the offense charged. Moreover, the Court noted, the trial court gave a cautionary instruction, one that it presumed the jury followed.

The Court rejected the argument that the Commonwealth could have proved the element in another fashion, repeating that the defendant "does not get to dictate how the Commonwealth presents its case" and "the Commonwealth was not obliged to have faith that the jury would be satisfied with any particular one or more of the items of proof. Therefore, it was entitled to utilize its entire arsenal."

The Court also agreed that trial court did not abuse its discretion in limiting cross-examination of the victim about having dealt drugs before meeting the defendant, because the probative value of that cross-examination was substantially outweighed by the undue prejudicial effect. The Court wrote that this evidence was "the core of what is prohibited by Rule of Evidence 2:404." The Court explained that the danger of unfair prejudice remains high when admitting prior bad act evidence to prove that an individual acted in a similar fashion at a later time. Moreover, evidence that the victim had dealt drugs in the past could "arouse the jury's hostility" against her, potentially confusing the issues properly pending at trial.

Likewise, the Court agreed that the trial court did not abuse its discretion in preventing the defendant from cross-examining the victim about having engaged in prostitution previously because that evidence was irrelevant. The Court expressed concern that introducing evidence of prior commercial sexual activity could confuse the jury into thinking that the Commonwealth needed to prove

that the defendant caused the victim to engage in commercial sexual activity for the first time. Instead, the Court emphasized that the question is whether the defendant caused her, through intimidation, to engage in the commercial sex acts at issue.

The Court found that the defendant's argument erroneously assumed that once a woman voluntarily engages in a single commercial sex act, every later commercial sex act is also voluntary. In a footnote, the Court acknowledged that it is not uncommon for victims of sex trafficking to have engaged in commercial sex acts prior to their exploitation and enslavement at the hands of traffickers.

Lastly, the Court agreed that the evidence was sufficient. Although the Court pointed out that the victim's testimony alone was sufficient to support the convictions, the Court also noted that the defendant "provided powerful confirmation he was involved in the sale of the drugs when he jumped out of a third story window" to evade police. The Court rejected the defendant's argument that the victim's testimony was insufficient due to police failure to check for fingerprints, DNA or contents of a computer at the scene.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0773182.pdf

Prior Convictions

Virginia Court of Appeals
Published

Raspberry v. Commonwealth: October 29, 2019
71 Va. App. 19, 833 S.E.2d 894 (2019)
Hampton: The defendant appeals his convictions for Possession with Intent to Distribute and several Firearms Offenses on Admission of Prior Convictions and Sufficiency of the Evidence.

Facts: The defendant, a convicted felon, drove a car with guns along with drugs that he intended to sell. The defendant was wanted at the time. Police stopped the defendant, arrested him, and searched the vehicle, finding the guns in a bag on the front passenger seat of the vehicle.

At trial, the defendant's girlfriend testified that she owned the vehicle and that the defendant frequently drove it. She also testified that the bag discovered by the police did not belong to her and that she did not know who it belonged to. The officer also testified that, in addition to the firearms, the bottom of the bag contained two Gatorade bottles with condensation on the outside of the bottles. Finally, the officer testified as an expert to a nexus between firearms and narcotics distribution.

At trial, the defendant objected to the admission of his prior conviction under *Waller v. Commonwealth*, arguing that § 8.01-389(A) requires circuit court orders to be authenticated pursuant to § 17.1-123(A). In this case, the orders were merely certified by the Hampton Circuit Court Clerk with an embossed seal that contained (1) use of the term "true copy," (2) the signature of a deputy clerk, and (3) the name of the court where the records were preserved, "Hampton Circuit Court."

Held: Affirmed. The Court held that the trial court did not err in admitting the court orders as proof of the prior felony convictions and that sufficient evidence existed to support the convictions.

The Court explained that the *Waller* case did not apply because after that case, the General Assembly revised § 17.1-123(A) in 2014, removing language that required authentication of an order. Now, § 8.01-389(A) only requires that the records be certified as a true record by the clerk of court for the circuit court where the record is preserved. Therefore, the Court concluded that the certification that appeared on the orders at trial complied with § 8.01-389, making them automatically authenticated for the purpose of admitting the records into evidence at trial.

The Court also agreed that evidence demonstrated constructive possession, noting that the trial court could infer that the Gatorade bottles had been recently placed at the bottom of the bag

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0988181.pdf

Virginia Court of Appeals
Unpublished

Jones v. Commonwealth: January 14, 2020

Alexandria: Defendant appeals his conviction for Possession of a Firearm by Violent Felon on Fifth Amendment grounds and admission of his Prior Conviction.

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.

At trial, the trial court prohibited the Commonwealth from introducing evidence of the defendant's actual prior conviction for second-degree murder. Instead, the trial court allowed the defendant to stipulate that he had been convicted of a prior violent felony. The defendant objected to admitting the stipulation, arguing that his conviction should not go to the jury at all. The trial court overruled the objection, instructing the jury that "[t]he Commonwealth has offered this stipulation into evidence for the sole purpose of proving that [the defendant] was convicted of the prior offense. You should not use this fact for any other purpose in your deliberations."

Held: Affirmed. Regarding the 5th Amendment issue, because the defendant did not make an unambiguous invocation of his right to have counsel present at the interrogation, the Court found that the trial court did not err in denying his motion to suppress the statements that he made during this interrogation.

The Court concluded that the defendant's first statement, "Hey, can you call my wife to tell her to call my lawyer for me?," did not indicate a clear invocation of his right to counsel because a reasonable officer would not know with clarity that the defendant wanted to have an attorney present for his interrogation. Rather, the Court observed that the question could have indicated that he wanted his wife to call a lawyer so that a lawyer could be present at his interrogation, or it could have indicated that he wanted to notify a lawyer that he faced future legal issues, or it could have indicated that he wanted a lawyer to assist him at some future stage in the legal proceedings.

Similarly, the Court concluded that the defendant's second statement, "You're gonna make the phone call," presented the same ambiguity. While the defendant asked the detective if he was going to call his wife in order for her to call an attorney, the Court found no indication in his words that he wanted an attorney present for his interrogation.

Regarding the fact of his violent conviction, because the stipulation was clearly less prejudicial than the admission of his actual prior offense, the Court rejected the defendant's argument that the stipulation was unduly prejudicial. The Court then repeated that, where there are concerns that evidence may be unfairly prejudicial, a limiting or clarifying instruction is the appropriate remedy. The Court concluded that any undue prejudice was cured by the court's cautionary instruction.

In a footnote, the Court, for the first time, explicitly distinguished *Old Chief* from the case at hand. The Court explained that *Old Chief* concerned a federal firearm statute, 18 U.S.C. § 922(g)(1), which has fundamental differences from the Virginia statute. The Court explained that in this case, pursuant to Code § 18.2-308.2(A), the Commonwealth was required to prove that the defendant had previously been convicted of a specific type of felony—a violent felony—rather than simply a felony. The Court found that *Old Chief* was not controlling in this case, where the Commonwealth was required to prove that that the defendant had committed a specific type of felony and the defendant was allowed to stipulate that he had previously committed this type of felony, rather than have his actual prior offense admitted into evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1359184.pdf

Miscellaneous Evidentiary Issues

Virginia Court of Appeals
Published

Williams v. Commonwealth: January 14, 2020
71 Va. App. 462, 837 S.E.2d 91 (2020)

Richmond: Defendant appeals his convictions for Receiving a Stolen Firearm and Possession of Marijuana on Fourth Amendment grounds and admission of a Field Test.

Facts: The defendant carried a stolen gun on his person while driving with marijuana in his car. An officer stopped him for a traffic violation at night and asked him whether he had any firearms in the vehicle. Although the defendant admitted that he did, he was evasive about where the firearm was located. The officer asked at least four times about the location of the gun. Each time, the defendant responded only that it was concealed.

The officer asked the defendant to step out of the vehicle, due to a dog in the passenger compartment and in order to observe the defendant's motor skills. The defendant initially refused to comply but eventually acquiesced. When the defendant got out of the car, the officer immediately saw the butt of the large revolver inside the defendant's open jacket. The officer seized the gun and ran the serial number. The officer learned that the gun was stolen.

Within moments of seizing the firearm, the officer noticed the odor of unburned marijuana coming from the defendant. The officer searched the defendant and found marijuana. He later field-tested it and it was positive.

The defendant would not identify the person from whom he received the gun, stating only that he bought it from "a person." Additionally, he told the officer that any charge "would get lost in court," and he added "that he had been stopped for a stolen firearm before and was not arrested at that time."

The defendant moved to suppress the seizure of the handgun and the search of its serial number, but the trial court denied the motion. At trial, the officer testified that the Richmond Police Department routinely used the marijuana field test in this case, the "NARK II #2005 Duquenois-Levine Reagent." The officer explained that he received training on the test "during basic school." The defendant objected to the admission of the field test results but the trial court overruled the objection.

Held: Affirmed regarding Receiving a Stolen Firearm, Reversed regarding Possession of Marijuana. Regarding the suppression motion, the Court first concluded that under these circumstances, once the officer saw the firearm in plain view protruding from the defendant's jacket, the objective circumstances provided him a reason to believe that his safety or that of another officer on the scene was in danger.

In a footnote, the Court explicitly dodged the broader question of whether a police officer may constitutionally seize a firearm during a traffic stop regardless of whether other factors support the inference that a driver or passenger is dangerous. However, the Court acknowledged the 4th Circuit's ruling in *Robinson* that the seizure of a gun was constitutional because the objective circumstances supported the conclusion that it posed a potential threat to officer safety.

The Court concluded that viewing and recording a serial number from a firearm lawfully seized by an officer does not violate the Fourth Amendment. The Court determined that, once the officer had lawfully seized the firearm to ensure safety during the stop, the defendant's expectation of privacy in its serial number was not objectively reasonable. Consequently, the officer was permitted to read the visible serial number and search for it in the firearms database. The Court cited numerous cases from other jurisdictions to support that conclusion.

The Court then found that the facts clearly supported a reasonable suspicion that the firearm was stolen. The Court observed that, when the defendant initially refused to comply with the officer's request to get out of the car, that supported the inference that he knew doing so would expose the gun to the officer's view. The Court also noted that, despite possessing a concealed handgun permit and advising the officer of such, the defendant was not cooperative in either telling the officer where the gun was located or getting out of the car, risking exposure of the large revolver on his person. The Court also noted that the smell of unburned marijuana and a green leafy substance believed to be marijuana on the defendant gave the officer reasonable suspicion to detain the defendant to investigate further based on the suspicious circumstances surrounding the gun and the evidence of marijuana. Consequently, the Court concluded that the continued detention and running of the serial number were permitted under the circumstances to allow the officers to confirm or dispel the suspicion that the defendant was in possession of a stolen gun.

Regarding the marijuana field test, however, the Court found that the officer's testimony that he was trained on the standard test used by the Richmond Police Department by "department narcotic officers" did not establish that DFS had approved the test or that he was trained by DFS. The Court wrote: "This record simply does not support the admission of the field test result into evidence under Code § 19.2-188.1." The Court complained that the record contained no evidence pertaining to the reliability or accuracy of the specific field test, nor did it demonstrate that the test used has been approved by the DFS as required by Code § 19.2-188.1.

While the Court agreed that a trial court could take judicial notice under Va. R. Evid. 2:201(a), of a fact that it is either (1) common knowledge or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, the Court pointed out that, in this case, the trial court had not taken judicial notice, on the record, that DFS approved the test at issue.

The Attorney General had asked, on appeal, that the Court of Appeals take judicial notice that the DFS approved the field test used by the officer. However, the Court explained that it was not persuaded that the "NARK II #2005 Duquenois-Levine Reagent" field test used by the officer was, as a matter of law, the same as the "NARK II" "05 - Duquenois - Levine Reagent" test approved by the DFS. The Court stated that it is not a matter of common knowledge that the tests are identical and that the description of the test in the record did not exactly match the description of the approved test in the Virginia Register of Regulations. The Court wrote: "On this record, to conclude that they reference the same test requires technical knowledge. This is not a readily ascertainable fact such as one of geography, and the source relied on now does not match the test referenced in the record."

Note: For the DFS regulation regarding field tests, click the link below and go to page 2057.
http://register.dls.virginia.gov/vol32/iss13/v32i13.pdf
Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0603182.pdf

Court of Appeals
Unpublished

Wilson v. Commonwealth: December 27, 2019

Portsmouth: Defendant appeals his convictions for Burglary, Larceny, and False Pretense, on sufficiency of the evidence.

Facts: The defendant broke into a home and stole the victim's phone. The victim identified the phone by serial number. Police learned that the defendant had sold the phone at an "EcoATM," which is an automated device where people can sell phones for cash. According to the company's records, the defendant provided his Virginia identification card and date of birth. The report contained a photocopy of the defendant's identification card and several small photographs of the defendant. At trial, a police officer identified the defendant as the person in the photographs. The report also included an entry that read "consumer verified by [employee]" and appeared to contain the signature of that employee. The report was admitted with a "certification of custodian of records or other qualified individual."

The defendant argued that the evidence failed to identify him as the individual who possessed and sold the phone.

Held: Affirmed. The Court agreed that, once the Commonwealth presented evidence from which the trial court could infer that the defendant was, in fact, the individual who sold the phone at the EcoATM, the Commonwealth established a prima facie case on all three charges. The Court agreed that the trial court could reasonably infer from the EcoATM report that an employee had an opportunity to view the individual at the EcoATM and confirm that his appearance matched the defendant's identification card.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1887181.pdf

MISCELLANEOUS

Appeals

Virginia Supreme Court

Jefferson v. Commonwealth: April 9, 2020

Winchester: Defendant appeals the revocation of his deferred disposition.

Facts: The trial court convicted the defendant of abduction and assault and battery of a family member, after he failed to successfully complete the terms and conditions of his deferred disposition. The trial court sentenced the defendant August 28, 2017. However, the trial court accidentally wrote "2018" instead of "2017" on the order.

Two weeks later, the trial court wrote "amended" on the order and corrected the "2018," by writing a "7" over the "8" so that it instead read as "2017." The court acknowledged the edit by initialing and writing the date it made the correction, September 15, 2017, to the right of the corrected date of entry. The terms and conditions of the sentence were left unchanged, and there was no language added indicating the court was modifying, vacating, or suspending the judgment of the original order.

On October 3, 2017, the defendant appealed his convictions to the Court of Appeals, identifying the date of final judgment from the trial court as September 15, 2017. The Court of Appeals dismissed the appeal as untimely under Rule 5A:6.

Held: Appeal dismissed. The Court observed that, regardless of how the amended order was labelled, it is clear on its face and from its substance that the only amendment was the date of entry of the original order. Thus, the deadline for the defendant's appeal was thirty days from the original order, September 27, 2017. Because the amended order did not modify, vacate, or suspend the judgment contained in the original order, the Court found that the amended order was not the final order in this case. Therefore, the defendant's notice of appeal filed on October 3, 2017, more than thirty days after the final order of August 28, 2017, was untimely and dismissal of his appeal was appropriate under Rule 5A:6.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180993.pdf

Virginia Court of Appeals
Unpublished

Commonwealth v. Williams: October 29, 2019
(Two cases)

New Kent: The Commonwealth appeals the granting of a motion to suppress and motion to dismiss on Fourth Amendment grounds.

Facts: After listening to and observing nearly an hour of loud noise coming from the defendants' residence, noise that appeared to be deliberate, officers decided to issue a summons for violation of a county noise ordinance. The officers, who had been standing on a neighbor's property, walked through the trees that separated the properties and walked towards the defendants' garage.

As the officers approached, the defendant husband "made several threats towards" the officers, including saying, "Come get some, bitches" as the officers were arriving. When an officer he placed his hands on the defendant husband in order to arrest him, the defendant wife intervened between the officers and began saying that they "weren't going to take him anywhere." She started pushing and shoving an officer, leading to a scuffle involving her, several officers, and the defendant husband.

The trial court granted the defendants' motions to suppress regarding the defendants' actions toward law enforcement officers based on a finding that the defendants' arrest violated the Fourth Amendment when they entered the property. Subsequent to granting the motions to suppress, the trial court – over the objections of the Commonwealth – dismissed the indictments against the defendants.

Held: Suppression and Dismissal reversed. The Court ruled that, even assuming without deciding that the officers' way of entering onto the defendants' property violated the Fourth Amendment, the trial court erred in suppressing the evidence concerning the illegal actions then taken by the defendants that led to their arrests. The Court found that the husband's belligerence and threats toward the officers from the moment of their arrival on the property, as well as the wife's pushing, shoving, and subsequent scuffle with the officers, were independent intervening criminal acts that should not have been excluded from evidence under the exclusionary rule.

Citing the *Brown* case, the Court wrote that the defendant did "not then have carte blanche to do anything they wish to the officers such that evidence or testimony of those unlawful actions against the officers would then be suppressed and excluded from evidence under the exclusionary rule."

The Court also held that the trial court erred in dismissing the indictments when the Commonwealth had the statutory right, pursuant to § 19.2-398, to seek a pretrial appeal. In a footnote, the Court also pointed out that, after the motion to suppress was granted by the trial court, the Commonwealth also should have been permitted to decide whether to proceed to trial, writing: "Given the separation of powers doctrine… the judicial branch should not infringe upon the executive branch's decision (exercised by the Commonwealth's Attorney) of whether even to take a prosecution to trial."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0850192.pdf
and
http://www.courts.state.va.us/opinions/opncavwp/0849192.pdf

Peaks v. Commonwealth: October 8, 2019

Carroll: Defendant appeals his conviction for Possession with Intent to Distribute on admission of Prior Bad Acts evidence.

Facts: The defendant possessed drugs with the intent to distribute them. At trial, the trial court concluded that evidence of the defendant's prior bad acts, specifically previous controlled buys from the defendant, was admissible. The trial court admitted testimony about prior purchases made by confidential informants, over defense objection.

During the defendant's case-in-chief, the defendant's attorney asked the defendant what he meant when, in a prior statement, he said, "I would also sale some to people that I knew." The defendant replied: "Well, uh, earlier, not that day, but earlier, I had sold some to some people…." He admitted during his case-in-chief that he had sold drugs in the past, but not on the day of the search, and he maintained that the methamphetamine in his pocket was for personal use.

Held: Affirmed. The Court held that, by testifying to having previously sold drugs during his case-in-chief, his testimony effectively waived his objection.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0995183.pdf

Braxton v. Commonwealth: June 25, 2019

Chesterfield: Defendant appeals his conviction for Strangulation on failure to provide a trial transcript.

Facts: The trial court convicted the defendant of felony strangulation at trial. The defendant noted his appeal. The clerk's office of the circuit court notified the defendant that the trial transcript he had requested could not be provided because the clerk was "unable to locate the court reporter notes." The clerk also notified him that he still had the opportunity to timely file with the trial court a statement of facts in lieu of a transcript. The defendant did not pursue that option.

On appeal, the defendant argued that the lack of a transcript from trial necessitated reversal of his conviction. The defendant also argued that, because he is indigent, the trial court's failure to provide a transcript as required by § 19.2-165 was a violation of his due process and equal protection rights.

Held: Affirmed. The Court pointed out that, in this case, the defendant could either have filed a statement of facts in lieu of a transcript or have filed a request with the trial court for an extension of the deadline to file a statement of facts in lieu of a transcript. The Court ruled that the defendant's failure to do so did not entitle him to a new trial. The Court also ruled that there was no due process or equal protection violation in this case, in light of the fact that no appellant, whether indigent or wealthy, would have been able to obtain a transcript under these circumstances where the court reporter's notes were lost.

Without a transcript or a statement of facts in lieu of a transcript, the Court did not reach the merits of the defendant's remaining assignments of error.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0815182.pdf

Prosecutor Liability

U.S. Supreme Court

McDonough v. Smith: June 20, 2019
588 U.S. ___, 139 S. Ct. 2149 (2019)
Certiorari to the 2nd Circuit: Plaintiff appeals the dismissal of his lawsuit against a prosecutor for fabrication of evidence on statute of limitations grounds.

Facts: The plaintiff was the commissioner of a county board of elections in New York. The defendant was a special prosecutor, assigned to investigate alleged voter fraud. The plaintiff alleges that the prosecutor falsified affidavits, coached witnesses to lie, and orchestrated a suspect DNA analysis to link the plaintiff to relevant ballot envelopes. The prosecutor presented the case to a grand jury, secured an indictment, and tried the matter to a jury. A jury ultimately acquitted the defendant.

After his acquittal, the plaintiff sued the prosecutor and other defendants under §1983 in federal court. Against the prosecutor, the plaintiff asserted two different constitutional claims: one for fabrication of evidence, and one for malicious prosecution without probable cause. The District Court dismissed the malicious prosecution claim as barred by prosecutorial immunity, though timely. The District Court dismissed the fabricated-evidence claim, however, as untimely.

The statute of limitations for that claim was three years. Given the dates at issue, the plaintiff's claim was timely only if the limitations period began running at acquittal. The 2nd Circuit Court of Appeals held that the plaintiff's fabricated-evidence claim accrued, and thus the limitations period began to run, when (1) the plaintiff learned that the evidence was false and was used against him during the criminal proceedings; and (2) he suffered a loss of liberty as a result of that evidence.

Held: Reversed. In a 6-3 decision, the Court ruled that the statute of limitations for the plaintiff's §1983 claim alleging that he was prosecuted using fabricated evidence began to run when the criminal proceedings against him terminated in his favor—that is, when he was acquitted at the end of his second trial. The Court explained that the proper approach in the federal system generally is for a criminal defendant who believes that the criminal proceedings against him rest on knowingly fabricated evidence to defend himself at trial and, if necessary, then to attack any resulting conviction through collateral review proceedings. In a footnote, the Court repeated that Congress has determined that a petition for writ of habeas corpus, not a §1983 action, "is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement."

Full Case At:
https://www.supremecourt.gov/opinions/18pdf/18-485_g2bh.pdf

Police Use of Force & Liability

Fourth Circuit Court of Appeals

Cybernet v. David: March 24, 2020

E.D.N.C.: Plaintiffs appeal the dismissal of their lawsuit for violation of Fourth Amendment rights.

Facts: Police executed search warrants at two "video sweepstakes" businesses. The warrants were based on an allegation that the video devices inside violated a state law that bans video sweepstakes wherein chance predominates over skill. During the execution of the warrants, police damaged some property. Due to the property damage, the plaintiffs sued the police and the prosecutor, alleging that they violated the plaintiff's rights under the Fourth, Fifth, and Fourteenth Amendments, by using or directing others to use excessive force on the plaintiff's property during the execution of the warrants.

The trial court dismissed the lawsuit on summary judgment.

Held: Affirmed. The Court recalled that officers are afforded a degree of discretion in determining how to carry out a search and that they are not required to "use the least possible destructive means to execute a search warrant." Thus, only excessive damage to property is objectively unreasonable; that definition implies something more than accidental or incidental injury to property in the course of working within the parameters of a lawful search warrant. As the Court explained: "Accidents happen. Unfortunate as they may be, such mishaps need not dictate Fourth Amendment liability."

The Court reviewed other cases and observed that "cases where courts have denied qualified immunity generally involve greater levels of destruction of property than what is alleged here." In this case, taking the plaintiff's allegations of damage at face value, the extent of the harm and the fact that the damage occurred incident to the lawful seizure of items in the warrants, the Court found that the facts supported the trial court's judgment.

The Court repeated that "[t]he Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry." Instead, the Court noted that

"(1) the whole business of a search warrant is to authorize officers to seize evidence relevant to an investigation;

(2) the relevance of an item may, as here, not be immediately apparent to those gathering the evidence; and

(3) the Fourth Amendment clearly restrains, but does not micromanage, how those executing a warrant perform that task."

Full Case At:
http://www.ca4.uscourts.gov/opinions/182420.P.pdf

Fijalkowski v. Wheeler: March 9, 2020

E.D.Va: Plaintiff appeals the dismissal of his lawsuit against police on Due Process grounds.

Facts: The plaintiff, an employee at a local pool, suffered from bipolar disorder and began suffering from psychosis. He physically assaulted a patron, argued with guests, and started talking to himself in Polish, his native language. Officers trained in crisis intervention tried to communicate with him, but were not able to. The plaintiff repeatedly threw his phone into the pool and submerged himself, later coming back to the surface and then going back under water. Finally, he went under water and did not come back up.

Initially, the officers ordered the lifeguard not to enter the pool. After the plaintiff had been submerged for approximately two-and-a-half minutes, the lifeguard again told the officers that he needed to rescue him, and this time the officers allowed him to do so. The lifeguard dove into the pool and brought the plaintiff to the surface. Several of the officers jumped in to help remove the plaintiff from the water. Officers performed lifesaving measures. The plaintiff remained in a hospital's heart and vascular unit for just over a week. He was then transferred to the psychiatric unit, where he was diagnosed with bipolar disorder and psychosis. He was discharged from the hospital six days later.

The plaintiff filed suit against the officers, the lifeguard, and the lifeguard's employer, seeking damages under 42 U.S.C. § 1983 and state law. In particular, the defendant argued that the officers' conduct constituted a substantive due process violation under the "state-created danger" doctrine, that the officers' conduct amounted to a "patently arbitrary assertion of power," and that they demonstrated gross negligence under Virginia law. The district court dismissed the lawsuit for failure to state a claim.

Held: Affirmed. The Court declined to resolve whether the officers' conduct constitutes a substantive due process violation under the state-created danger doctrine. Instead, the Court simply agreed with the district court that, even if it did, the officers were entitled to qualified immunity because it was not clearly established at the time of the incident that delaying by up to two-and-a-half minutes the rescue of a drowning person who may have posed a danger to others violated that person's substantive due process rights. The Court also rejected the argument that the officers' conduct amounted to a "patently arbitrary assertion of power."

Regarding the gross negligence claim, the Court agreed that the officers exercised some degree of care, noting that the officers came to the deep end of the pool and monitored the plaintiff, eventually permitted the lifeguard to rescue him, and they also assisted in the rescue. Even if they waited too long to do so, the Court agreed with the district court that the claim is one of inadequacy, not indifference.

In a footnote, the Court explained that it would not address the officers' arguments that, because he committed the common law crime of attempted suicide, the plaintiff could not recover damages.

Full Case At:

http://www.ca4.uscourts.gov/opinions/191262.U.pdf

Shiheed v. Harding: February 12, 2020

Baltimore: An inmate appeals the dismissal of his lawsuit under the Eighth Amendment.

Facts: While incarcerated, the inmate refused to allow a guard to close the aperture on his cell door. A video recording captured the incident. On video, a nurse and a guard approached the inmate's cell to deliver medication. They opened the slot on his door, but when the guard tried to close it, the inmate held it open. The guard then sprayed the inmate with pepper spray. The inmate then threw a milk carton at the guard through the open slot, striking her in the shoulder. In response, the guard moved toward the inmate, but she stepped away again when the inmate tried to grab her. The inmate then extended a long, white pole make of milk cartons and sock out of the slot and struck the guard.

The inmate refused medical treatment and did not claim any injury. The inmate filed a lawsuit for unlawful use of force against the guard. The district court dismissed the lawsuit on summary judgment.

Held: Affirmed. The Court applied the rule that the Eighth Amendment prohibits prison officials from unnecessarily and wantonly inflicting pain on prisoners. The Court applied the four-factor test under *Thompson v. Virginia* to evaluate whether officers acted maliciously or wantonly, considering:

(1) the need for the application of force;

(2) the relationship between the need and the amount of force that was used; (3) the extent of any reasonably perceived threat that the application of force was intended to quell; and

(4) any efforts made to temper the severity of a forceful response.

The Court concluded that no reasonable jury could find that the guard acted maliciously or wantonly. The Court found it clear that leaving the slot open posed a potential threat and that the guard's use of force was minimal. The Court further concluded that the evidence does not support a reliable inference that the guard acted maliciously and sadistically for the purpose of causing harm.

Full Case At:
http://www.ca4.uscourts.gov/opinions/196969.U.pdf

Ray v. Roane: January 22, 2020
948 F.3d 222 (2020)
W.D.Va: Plaintiff appeals the dismissal of her Fourth Amendment suit against a police officer for shooting and killing the plaintiff's dog.

Facts: While serving a warrant on the plaintiff for domestic assault, a police officer encountered the plaintiff's dog, a 150-pound German Shephard. According to the plaintiff's pleadings (which the officer disputes), as the officer approached, the dog reached the end of his zip-lead and "could not get any closer" to the officer. The plaintiff claims that she held onto the dog's fully-extended lead and

repeatedly called the dog's name. The officer stopped backing up, took a step forward, and shot and killed the dog.

The plaintiff sued the officer for unlawful seizure of the dog in violation of the Fourth Amendment, Conversion, and Intentional Infliction of Emotional Distress. The trial court ruled that the plaintiff's allegations complaint failed to allege a violation of the Fourth Amendment and that, based on the pleadings, the officer's actions had been reasonable under the totality of the circumstances and he would be entitled to qualified immunity.

Held: Reversed. The Court first repeated that privately owned dogs are "effects" under the Fourth Amendment, and that the shooting and killing of such a dog constitutes a "seizure." In this case, the Court concluded that the trial court erred in holding that the complaint failed to allege a violation of the plaintiff's Fourth Amendment rights. The Court criticized the trial court for relying on cases that were all decided on summary judgment involving one or more dogs that, like here, were barking or advancing toward an officer but, unlike here, were unleashed or unrestrained and posed an immediate danger to the officer.

The Court held that a reasonable police officer would have understood that killing the dog under these circumstances would constitute an unreasonable seizure of the plaintiff's property under the Fourth Amendment. The Court maintained that it is unreasonable for an officer to shoot a privately-owned dog when the dog poses no objective threat to the officer or others.

Full Case At:
http://www.ca4.uscourts.gov/opinions/182120.P.pdf

Betton v. Belue: November 4, 2019
942 F.3d 184 (2019)
S.C.: Plaintiff appeals the dismissal of his lawsuit against police on Fourth Amendment grounds.

Facts: While serving a drug search warrant, officers shot and paralyzed the plaintiff. The search warrant was based on the plaintiff selling small amounts of marijuana on two occasions. Although the informant observed security cameras and two firearms in the plaintiff's home, there was no evidence indicating that the plaintiff had engaged in threatening or violent conduct.

Officers did not knock and announce their presence before forcibly entering the plaintiff's residence. When he heard people entering his home, he picked up a handgun and investigated, holding the gun at his side. When officers saw him holding the gun, they shot him. The plaintiff maintains that the officers never announced their presence and did not give him any verbal commands; the officers dispute his claim. The district court dismissed the lawsuit before trial on qualified immunity grounds.

Held: Reversed. The Court applied the *Cooper* ruling and found that that shooting an individual is an unconstitutional use of excessive force when the officer:

(1) came onto a suspect's property;

(2) forcibly entered the suspect's home while failing to identify himself as a member of law enforcement;

(3) observed an individual holding a firearm at his side inside the home; and

(4) failed to give any verbal commands to that individual.

The Court agreed that, if the officers had identified themselves as members of law enforcement, the officers reasonably may have believed that the plaintiff's presence while holding a firearm posed a deadly threat to the officers. The Court also agreed that, had the plaintiff disobeyed a command given by the officers, such as to drop his weapon or to "come out" with his hands raised, the officers would have reasonably feared for their safety upon observing the plaintiff holding a gun at his side.

Full Case At:
http://www.ca4.uscourts.gov/opinions/181974.P.pdf

Gilliam v. Sealey: July 30, 2019
932 F. 3d 216 (2019)
E.D.N.C.: Law Enforcement officers appeal the denial of their motion to dismiss a lawsuit for Deprivation of Fourth Amendment and Due Process Rights.

Facts: Plaintiffs are two brothers who spent 31 years in prison and on death row for the rape and murder of an 11-year-old girl in 1983 before being exonerated based on DNA evidence linking another individual, a man who was known to officers at the time of the investigation, to the crime. The other suspect had committed a very similar rape and murder just one month later in the same jurisdiction. A state court vacated the plaintiffs' convictions in 2014 and the governor granted them a full pardon in 2015.

The plaintiffs sued the officers for deprivation of rights under 42 U.S.C. § 1983 for false arrest, malicious prosecution and deprivation of due process. They claimed that the officers coerced and fabricated the plaintiffs' confessions, and then, to cover up this wrongdoing, the officers withheld in bad faith exculpatory evidence that demonstrated their innocence and buried pieces of specific evidence indicating that the other suspect raped and murdered the victim.

The plaintiffs attacked the confessions that they provided, arguing that the interrogations took place very late in the night into the early morning, when they were 19 and 15 years old, both with serious intellectual disabilities, and alleging that the officers tricked them and threatened them with the gas chamber and yelled racial epithets at them, while neither plaintiff was aware of his rights." They also noted that their confessions contained details about the crime that were not accurate and did not match the crime scene.

The plaintiffs pointed to the officers' failure to disclose evidence that the other suspect committed a similar crime in the same area and during the same time period as the victim's rape and murder, and that the other suspect was considered a suspect in this crime. The plaintiffs also allege that the officers intentionally fabricated, obscured, and failed to disclose relevant and exculpatory evidence in the case, specifically, a statement from an eyewitness affirmatively identifying a different suspect as the attacker.

The plaintiffs also alleged that the officers coached or coerced a cooperating witness to testify falsely, only after the officers identified the witness as a suspect and requested his fingerprints, and they argue that the witness's statements were coerced or fabricated.

The officers moved for summary judgment but the trial court denied their motion.

Held: Affirmed, motions to dismiss properly denied. The Court found no basis for qualified immunity, as it was beyond debate at the time of the events in this case that the plaintiffs had clearly established constitutional rights not to be imprisoned and convicted based on coerced, falsified, and fabricated evidence or confessions, or to have material exculpatory evidence suppressed.

The Court allowed that the question of whether the officers had probable cause to arrest the plaintiffs, and whether their confessions were coerced or fabricated, must be determined by a jury.

The Court acknowledged that, unlike prosecutors, police officers commit a constitutional violation only when they suppress exculpatory evidence in bad faith. In addition, to prove a due process violation, a plaintiff must prove both but-for causation and proximate causation -- in other words, that the alleged wrongful act(s) caused the plaintiff a loss of liberty and the loss of liberty was a reasonably foreseeable result of the act.

The Court found that the plaintiffs could establish a due process violation if a jury concludes that the officers' actions after the arrests -- including failing to adequately investigate the other suspect and the crime scene and failing to disclose exculpatory evidence -- were done in bad faith in order to shield the officers' wrongful acts related to the plaintiffs' alleged coerced or fabricated confessions.

Full Case At:
http://www.ca4.uscourts.gov/opinions/181366.P.pdf

Turner v. Thomas: July 19, 2019
930 F. 3d 640 (2019)
W.D.Va: Plaintiff appeals the dismissal of his lawsuit against the police on Due Process grounds.

Facts: The plaintiff attended the August 12 rallies in Charlottesville as a "counter-protester." During the rallies, KKK members or sympathizers attacked him, spraying his eyes with mace, beating him with a stick, and throwing bottles of urine at him. He alleged that during the attack, police looked on and did nothing. Despite a warning from the Department of Homeland Security that the rally could turn violent, police did not initially wear riot gear to patrol the rally.

The plaintiff sued the chief of the local police and the superintendent of the Virginia State Police, claiming that the commanders violated his substantive due process rights by ordering officers at the rally not to intervene in violence among protesters. The district court ruled that the police were entitled to qualified immunity and dismissed his complaint.

Held: Affirmed. The Court examined the "state-created danger" doctrine, which holds that a state actor may be held liable for harm resulting from "affirmative actions" that created or enhanced the dangerous conditions that produced the plaintiff's injury. The Court concluded that it was not clearly established at the time of the rally that ordering officers not to intervene in private violence between protesters was an affirmative act within the meaning of the state-created danger doctrine.

The Court wrote: "Our precedent sets an exactingly high bar for what constitutes affirmative conduct sufficient to invoke the state-created danger doctrine. Turner has put forth no facts suggesting

that a stand-down order crosses the line from inaction to action when the state conduct in *Pinder* and *Doe* did not." As there was no clearly established law imposing liability based on deliberate indifference in this context, the Court found that qualified immunity shielded the police from lawsuit.

Full Case At:
http://www.ca4.uscourts.gov/opinions/181733.P.pdf

Graves v. Lioi: July 16, 2019
930 F. 3d 307 (2019)
Baltimore: The family of a murder victim appeal the dismissal of their lawsuit against the police on Due Process grounds.

Facts: While wanted on a second-degree assault warrant, a man stabbed and killed the victim of that assault, his pregnant wife, outside a courthouse where she had just obtained a protective order against him. Prior to the murder, officers had allowed the murderer to leave the area rather than detaining him until the warrant—which was missing—could be found. The officers did not aggressively pursue the arrest after the warrant was located and ultimately agreed to allow him to self-surrender. Before police arrested him, however, he murdered his wife.

The family sued Baltimore Police Department officers, alleging that they were responsible for the victim's death because they enabled the murderer to postpone his self-surrender on the misdemeanor arrest warrant, thereby providing him the opportunity to murder his wife. The District Court dismissed the case for failure to state a claim, but the Fourth Circuit reversed and remanded. The District Court again dismissed the case at summary judgment and the plaintiffs appealed.

Held: Affirmed. The Court agreed that the evidence was not sufficient to allow a verdict in the plaintiffs' favor and, in the alternative, the officers were entitled to qualified and public official immunity. The Court characterized the officers' behavior as omissions and failures to act, rather than affirmative acts that could give rise to liability. The Court found that the evidence demonstrated "at most" that the officers agreed to allow a cooperating individual that posed no known immediate risk to self-surrender.

The Court pointed to the lack of evidence that the officers had orchestrated the warrant being unavailable when the murderer self-surrendered or that the officers conspired to help him to evade arrest. The Court also noted the lack of evidence of personal knowledge on the officers' part that the murderer posed a threat—let alone an ongoing, immediate, or increasingly violent threat—toward his victim.

Reviewing the Supreme Court's decisions in *DeShaney* and *Town of Castle Rock*, the Court pointed out that, to fall into the "state-created danger" theory of liability, an officer has to engage in conduct that created or increased "the dangerous situation that resulted in a victim's injury" such that the circumstances were "much more akin to an actor . . . directly causing harm to the injured party." However, the Court found that exercising routine police discretion in when and how to serve a warrant does not give rise to a state-created danger. Noting the lack of any cases to the contrary, the Court

found that the officers did not have "fair warning that their conduct was unconstitutional" and therefore were entitled to qualified immunity.

Full Case At:
http://www.ca4.uscourts.gov/opinions/171848.P.pdf

Harris v. Pittman: June 18, 2019
927 F. 3d 266 (2019)
E.D.N.C: Plaintiff appeals the dismissal of his lawsuit against a police officer for Use of Force under the Fourth Amendment.

Facts: The defendant, a police officer, tried to stop the plaintiff for driving a stolen car, but the plaintiff fled. After he repeatedly told the plaintiff to stop, the officer caught up to the plaintiff at the edge of a tree line and both men fell into the woods. In the ensuing struggle, the plaintiff fought off the officer's taser and repeatedly struck the officer. As the plaintiff later admitted in a guilty plea for the assault, the plaintiff wrested the officer's gun from him and tried to shoot the officer in the face with his own gun. However, the gun malfunctioned and the officer regained control of his gun.

The officer shot the plaintiff repeatedly. The plaintiff did not dispute that, when the officer fired on him initially, hitting him in his hand and his abdomen, that the officer's use of deadly force was justified. However, the plaintiff claimed that after the first shots, he fell to the ground and rolled onto his stomach before the officer fired for the final time. Therefore, he claimed that once he had been knocked to the ground with a gunshot wound to his chest, a "reasonable officer" no longer "would have probable cause to believe that [the plaintiff] posed a significant threat of death or serious physical injury," rendering the officer's final two shots objectively unreasonable and thus constitutionally excessive.

The district court granted the officer summary judgment, finding that his use of force was protected by qualified immunity, and dismissed the plaintiff's lawsuit.

Held: Reversed. The Court ruled that, when the record is viewed in the light most favorable to him, the plaintiff could show that the officer's final two shots, fired while he was lying on the ground wounded and unarmed, violated his Fourth Amendment rights, and that those rights were clearly established at the time of the incident. The Court concluded that the factual disputes bearing on the officer's qualified immunity defense preclude the award of summary judgment, and therefore the Court reversed the judgment of the district court.

The Court found that the facts that the plaintiff alleged, taken in the light most favorable to him, would allow a reasonable jury to find a violation of his constitutional rights, satisfying the first prong of the qualified immunity analysis. The Court emphasized that "the reasonableness of force employed can turn on a change of circumstances during an encounter lasting only a few seconds."

The Court contended that even a police officer who has just survived an encounter that necessitated the use of deadly force to extricate himself may not continue to use deadly force once he has reason to know that his would-be assailant is lying on the ground wounded and unarmed. The Court argued that even if the officer's shots were all part of a single series, with the initial shots concededly

justified, it did not establish that the final shots were justified as well; instead, the Court repeated that: "it is possible to parse the sequence of events as they occur." Applying that principle to this case, the Court concluded that the officer was not entitled to qualified immunity on summary judgment.

Judge Wilkinson filed a strong dissent. He wrote, "I cannot join a decision that engineers such a perverse punishment for his actions and tells future officers that they cannot preserve their very lives without having their conduct assessed through the uncomprehending lens of hindsight. The second-guessing will have no end. If not now, never."

Full Case At:
http://www.ca4.uscourts.gov/opinions/177308.P.pdf

Virginia Supreme Court

Cromartie v. Billings: January 16, 2020
837 S.E.2d 247 (2020)
Petersburg: Plaintiff appeals the dismissal of her suit against a police officer for Unlawful Arrest and Search.

Facts: An officer stopped the plaintiff for speeding. She immediately exited her car and began to approach and yell at the officer, but the officer ordered her back into her car and she complied. The officer waited for a backup officer to arrive and then re-approached the plaintiff. Her car was off and her window was closed. The officer knocked on the window, but the plaintiff was talking on the phone loudly inside the car and apparently ignoring the officer, though she briefly said, "What." After a pause, the officer said, "I need you to roll down your window." Following another pause, the officer said, "Ma'am," and knocked on her window a second time. The plaintiff continued talking on the phone, turned momentarily towards the officer, and said, "Hey officer, leave me alone."

The officer waited three seconds before opening the plaintiff's door, grabbing her left wrist, removing her from the vehicle, and forcing her face-down onto the pavement. The plaintiff suffered several injuries. The officer arrested her and entered the plaintiff's car, retrieved her purse from it, and proceeded to search the purse. He found marijuana inside the purse. The officer charged the plaintiff with Obstruction of Justice, Possession of Marijuana, and Speeding.

The Commonwealth did not contest the plaintiff's motion to suppress in the criminal case, and the criminal court dismissed the possession and obstruction of justice charges, finding her guilty only of speeding. The plaintiff then filed a civil suit against the officer.

At trial in the civil case, the jury found in favor of the plaintiff for assault, battery, false imprisonment, and malicious prosecution. The jury found that the officer did not have probable cause to arrest the plaintiff for obstruction of justice. The officer did not appeal these verdicts. However, after the trial, the trial court granted the officer's motion to strike the evidence of the plaintiff's claims against him for an unlawful search based on § 19.2-59, for excessive force under 42 U.S.C. § 1983 ("§ 1983"), and for false arrest under § 1983.

Held: Reversed. The Court reversed the trial court's decision to grant the motion to strike the § 19.2-59 unlawful search claim, the § 1983 false arrest claim, and the § 1983 excessive force claim. The Court remanded the case for an assessment of damages.

Regarding the use of force, the Court applied the three factors under *Graham v. Connor.* The Court wrote that "there was obviously no need for the use of any force," in view of the plaintiff's minor delay in responding to the request to open her window, and the Court agreed that the officer took an unreasonably aggressive action of forcing her face-down onto the pavement, "escalating this incident to a violent exchange where she suffered numerous injuries." The Court noted that the officer had grabbed the plaintiff without warning or explanation, and thus the Court found her reaction was instinctive, and not resistance, resulting from the abrupt physical contact by the officer.

The Court found that, since the jury had ruled that the officer lacked probable cause, and since a person has a right to use reasonable force to resist an unlawful arrest, the force exercised by the officer was *per se* excessive as he did not have the legal right to use force against the plaintiff to effectuate an illegal arrest.

Since the jury had found that the officer did not have probable cause to arrest the plaintiff, the Court also agreed that the officer did not have probable cause to search the plaintiff's purse and the search was not performed incident to a lawful arrest. The Court also concluded that no reasonable officer could have concluded that the plaintiff's behavior constituted obstruction of justice.

The Court considered the officer's defense of sovereign immunity regarding the search. The Court acknowledged that sovereign immunity applies to § 19.2-59 actions. However, in this case, the Court found that, by entering the plaintiff's car multiple times to collect information, the officer exceeded simple negligence. Therefore, the Court ruled that sovereign immunity did not protect the officer. The Court pointed out that, applying *Gant,* neither her vehicle nor her purse could have contained evidence of speeding, nor of Obstruction of justice.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180851.pdf

Innocence Petitions

Virginia Court of Appeals
Published

Madison v. Commonwealth: March 24, 2020

Virginia Beach: The defendant seeks a writ of actual innocence.

Facts: The defendant and another man robbed a man in 1997. The trial court convicted the defendant in 1997. At trial, the victim identified the defendant as the person who robbed him at trial. Another man at the scene did not identify any of the robbers. The Commonwealth subpoenaed him for trial, but that person refused to cooperate and did not appear at trial.

The Innocence Project obtained a statement from a man incarcerated in Arkansas that he, and not the defendant, committed this robbery. The victim, in an affidavit prepared by the Innocence Project, stated that he is "no longer confident" in his identification. The Innocence Project also located the third-party witness, who claimed that the defendant was not involved in the robbery.

The Court of Appeals directed the circuit court to conduct an evidentiary hearing. The specific question posed by the Court's remand order was whether the incarcerated man would state, under oath before the circuit court, that he participated in a robbery in Virginia Beach in 1997 and that the defendant was not a participant in the robbery. The incarcerated man who claimed to have committed the robbery did not testify at the hearing.

Held: Writ denied. The Court concluded that the defendant had not met his burden to show by clear and convincing evidence that no rational trier of fact would have found proof of guilt beyond a reasonable doubt. The Court repeated that "Requiring 'material' evidence to be 'true' is consistent with the statute's legislative purpose." The Court treated the victim's new statement as a "recantation," and reaffirmed that: "Because victims' recantations are often unreliable, it is rare that a petitioner can offer clear and convincing evidence that the recantation is true and it is the trial testimony that is false."

The Court observed that the incarcerated man's account did not match the victim or witness' account of what happened. The Court also found that a reasonable jury would likely give little credit to the incarcerated man's confession when he refused to testify in court under oath. The Court discounted the victim's lack of confidence in his identification, noting that a jury would have to balance this evidence with the victim's initial identification and his trial testimony that his identification was not influenced by the police.

The Court also concluded that the defendant had not demonstrated sufficient diligence in contacting the third-party witness in 1997. Although the record showed that the witness was uncooperative with police, the Court found no evidence in the record demonstrating the exercise of any diligence on the defendant's part.

In a footnote, the Court explained that witnesses' testimony regarding the incarcerated man's earlier statements made to them was not relevant as to the question of whether he would make certain statements under oath during the evidentiary hearing. The Court also stated that their testimony was also not relevant, because it could not assist the circuit court in making findings of fact regarding his refusal to make certain statements under oath at the evidentiary hearing.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0942181.pdf

Dennis v. Commonwealth: March 10, 2020

Newport News: Defendant seeks a writ of Actual Innocence.

Facts: The defendant and his confederates robbed a man and shot him three times in the face. The trial court convicted the defendant in 1998 of aggravated malicious wounding, attempted murder, and using a firearm in the commission of a felony.

The defendant filed a writ of actual innocence. The Court of Appeals dismissed the petition on the pleadings, but the Supreme Court reversed, and the Court of Appeals ordered the circuit court to take evidence. The Circuit Court took evidence from four witnesses regarding an alleged third-party, whom the defendant claimed committed the offense. The defendant claimed that this third-party confessed to committing the offense.

Held: Writ Denied. The Court concluded that the defendant failed to establish by clear and convincing evidence that, if the third-party's statements to the witnesses had been known and introduced at the time of his trial, a reasonable jury would not find the defendant guilty beyond a reasonable doubt. The Court noted that the witnesses made numerous inconsistent statements and that their statements lacked crucial specificity. The Court found that their testimony, at best, established no more than "the possibility of reasonable doubt," which was insufficient as a matter of law to satisfy the defendant's statutory burden.

http://www.courts.state.va.us/opinions/opncavwp/0774171.pdf

Waller v. Commonwealth: October 22, 2019
70 Va. App. 772, 833 S.E.2d 484 (2019)
Roanoke: Defendant seeks a writ of actual innocence regarding his conviction for Attempted Sodomy.

Facts: In 1989, a jury convicted the defendant of Attempted Sodomy. The defendant had asked an undercover detective at a public park if he wanted to engage in oral sodomy. The detective suggested that they move to another spot in the park. Once there, the defendant turned, grabbed the detective, and attempted to unzip the detective's pants. The detective arrested the defendant.

In 2003, the U.S. Supreme Court issued its ruing in *Lawrence v. Texas* and in 2015, the Virginia Supreme Court issued its ruling in *Toghill v. Commonwealth*. Under those rulings, Sodomy is not a crime unless it involves minors, non-consensual activity, prostitution, or public conduct. The defendant sought a writ of actual innocence, arguing that *Lawrence* and *Toghill* decriminalized his speech and conduct and therefore he was entitled to a writ of actual innocence.

Held: Dismissed. The Court found that the defendant failed to allege the existence of any newly discovered evidence. The Court repeated that the legislature intended this writ to be issued solely upon consideration of newly discovered evidence that was not available at the time of trial. The Court complained that the defendant only advanced an argument on the legal effect of subsequent judicial decisions, a ground not contemplated by the Code.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0659193.pdf

Virginia Court of Appeals

Published

Knight v. Commonwealth: January 9, 2019
71 Va. App. 492, 837 S.E.2d 106 (2020)
Norfolk: Defendant seeks a hearing on Actual Innocence

Facts: The defendant shot and killed a man during a robbery. Eyewitnesses, the defendant's accomplices and a few informants testified at trial. At trial, the defendant offered an alibi.

Several years after the trial in this case, an investigating officer in this case was convicted of conspiracy to commit extortion, extortion, and making false statements. The Court that convicted the officer noted that the officer had "a proven history of eliciting false confessions; he had previously been demoted for securing a series of false confessions."

Recently, the defendant filed a writ of actual innocence based upon based upon the purported recantations of his accomplices and two informants. The defendant also argued that an investigating officer used "unscrupulous tactics" to secure his convictions, noting the officer's convictions. The defendant averred in his petition that the evidence upon which he relied became known or available to him in 2016-2018 through investigation of his case by the Innocence Project and that he could not have secured the new evidence without the assistance of counsel.

Held: Writ dismissed. The Court emphasized that a petitioner's evidence "must establish such a high probability of acquittal, that the reviewing court is reasonably certain that no rational fact finder would have found him guilty." Upon review of the record, considering the old evidence together with the new, the Court found that the defendant did not met his burden to show by clear and convincing evidence that no rational trier of fact would have found proof of guilt beyond a reasonable doubt. The Court concluded that a reasonable jury likely would give considerable weight to the un-recanted testimony of the two disinterested eyewitnesses.

The Court also find that a reasonable jury likely would be unpersuaded by "stale recantations" that were inconsistent with other record evidence. The Court noted that the numerous threats against the witnesses in this case provide reason for caution in evaluating the proffered evidence. The Court also explained that a reasonable jury likely would consider the defendant's failed alibi to conclude that he had attempted to cover up his role in the murder.

The Court also noted that the proffered statements were executed in 2006 and indicate that both the defendant and his trial counsel received copies. In addition, the Court pointed out that the officer was indicted in 2010 and convicted in 2011. The Court held that "a rational, properly instructed jury would consider the demonstrably false assertions that Knight did not learn of the evidence upon which he now relies until "2016-2018" in assessing the credibility of Knight's claim of innocence and would weigh them against Knight."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1162181.pdf

Virginia Court of Appeals
Unpublished

Beamon v. Commonwealth: November 12, 2019

Suffolk: Defendant appeals his convictions for Sexual Assault on the Refusal to Set Aside the Verdict.

Facts: The defendant sexually assaulted a woman. The trial court convicted her at trial. Prior to sentencing, however, the victim signed a "recantation" in front of the defendant's attorney. The defendant's attorney moved to set aside the verdict.

At a hearing on the motion, the victim reaffirmed that her trial testimony was true. She explained that the defendant's family repeatedly contacted her and that she only recanted to get the defendant's family to leave her alone. They called more than twenty times, and the defendant's mother showed up at the victim's work at least once. The victim admitted she had visited the defendant in jail twice but explained that she only did so because his family kept calling her. She felt threatened and went to the jail with them, hoping they would leave her alone.

The trial court concluded that the victim was coerced into her recantation and denied the motion to set aside the verdict.

Held: Affirmed. The Court repeated that the defendant was required to demonstrate that the victim's recantation was true and that her trial testimony was false by clear and convincing evidence. The Court found that he failed to do so. The Court repeated that recantation evidence is generally questionable in character and is widely viewed by courts with suspicion because of the obvious opportunities and temptations for fraud. The Court explained that the fact that the trial court could not find the recantation was true is fatal to the defendant's argument.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1695181.pdf