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2020 - 2021 VIRGINIA LAW ENFORCEMENT APPELLATE UPDATE

MASTER LIST

Cases Reported from June 1, 2020, to June 1, 2021

CRIMINAL PROCEDURE

Bail

Virginia Court of Appeals
Published

Commonwealth v. Thomas: April 6, 2021

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

Facts: The defendant, while on probation, raped one child and sexually assaulted another. He admitted to police that he sent threatening messages to many women and children to obtain nude photographs. He confessed to threatening and forcing several women to meet and perform sexual acts on him. Additionally, he admitted that he had threatened at least thirty other people for nude photographs via social media, even though his probation included a total ban on social media.

To carry out his scheme, the defendant purported to be a member of a criminal organization and threatened children with harm to them and their families if they did not send him nude photographs and admitted doing so to approximately thirty victims. He committed forcible sodomy on three separate occasions and raped one child. He fully confessed to those crimes.

At a bond hearing, the trial court set a bond of $25,000 secured, and included several conditions (which mirrored the existing conditions he had already violated repeatedly). The Commonwealth appealed.

Held: Reversed. The Court concluded that, despite the significant evidence favoring the denial of bail, the lack of evidence favoring release on bail, and the presumption itself, the circuit court made no factual findings as required by *Shannon* and *Lawlor* to support its conclusion that the defendant had borne his burden of persuasion that he was neither a flight risk nor danger to the public and should be released on bail. The Court emphasized that the trial court was required by § 19.2-120(E) to evaluate the nature and circumstances of the defendant's offenses, his personal history and ensuing characteristics, and the nature and seriousness of the danger posed by his potential release, but here failed to do so.

The Court repeated that, under *Shannon*, it is not sufficient that an appellate court assume the presumption was rebutted simply by virtue of the fact that a circuit court admitted a defendant to pre-trial bail. In this case, the Court complained that the brief statements made by the circuit court failed to "articulate the basis of its ruling sufficiently to enable a reviewing court to make an objective determination that the court below has not abused its discretion." The Court wrote: "the circuit court gave no reasons to support its decision to grant pre-trial bond."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1208204.pdf

Barnes v. Commonwealth: June 2, 2020
72 Va. App. 160, 842 S.E.2d 433
Norfolk: Defendant appeals the denial of pre-trial bond.

Facts: The defendant, a juvenile, is charged with three misdemeanors: Possession of a Handgun, Reckless Handling of a Firearm, and Carrying a Concealed Weapon. Police arrested the defendant after he fled from police, who pursued him and recovered a gun. In the previous three years, the defendant had committed burglary, larceny of a firearm, malicious wounding, conspiracy, use of a firearm, trespass, and destruction of property. The defendant is on parole for malicious wounding and use of a firearm.

The defendant's parole officer recommended that the defendant be released to home monitoring. Three different J/Dr judges denied the defendant bond. The defendant appealed to circuit court. The circuit court also denied bond.

Held: Bond denied. The Court concluded that the decision to continue the defendant's secure detention was supported by clear and convincing evidence under the criteria in § 16.1-248.1.

The Court first held that the trial court failed to articulate the basis for its ruling sufficiently to enable the Court to make an objective determination. In particular, the Court pointed out that the trial court failed to make a finding that there was probable cause to believe that the defendant had committed the act alleged, or that there was clear and convincing evidence to support the decision not to release the defendant. However, the Court then made its own evaluation of the evidence in this case.

The Court found that the defendant's release would be a clear and substantial threat to others or a clear and substantial threat of serious harm to himself. The Court noted that the defendant had committed several serious offenses in the space of three years that endangered the person and property of others.

The Court also found that the defendant's release would present a clear and substantial threat of serious harm to his own life or health. The Court noted that, "if the defendant decided to violate his home confinement conditions, as he violated parole by carrying a loaded gun, then neither an electronic device nor his mother's command is likely to stop him."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/9999991.pdf

COVID Issues

U.S. Supreme Court

Roman Catholic Diocese of Brooklyn v. Cuomo: November 26, 2020

New York: Plaintiffs seek an injunction against COVID-related restrictions on First Amendment grounds.

Facts: In response to the COVID-19 pandemic, New York imposed severe restrictions on attendance at religious services in areas classified as "red" or "orange" zones. In red zones, no more than 10 persons may attend each religious service, and in orange zones, attendance is capped at 25. The plaintiffs, the Roman Catholic Diocese of Brooklyn and Agudath Israel of America, sought an injunction, contending that these restrictions violate the Free Exercise Clause of the First Amendment.

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. In an orange zone, attendance at houses of worship is limited to 25 persons, but again, non-essential businesses may also decide for themselves how many persons to admit. The list of "essential" businesses includes acupuncture facilities, camp grounds, garages, hardware stores, acupuncturists, liquor stores, bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents.

The District Court and the Second Circuit Court of Appeals refused to issue a preliminary injunction.

Held: Reversed, Temporary Injunction Granted. In a 5-4 ruling, the Court ordered that New York is enjoined from enforcing its 10- and 25-person occupancy limits on the plaintiffs pending disposition of the lawsuit. In a *per curiam* opinion, the Court concluded that the plaintiffs had shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest.

The Court found that the challenged restrictions violate "the minimum requirement of neutrality" to religion because they single out houses of worship for especially harsh treatment. Because the challenged restrictions are not "neutral" and of "general applicability," the Court explained that they must satisfy "strict scrutiny," and this means that they must be narrowly tailored to serve a compelling state interest. The Court acknowledged that stemming the spread of COVID–19 is unquestionably a compelling interest, but found that the religious rules were not "narrowly tailored."

The Court wrote: "Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten."

Justice Gorsuch and Justice Kavanaugh both wrote concurring opinions. Chief Justice Roberts and Justices Breyer and Sotomayor wrote dissenting opinions. Justice Kagan joined Justice Breyer's dissent.

Full Case At:
https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf

Virginia Court of Appeals
Published

Barrow v. Commonwealth: April 27, 2021

Montgomery: Defendant appeals her conviction for Drug Possession on Denial of a Continuance

Facts: In June, the trial court placed the defendant on a deferred disposition for drug possession for one year, placing her on one year of probation supervised by VASAP, ordered 100 hours of community service through VASAP, and ordered her to pay court costs. In October, her probation officer informed the trial court that the defendant was not compliant with the terms of probation. In January, at a show cause hearing, the Commonwealth noted that six months into the year of probation, "she hasn't done anything at all."

At a review hearing one year after her deferred disposition, the defendant admitted that she had failed to complete any of the probation requirements, including payment of court costs. The defendant asked for a continuance, based on the Supreme Court's COVID-related order of judicial emergency. That order gave extensive guidance to the trial courts on a variety of matters, including the directive that "[c]ontinuances and excuses for failure to appear shall be liberally granted for cause resulting from the impact of the ongoing COVID-19 crisis."

The trial court denied the continuance.

Held: Affirmed. While the Court acknowledged that the judicial order directing trial courts to "liberally" grant continuances for any impact caused by the COVID-19 crisis added a factor for the trial court to consider, the Court concluded that the order "did not require a trial court to grant a continuance every time a party invoked the magic word "COVID.""

Based on the defendant's history noncompliance with the requirements imposed by the trial court as a condition of its deferred disposition of her case, the Court found that the trial court's denial of the request for a continuance was reasonable.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0769203.pdf

Data Act

Virginia Supreme Court

Neal v. Fairfax County Police: October 22, 2020
299 Va. 253, 849 S.E.2d 123
Fairfax: Police appeal an injunction to prohibit the use of passive license plate readers.

Facts: The Fairfax County Police Department uses automated license plate readers ("ALPRs"). The ALPRs use cameras, which can be stationary or mounted on a police vehicle, and which capture images of passing vehicles' license plates. The police have an electronic ALPR database that stores the captured images, the alpha-numeric conversion of the license plate number, and the time, date, and

location from which the image was captured for 364 days. Officers may only search the ALPR database by license plate number, although the police also have regular access to DMV's database.

The plaintiff filed a request for an injunction to prohibit the Fairfax County Police Department from using ALPRs in "passive" mode, collecting and storing license plate data in their database. The plaintiff argued that the ALPRs violate the Virginia Government Data Collection and Dissemination Practices Act, §§ 2.2-3800 to -3809 (the "Data Act"), including the requirement in § 2.2-3800(C)(2) that information not be collected "unless the need for it has been clearly established in advance" of collecting that information.

The trial court ruled, on summary judgment, that the retention of information gathered and stored by a police department using ALPRs did not constitute a violation of the Data Act, and dismissed the case. However, on initial appeal in 2018, the Virginia Supreme Court reversed, ruling that the pictures and associated data stored in the ALPR database meet the statutory definition of "personal information" under § 2.2-3801.

In its 2018 ruling, the Virginia Supreme Court held that the police department's "sweeping randomized surveillance and collection of personal information" do not fall under the exception for "investigations and intelligence gathering related to criminal activity" and, therefore, if the ALPR database is an information system, it is not exempt from the Data Act. However, the 2018 Court explained that, on the record established in the trial court, it was unable to determine whether the police department's retention and "passive use" of information generated by ALPRs is an "information system" governed by the Data Act. Because the Court could not determine that, the Court found that summary judgment was improper.

Therefore, the Virginia Supreme Court remanded the case to the trial court for a determination of whether the total components and operations of the ALPR record-keeping process provide a means through which a link between a license plate number and the vehicle's owner "may be readily made." The Court stated that, if such a means existed, then the police department's "passive use" of ALPRs is not exempt from the operation of the Data Act under the law enforcement exception of § 2.2- 3802(7), because the police department collected and retained personal information without any suspicion of criminal activity at any level of abstraction, and thus created an information system that does not "deal with investigations and intelligence gathering related to criminal activity."

On remand, the trial court concluded that the ALPR system satisfied the definition of an "information system" under the Data Act and issued an injunction that permanently enjoined the Police Department from the passive collection, storage and use of ALPR data. The trial court found that the ALPR system provides a means through which a link to the identity of a vehicle's owner can be readily made, and therefore the ALPR record-keeping process is subject to the Data Act when in passive use.

Held: Reversed. The Court found that the ALPR system does not constitute an "information system" within the intendment of the Data Act.

The Court examined the record and observed that the ALPR database itself does not contain the name, personal number, or other identifying particulars of an individual. Therefore, the Court explained that the ALPR system itself does not include the things that would bring it under the strictures of the Data Act. Thus, the Court concluded that the Police Department's passive use of the ALPR system to

capture license plates, photographs of the vehicles, and the date, time, and GPS location of the vehicles do not run afoul of the Data Act.

The Court elucidated that "a record-keeping process," singular, cannot plausibly consist of a combination of multiple separately generated and maintained systems. In the Court's view, "a record-keeping" process for ALPR does not include logging off of the ALPR system and separately logging on to other databases to query their contents. In addition, the Court found that the definition of "information system" does not sweep in all components and operations that an agency has access to, or components and operations that in some way support a particular crime-fighting or public protection task. The Court wrote: "The Data Act imposes restrictions and obligations on "an agency." "It does not contemplate holding an agency accountable for the information systems of other agencies."

The Court complained that the plaintiff's argument conflated the ultimate goal of the ALPR system – accurately locating suspects or stolen vehicles – with the ALPR system itself. In doing so, the Court rejected the plaintiff's complaint that the Fairfax Police use the State Police's "hot list" of license plates; the Court noted that the list contains no name, personal number, or other identifying particular of a data subject that would trigger the application of the Data Act to the ALPR system.

The Court explained: "Although other databases maintained by other agencies can allow the Police Department to learn 'the name, personal number, or other identifying particulars of a data subject,' the ALPR system does not. Therefore, the Police Department's passive use of the ALPR system is lawful under the Data Act."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1191127.pdf
Previous Ruling At:
http://www.courts.state.va.us/opinions/opnscvwp/1170247.pdf

Discovery & Brady

Fourth Circuit Court of Appeals

Long v. Hooks: August 27, 2020 (*En Banc*)
972 F.3d 442
M.D.N.C.: Defendant seeks Habeas relief on *Brady* discovery grounds.

Facts: In 1976, a jury convicted the defendant of a brutal rape and burglary. In 1989, the defendant filed a pro se petition for a writ of habeas corpus in federal district court, but the court dismissed the petition. The investigating detective was later convicted of a felony in federal court in 1987 and sentenced to four years in the penitentiary. In 2005, during a new investigation of the case, the State Bureau of Investigation (SBI) reported that the only evidence they found was a latent shoe print. The investigating police agency stated that the only item it had in its possession was the master case file, which the district attorney had reviewed and found "nothing of evidentiary value." The victim's rape kit was missing but had never been tested.

However, after further investigation, the police and SBI found a large amount of un-tested physical evidence. The SBI examined the evidence and found that the suspect hair found at the scene was different from the defendant's hair. No physical evidence matched the defendant. An investigation by the North Carolina Innocence Inquiry Commission also revealed that an officer had taken over 40 latent prints but that no one had examined the prints. An independent expert analyzed the prints, and excluded the defendant as the source of the prints. The district attorney had never known about that evidence.

The defendant filed motion in state court to set aside his conviction on *Brady* grounds. The trial court denied the motion and the state courts of appeal affirmed. The defendant sought *habeas* relief in federal district court, but the district court dismissed his petition.

Held: Reversed. In a 9-6 ruling, the Court held hold that the lower court's adjudication of the defendant's *Brady* claims resulted in a decision that is an unreasonable application of Supreme Court precedent and objectively unreasonable. Therefore, the Court vacated the district court's dismissal of the Petition, and remanded the case for consideration of the actual innocence question in the first instance, with the Petitioner being afforded the opportunity for discovery before the district court makes a final determination on that actual innocence question.

The Court noted that, under AEDPA, the defendant's second or successive § 2254 petition can only survive if he can demonstrate "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." However, a reviewing court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under evidentiary rules.

The Court repeated that, since the prosecutor in this case maintained an open file policy, "defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*." Here, the Court complained that nothing that would have put the defendant on notice that there were undisclosed lab reports or a document demonstrating that rape kit evidence was turned over to the police. The Court pointed out that if the missing reports and the SBI reports excluding Petitioner been disclosed, the jurors could have more credibly questioned and considered the reliability of the state's evidence in the absence of other evidence

The Court also directly found that the investigating police detective "lied on the stand at trial."

Full Case At:
https://www.ca4.uscourts.gov/opinions/186980A.P.pdf

Fifth Amendment: Double Jeopardy

Virginia Supreme Court

Evans v. Commonwealth: December 3, 2020
Conway v. Commonwealth: December 3, 2020

Norfolk/Danville: Defendants appeal their convictions for Possession of Firearm by Convicted Felon and Carrying a Concealed Weapon on § 19.2-294 successive prosecution grounds.

Facts: The defendants are felons who possessed concealed firearms. Both defendants pled guilty to a charge of carrying a concealed weapon in violation of Code § 18.2-308. The Commonwealth subsequently indicted the defendants for possession of a firearm as a convicted felon. The defendants filed motions to dismiss, arguing that § 19.2-294 barred the successive prosecution. The trial courts denied the motions. The Court of Appeals denied their appeals.

Held: Affirmed. The Court ruled that, in each case, the act of concealing a weapon was an act separate from the act of simply possessing the weapon. The Court found that the additional act of concealing the weapon makes it a different act from merely possessing it.

The Court explained that like the Fifth Amendment bar of former jeopardy, § 19.2-294 prevents the Commonwealth from subjecting an accused to the hazards of vexatious, multiple prosecutions. However, unlike the Fifth Amendment *Blockburger* test, § 19.2-294 is not concerned with the elements of an offense. Instead, it bars a subsequent prosecution based on the "same act." Instead, the Code requires an examination of the act committed by a defendant upon which a prior prosecution was predicated. Additionally, the Court explained that the statutory bar applies only if there has been "a conviction under one of the acts or ordinances before this clause of the statute operates. A mere proceeding or prosecution which does not result in a conviction does not bar another prosecution in a state court."

The Court elucidated that whether an act at issue is the "same act" under § 19.2-294 turns on a common-sense assessment of whether (1) the act in question is a separate volitional act, (2) the acts are separated in time and place, and (3) the act differs in its nature. The Court set forth a three-part test under § 19.2-294, explaining that it bars a prosecution when:

(1) The defendant was previously prosecuted – if the prosecutions are simultaneous, § 19.2-294 does not apply;

(2) The prior prosecution resulted in a conviction – if the defendant was not convicted, § 19.2-294 does not apply; and

(3) The prior prosecution was based on the "same act." In resolving this question, the Court directed that the trial court should compare the act proved in a prior prosecution with the act alleged in the successive prosecution to determine whether the act is the same: was it separated in time or location, was it a separate volitional act, and did the act differ in its nature?

Justice Millette wrote a dissent, that Justices Goodwyn and Powell joined.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1190846.pdf

Groffel v. Commonwealth: November 19, 2020
Aff'd Court of Appeals Ruling of August 20, 2019

849 S.E.2d 905
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.

The Court of Appeals affirmed in part and 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.

Held: Court of Appeals' ruling sustained. The Court simply wrote: "For the reasons stated in the opinion of the Court of Appeals, the judgment of the Court of Appeals is affirmed."

Regarding the protective order offense, the Court of Appeals had 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 of Appeals 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 of Appeals had 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 of Appeals had 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 of Appeals also had 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 of Appeals 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 of Appeals distinguished the *Baker* case, acknowledging that separate instances of possession may be punished separately.

The Court of Appeals had 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

Three Virginia Supreme Court judges, Powell, Goodwyn, and Mims, dissented in part. They agreed with Justice Bumgardner, who had dissented from the Court of Appeals' 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/opnscvwp/1191233.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0485182.pdf

Virginia Court of Appeals
Unpublished

Mintee v. Commonwealth: December 8, 2020

Richmond: Defendant appeals his convictions for Robbery and Use of a Firearm on Double Jeopardy grounds.

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

Prior to the second jury trial, the defendant moved to dismiss on Double Jeopardy grounds, but the trial court overruled the objection.

Held: Reversed and dismissed. The Court held that the trial court erred when it denied the defendant's motion to dismiss. The Court found that the trial court abused its discretion when it declared a mistrial over the defendant's objection without detailing its consideration of less drastic alternatives for the record.

The Court repeated that the prosecution bears the burden of demonstrating that the trial court's discharge of the jury was manifestly necessary. The Court emphasized that, when declaring a

mistrial in a case like this, the trial court must make clear that the trial judge devoted time and thought to less drastic alternatives when weighed against a defendant's valued interest in "being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." In this case, the Court complained that the record, at the time the mistrial was declared, was bereft of any evidence clearly reflecting that the trial court considered any less drastic alternative. For example, the Court noted that § 19.2-154 permits another judge to substitute for the original trial judge.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1054192.pdf

Francis v. Commonwealth: November 17, 2020

Dinwiddie: Defendant appeals his conviction for Eluding on Double Jeopardy grounds.

Facts: The defendant led police on a multi-jurisdictional, high-speed chase that began in Chesterfield and continued into Dinwiddie County. In Chesterfield, an officer saw the defendant weaving in and out of traffic, using both the right and left shoulders, and driving over 90 miles per hour. In Dinwiddie, the officer observed the defendant pass a car in the right lane by driving onto the right shoulder of the interstate and merging back into the right lane from the shoulder in front of the car, cutting it off. The defendant reached speeds of 180 miles per hour before capture.

The defendant pled guilty to felony eluding in Chesterfield. Thereafter, the defendant moved to dismiss his eluding charges in Dinwiddie, arguing that the charges violated his Double Jeopardy rights. The trial court rejected his argument.

Held: Affirmed. The Court concluded that the evading and eluding in Chesterfield and Dinwiddie counties each were separate and distinct acts. In this case, the Court noted that there were multiple victims in different jurisdictions. The Court observed that the victim in Dinwiddie was a driver that the defendant cut off; that victim was different from the other victims driving in Chesterfield.

The Court distinguished the *Thomas* case but cautioned that a chase could be a continuing offense. "We do not hold here that every police chase that crosses jurisdictional lines would create the requisite separate acts to support more than one eluding conviction."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1674192.pdf

Commonwealth v. Jordan: June 9, 2020

Portsmouth: The Commonwealth appeals the dismissal of Murder indictments on Double Jeopardy grounds.

Facts: At trial for first degree murder, the Commonwealth presented evidence from two individuals who were incarcerated. The defense presented a witness who testified that he overheard those two witnesses trying to come up with "the best story" to get time taken off their sentences. After the defense witness testified, defense counsel asked the witness: ""You don't really know [the defendant], is that correct?" The defense witness answered "no."

After the parties released their witnesses and agreed upon jury instructions, the Commonwealth located a five-and-a-half-hour video where the defendant and his witness had been talking and "fist-bumping." The Commonwealth asked the trial court to declare a mistrial or strike the defense witness' testimony, arguing that the witness had testified he had never met the defendant and that the video demonstrated he had lied.

The trial court granted the mistrial, although the defendant objected. The trial judge then recused himself and another circuit court judge heard the defendant's motion to dismiss on Double Jeopardy grounds. The circuit court found there was not manifest necessity for a mistrial. Therefore, the circuit court granted the defendant's motion to dismiss the indictments on double jeopardy grounds.

Held: Affirmed. The Court agreed that a mistrial was not manifestly necessary. Consequently, the Court found that the circuit court did not err in dismissing the indictments as a violation of Double Jeopardy.

The Court agreed that whether the defense witness lied was an issue of credibility for the jury, as the fact-finder, to resolve. The Court expressed confusion about what defense counsel's question really meant, writing: "it is still unclear what "really know" meant. [The witness] could have meant he had never met [the defendant], as the Commonwealth argued. Or he could have simply meant that he had met [the defendant], but did not "really know" him."

The Court argued that there were narrower alternatives available, other than a mistrial. The Court wrote that "there was nothing to prevent the Commonwealth from seeking to reopen its case and present the video as impeachment evidence to challenge [the witness'] testimony and credibility," even after all of the testimony has been concluded and the witnesses have been released." The Court also thought that another alternative was to "have allowed the case, as presented, to go to the jury and, thus, allowed the jury to assess the credibility" of the witness' testimony.

In a footnote, the Court stated that it was important that the circuit court specifically found that defense counsel "didn't have anything to do with what the trial court perceived as a lie being perpetrated."

Full Cases (2) At:
http://www.courts.state.va.us/opinions/opncavwp/0188201.pdf
http://www.courts.state.va.us/opinions/opncavwp/0187201.pdf

Fifth Amendment: Interviews & Interrogations

Fourth Circuit Court of Appeals

U.S v. Khweis: August 11, 2020
971 F.3d 453
E.D.Va.: Defendant appeals his convictions for Providing Material Support or Resources to Terrorism and related charges on Fifth Amendment *Miranda* grounds.

Facts: The defendant traveled to territory in Syria and Iraq controlled by ISIS and spent several months training with and supporting ISIL fighters and leaders. However, Kurdish forces captured him and transported him to a Kurdish detention center in Iraq. Kurdish forces held the defendant in custody for violations of Kurdish and Iraqi law. While the defendant was in custody, an FBI attaché visited him and interviewed him over the course of eleven interviews that each lasted no longer than half a day. The defendant did not receive any *Miranda* warnings.

In the interviews, the defendant described his efforts to join ISIL, identified other ISIL members, and explained his understanding of ISIL operations in the region. The defendant frequently admitted that he had not been fully truthful during prior sessions, resulting in multiple resets of the interview process. In these instances, the attaché would "go all the way back to the beginning and start walking through . . . every single detail of the facilitation network all over again" in order to obtain accurate intelligence. The defendant repeatedly expressed a desire to return to the United States for prosecution rather than remain in the Kurdish or Iraqi justice system.

Ten days later, two U.S. FBI agents visited the defendant to conduct new interviews that began with formal *Miranda* warnings. Although conducted at the Kurdish detention center, the warned interviews were held in a different room than the unwarned interviews. Entirely different American and Kurdish personnel attended the Mirandized interviews. The agents told the defendant that they did not know what, if anything, he had said in prior interviews.

In addition to informing the defendant of his right to remain silent, they also advised him that he did "not need to speak with [them] today just because [he] h[ad] spoken with others in the past." The advice-of-rights form elaborated that the agents were "not interested in any of the statements [he] may have made to [others] previously." It explicitly stated: "We are starting anew." In addition to apprising the defendant of his right to counsel, the agents informed him that his family had retained counsel for him in the United States. The defendant again confessed to his offenses.

Prior to trial, the defendant moved to suppress his statements, contending that the *Miranda* warnings he received were ineffective. The trial court denied the motion.

Held: Affirmed. The Court ruled that, even assuming the FBI deliberately used a "two-step interview strategy," the agents undertook sufficient curative measures to ensure that a reasonable person in the defendant's position would understand the import and effect of the *Miranda* warnings and waiver.

The Court found that the circumstances were sufficient to allow a reasonable person in the defendant's position to distinguish between the unwarned interviews with the attaché and the later warned interviews with the FBI agents, and to "appreciate that the interrogation ha[d] taken a new turn" under *Seibert*. The Court concluded that the break in time and place, total separation of personnel, and thorough explanation to the defendant about the distinction between the Mirandized interviews

and anything that had come before sufficed to communicate to him "the import and effect of the *Miranda* warning and of the *Miranda* waiver."

The Court also highlighted the additional information the agents disclosed, such as that his family had hired counsel, that the second set of agents did not know what, if anything, he had said to others in earlier interviews, and that with these agents, he was starting anew from a baseline of silence. The Court reasoned that these factors would "indicate a reset" to a reasonable person in the defendant's position. The Court refused to find that the FBI was required to inform the defendant about its plans during the ten-day break between interviews, or to inform the defendant about the inadmissibility of his prior unwarned statements.

Judge Floyd dissented. He argued that it was error for the district court to admit the post-warning statements that the defendant made to the FBI during his custodial interviews at the Kurdish detention center in Iraq. He did not to claim that the FBI was wrong to employ this process; instead, he contended that, having chosen to do so, it needed to cure the inherent coercion.

Full Case At:
https://www.ca4.uscourts.gov/opinions/174696.P.pdf

Virginia Court of Appeals
Published

Thomas v. Commonwealth: December 1, 2020

Richmond: Defendant appeals his convictions for Murder, Robbery, and Use of a Firearm on Fifth Amendment grounds.

Facts: The defendant and a co-defendant shot and killed the victim during a robbery. Police detained the defendant and read him his *Miranda* warnings. After several moments, the defendant stated, "Imma stop talking." The officers immediately stood up and moved away from the interview table. However, as they stepped away, they asked him, "Listen to me. Did we treat you right? … We gave you every opportunity to talk to us, is that fair? …Okay, we're basically friends here, right? It's just a job, right? Can you shake my hand?" The defendant did not respond.

The officers then asked the defendant if he knew what charges were pending against him. The defendant again did not respond. The officers stated: "robbery, use of a firearm, first-degree murder, and use of a firearm." The officers then asked if the defendant was aware of the penalties for those crimes. The defendant said nothing. The officers said, "I'll be more than glad to explain it if you'd like me to." The defendant nodded yes. The officers stated the penalties, and then stated: "And the jury sentences you, you're twenty, the other young man is seventeen, he's going to catch a break."

The defendant immediately asked the officers why the other suspect would "catch a break" and if it was because he was a juvenile. The officers replied "Well, he talked ... He got the story. You don't think he should get as much of a break?" Shortly afterward, the defendant admitted his involvement in the killing.

The defendant moved to suppress his statements on Fifth Amendment grounds, but the trial court denied the motion.

Held: Affirmed. Assuming without deciding that the defendant's statement amounted to a clear and unambiguous assertion of his right to remain silent, the Court concluded that the defendant was not subject to the type of police conduct that would compel a reasonable person to incriminate themself in violation of the Fifth Amendment and the defendant's voluntary communication with police demonstrated a knowing, intelligent, and voluntary waiver of any previously invoked right to silence.

The Court repeated that, once a suspect invokes his right to remain silent, police are prohibited from interrogating him further unless the suspect voluntarily reinitiates questioning or a significant amount of time passes. However, the Court then examined the parameters of questions and conduct by the police that do not constitute interrogation. The Court found that the officers telling the suspect about the charges filed against him and their corresponding penalties would not reasonably call for an incriminating response, and also that the detectives' statements regarding the minor co-defendant were neither coercive nor deceitful.

In this case, the Court observed that, instead of remaining silent, the defendant re-opened the conversation with the officers when he asked why his co-defendant would likely get a lesser sentence and then inquired if it was because the co-defendant was a juvenile. The Court concluded that the defendant clearly indicated his waiver of the right to remain silent by his voluntary verbal interactions with the detectives.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0176202.pdf

Virginia Court of Appeals
Unpublished

Cobb v. Commonwealth: April 27, 2021

Norfolk: Defendant appeals her conviction for Child Neglect on Fifth Amendment and Sufficiency grounds.

Facts: Rescue personnel responded to the defendant's residence to find her seventeen-month-old child on a tile floor, nonresponsive with "agonal respirations." The child's body was cold to the touch and "completely limp" when the medic lifted him. The child was severely malnourished and weighed fourteen pounds and eight ounces. The defendant appeared indifferent to the child

Hospital staff found injuries in multiple planes of the child's body, with varying levels of penetration into his face. Doctors found numerous brain injuries and several injuries to the child's abdomen, including his liver. At trial, doctor testified as an expert that the breadth of the child's injuries was uncharacteristic of a single impact. The child remained in the hospital for a month and two days.

At the hospital, police interviewed the defendant. They did not tell the defendant that she was under arrest or suspected of an offense. At the time, they were conducting a preliminary investigation to try and understand what happened to the child and communicated that to the defendant. Two CPS workers were present during the interview. Although the door of the room was closed, it was not locked. The defendant was not threatened or forced to speak with the detectives. The detectives did not tell the defendant that she could not leave. The interview lasted forty minutes. The defendant was free to leave.

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

At trial, the doctor testified that the child's ear bruises indicated "some type of significant and direct trauma to the ear." Similarly, the doctor testified that abdominal injuries are "fairly rare in children as far as accidental injuries go" because they require direct trauma to usually protected areas. The doctor also noted that it takes significant force to cause bruising to the abdomen because it is very soft; Such injuries raise concern for "non-accidental or otherwise inflicted trauma because of the force it takes."

The defendant claimed that the child was injured because of a fall and because the child's sibling struck him with a toy. However, the doctor explained that a fall and being struck by a toy fire truck did not sufficiently account for the extent of injuries because bleeding in the child's brain was widespread in multiple locations, and "we don't expect to see that kind of distribution of bleeding when there is a single impact."

The trial court found that the defendant was the child's parent and responsible for his care. The trial court also found that the defendant was either "the one striking this child," or she permitted "his condition to deteriorate and allowed" the trauma identified.

Held: Affirmed. Regarding the defendant's *Miranda* claim, the Court found that a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter. Accordingly, the Court concluded that the interview at the hospital was a consensual encounter.

The Court also agreed that the evidence was sufficient to find the defendant guilty.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0180201.pdf

Arencibia v. Commonwealth: December 22, 2020

Chesterfield: Defendant appeals his conviction for Possession with Intent to Distribute on Fifth Amendment *Miranda* grounds.

Facts: Police observed the defendant sell heroin. They stopped the defendant and searched his car, finding scales and other evidence. Officers read the defendant *Miranda* warnings, but he stated that he did not understand them. When the officer asked what the defendant did not understand, the defendant replied, "Because I don't trust you guys." The defendant then asked the officer to turn off his body camera. Ultimately, the defendant admitted to selling heroin and/or fentanyl.

The defendant also admitted that he had been to court many times and had previously been charged with Possession with Intent to Distribute. The defendant moved to suppress, but the trial court reviewed the body camera video and found that, based on his demeanor, tone, and the context of the conversation, the defendant implicitly waived his right to remain silent.

Held: Affirmed. The Court agreed that, based on the conduct of the police, the polite and brief nature of the questioning, and the defendant's experience with the legal system, the trial court did not err by concluding that the defendant's statements were not coerced.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0427202.pdf

Stevenson v. Commonwealth: November 24, 2020

Hampton: The defendant appeals his convictions for Aggravated Malicious Wounding, Shooting into an Occupied Vehicle, and related offenses on Fifth Amendment *Miranda* grounds.

Facts: The defendant shot two people in a restaurant parking lot. The defendant also received a gunshot wound during the incident and visited a local hospital for treatment. There, police questioned the defendant about his involvement in the shooting. At the time, police had "substantial confusion" as to who was a victim and who was a perpetrator.

During the interview, the defendant was not restrained, was not told that he was under arrest, and was not told that he was not free to leave. Hospital personnel continued to provide medical treatment and collect insurance information while the law enforcement officers were in the room. Officers stepped away whenever treatment providers entered the room to work. One of the defendant's family members also arrived at the hospital and stayed in the room.

During questioning, police briefly asked everyone to leave while they conducted a GSR test on the defendant. At the motion to suppress, an officer testified that the test would have been conducted regardless as to whether the defendant was the suspect in or victim of the shooting. An officer asked the defendant about taking a lie detector test and asked if he would pass the test. When the defendant stated that he had been shot in Newport News, the officers replied that they knew he had been at the restaurant in Hampton where a shooting had occurred. Police left the hospital, conducted more investigation, and then obtained a warrant for the defendant's arrest.

The defendant filed a motion to suppress the statements he made at the hospital to police, but the trial court denied the motion

Held: Affirmed. The Court concluded that a reasonable person in the defendant's position during the hospital interview would have understood that his freedom was not restricted to a degree associated with a formal arrest. The defendant was not in custody at the hospital, and thus police officers were not required to provide *Miranda* warnings to the defendant before questioning him.

The Court described the police interview as "an attempt to make sense of a confusing and still-evolving situation." Even as police began to suspect the defendant was the perpetrator, the Court cautioned: "the fact that an investigation has become accusatory and focused upon a suspect is not necessarily determinative of custody."

The Court reviewed the six factors under *Wass* to examine whether the defendant was in custody. The Court pointed out that the defendant was at the hospital of his own free will. The Court also observed that, while five officers were present at the hospital, there were only three who stayed in the room, and only one was in uniform. In addition, the police did not physically restrain the defendant in any way and the questioning lasted no more than twenty to thirty minutes. The Court also noted that hospital personnel continued treating the defendant during and after police had concluded their questioning and left the hospital.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1614191.pdf

Fourth Amendment – Search and Seizure

U.S. Supreme Court

Caniglia v. Strom: May 17, 2021

First Circuit: Plaintiff appeals the dismissal of his lawsuit against Police on Fourth Amendment grounds.

Facts: The plaintiff's wife called police when the plaintiff expressed a desire to kill himself using one of his firearms. Police responded and spoke to the plaintiff outside his home. They convinced him to seek medical treatment. The officers then entered the plaintiff's home and seized the plaintiff's firearms.

The plaintiff sued, claiming that the officers violated the Fourth Amendment when they entered his home and seized him and his firearms without a warrant. The District Court granted summary judgment to the officers, and the First Circuit affirmed on the ground that the decision to remove the plaintiff and his firearms from the premises fell within the "community caretaking exception" to the warrant requirement. The First Circuit relied on the ruling in *Cady v. Dombrowski*, that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. Cady had observed that officers who patrol the "public highways" are often called to discharge noncriminal "community caretaking functions," such as responding to disabled vehicles or investigating accidents.

Held: Reversed. In a 9-0 ruling, the Court ruled that *Cady*'s acknowledgment of community "caretaking" duties does not create a standalone doctrine that justifies warrantless searches and seizures in the home.

The Court acknowledged that other exceptions, such as exigent circumstances and implied consent, permit invasions of the home and its curtilage. However, regarding the so-called "community

caretaking" exception in *Cady*, the Court wrote: "What is reasonable for vehicles is different from what is reasonable for homes." The Court pointed out that Cady expressly contrasted its treatment of a vehicle already under police control with a search of a car "parked adjacent to the dwelling place of the owner."

Chief Justice Roberts wrote a concurrence to restate that, under *Brigham City*, a warrant to enter a home is not required when there is a "need to assist persons who are seriously injured or threatened with such injury."

Justice Alito wrote a concurrence, contending that, in this case, the Court was holding that that there is no special Fourth Amendment rule for a broad category of cases involving "community caretaking." Nevertheless, he cautioned, searches that are conducted for non-law-enforcement purposes may not need to be analyzed under the same Fourth Amendment rules developed in criminal cases. Justice Alito pointed out that the Court has not addressed Fourth Amendment restrictions on seizures like this case, i.e., a short-term seizure conducted for the purpose of ascertaining whether a person presents an imminent risk of suicide. He also explicitly noted that this case does not address whether so-called "Red Flag" laws, permitting seizures of firearms based on mental health concerns, are lawful.

Justice Alito also pointed to an issue that had concerned some Justices at oral argument: cases involving warrantless, nonconsensual searches of a home for the purpose of ascertaining whether a resident is in urgent need of medical attention and cannot summon help (so-called "welfare checks"). Justice Alito noted that the as-yet-unanswered question is: "If the police entered a home without a warrant to see if an occupant needed help, would that violate the Fourth Amendment?" In his example, "This imaginary woman may have regarded her house as her castle, but it is doubtful that she would have wanted it to be the place where she died alone and in agony."

Justice Kavanaugh, in his concurrence, contended that the court's decision does not prevent police officers from taking reasonable steps to assist those who are inside a home and in need of aid. For example, he argued that police officers may enter a home without a warrant in circumstances where they are reasonably trying to prevent a potential suicide or to help an elderly person who has been out of contact and may have fallen and suffered a serious injury. In a footnote, he noted that in 2018 in the United States, approximately 32,000 older adults died from falls. He wrote extensively to explain that the Fourth Amendment does not prevent officers from entering the home and checking on a person's well-being.

Full Case At:
https://www.supremecourt.gov/opinions/20pdf/20-157_8mjp.pdf

Fourth Circuit Court of Appeals

U.S. v. Davis: May 7, 2021

E.D.N.C.: Defendant appeals his convictions for Possession with Intent to Distribute and related offenses on Fourth Amendment grounds.

Facts: Officers stopped the defendant for a traffic violation. However, the defendant drove away during the stop and fled police at high speed. He then escaped from his car and fled on foot, carrying a backpack. While running, he appeared to discard an object. Police chased him into a swamp, where he surrendered. He exited the swamp, dropped the backpack to the ground, and laid prone on the ground. Police handcuffed him with his hands behind his back and lying on his stomach, and then an officer searched his nearby backpack. In the backpack, police discovered cash and two plastic bags of cocaine. They then searched his car and found more evidence.

The defendant moved to suppress the items found in his backpack and in the vehicle, but the district court denied the motion.

Held: Reversed. The Court adopted the holdings of the Third, Ninth, and Tenth Circuits regarding whether the Supreme Court's holding in *Arizona v. Gant* applies beyond the automobile context to the search of a backpack. The Court concluded that *Gant* applies to searches of non-vehicular containers and concluded that police officers can conduct warrantless searches of non-vehicular containers incident to a lawful arrest "only when the arrestee is unsecured and within reaching distance of the [container] at the time of the search."

The Court found that, under *Chimel*, police can "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." The Court then reasoned that, under *Gant*, an item is not within a person's immediate control if it is unreasonable to believe that they can access it.

In this case, the Court noted that the defendant was face down on the ground and handcuffed with his hands behind his back. The Court wrote, "He had just been ordered out of the swamp at gunpoint. The only other individuals within eyesight were officers, who outnumbered him three to one. And while this all took place in a residential area, it appears there was no one else around to distract the officers." The Court concluded that the defendant "would have had to jump up from the ground or contort his body in order to snatch the backpack away from" the officers. Thus, the defendant was secure and not within reaching distance of his backpack when the officers searched it

The Court distinguished the 2020 *Ferebee* case, where the Court had found that officers lawfully searched a backpack incident to arrest. In that case, the defendant, though under arrest outside the house where the backpack was located and in handcuffs, "still could walk around somewhat freely and could easily have made a break for the backpack inside the house." The Court agreed that it was arguably reasonable for the officers in *Ferebee* to believe that the defendant could access his bag because, although handcuffed and out of reaching distance, the defendant was not secured and presumably could have reentered the home and retrieved his bag.

The Court also distinguished the Third Circuit's *Shakir* case, where the Court had also approved of a backpack search incident to arrest. In *Shakir*, the defendant was placed under arrest and dropped a duffel bag at his feet; while the defendant was handcuffed and guarded by two police officers, he was still standing and could access the bag if he "dropped to the floor." The Court explained that an arrest scene may be more fluid—and an arrestee less secure—when officers must not only maintain custody of the arrestee, but also must stay vigilant of a crowd and any efforts by confederates to interfere with the arrest.

In a footnote, the Court acknowledged that there remains an open question as to whether the *Gant* inquiry (1) amounts to a two-factor test, both aspects of which the government must satisfy (secureness and reaching distance), or (2) is more akin to a sliding scale with two dimensions for evaluating the reasonableness of the officer's belief that the arrestee could access the container so as to retrieve a weapon or destroy evidence.

The Court also rejected the argument that the officers had cause to search the car incident to arrest. The Court found that it was not reasonable to believe that the defendant's vehicle contained evidence of any of the defendant's traffic violations, speeding to elude arrest, and resisting an officer.

The Court concluded by acknowledging that the "thicket of nuanced exceptions to the warrant requirement may appear, at times, confusing and unnavigable. Indeed, law enforcement may feel that courts are missing the forest for the trees—focusing myopically on minor details and ignoring the big picture..."

Full Case At:
https://www.ca4.uscourts.gov/opinions/204035.P.pdf

U.S. v. Cloud: April 12, 2021

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, kept a handgun in a vehicle. Officers observed the defendant's vehicle in a hotel parking lot in a high-crime area and decided to speak with him and the other occupants. Within seconds of approaching the vehicle, an officer observed one of the people nervously and furtively conceal a firearm under the driver's seat.

The defendant then exited the hotel and approached the car, attempting to get in the driver's seat. An officer prevented him from entering the car, though. After answering the officer's initial questions, the defendant walked away and went to the front of the car, ignoring the officer's order to stay back with one of the other officers. He instead focused on calling his mother; he freely moved around the hotel sidewalk without hindrance or restriction.

The officers asked the defendant if there were any drugs or guns in the car. The defendant stated that he did not know and claimed that the vehicle belonged to his mother. However, when the officers told him that they were going to "frisk" the car, he told the officers that they could not search the car. Officers searched the car, found the gun, and arrested the defendant.

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

Held: Affirmed. The Court first considered when the police seized the defendant, and then whether the seizure was lawful. In answering the first question, the Court examined whether a reasonable person in the defendant's position would have felt free to leave the scene or otherwise terminate the encounter with police. The Court rejected the defendant's argument that, "once police asked him if there were drugs or weapons in the car," that he was seized. Instead, the Court found that

the record demonstrated that the defendant did not feel compelled to answer the officers' questions, as he selectively chose which to answer, and which to ignore. The Court pointed out that the defendant ignored police orders and moved about the scene without restraint, hinderance, or regard to the officers' presence.

The Court repeated that a person's mere movement within a scene of police activity generally neither establishes nor eliminates acquiescence. The Court acknowledged that, in certain contexts, like a traffic stop, a person's lack of movement within a scene of police activity can be enough to indicate his acquiescence to the show of authority by police.

Nevertheless, the Court found that, once officers seized the defendant, the officers had reasonable suspicion to do so. The Court was satisfied that the officers had a reasonable articulable suspicion that the defendant may have been the owner, or had dominion and control, of the firearm that the other person hid under the defendant's seat in the car. The Court noted that the officers didn't know whether the firearm was the defendant's or not; all they knew was that "there's a firearm in a vehicle with four kids and one adult. Juveniles can't possess firearms or even purchase one." The Court also noted that the officers did not know whether the defendant was in conformance with North Carolina's concealed carry laws at that moment.

The Court pointed to the "commonsense inference" for police was that the defendant was the owner, or at least the one exercising dominion and control over, the vehicle. The Court wrote that "In these rapidly evolving circumstances—in which the danger to police officers was heightened by the presence of a firearm within Cloud's and L.W.'s reach while each remained in the Dodge—nothing in our precedents required Officers Jenkins and Skipper to merely "shrug their shoulders" to the reasonable possibility that the firearm was Cloud's, and that Cloud was illegally concealing that firearm."

Full Case At:
https://www.ca4.uscourts.gov/opinions/204091.P.pdf

U.S. v. Pulley: February 10, 2021

E.D.Va: Defendant appeals his conviction for Possession with Intent on Fourth Amendment grounds.

Facts: The defendant sold Hydrocodone. Law enforcement obtained search warrants and seized evidence pursuant to warrants authorizing searches of his residence, automobile, and mobile device. The warrants were partially based upon statements made by the defendant's co-conspirator regarding a series of robberies that the men allegedly committed together.

In a *Franks* motion to suppress, the defendant argued that one statement tending to establish probable cause and three omissions from the affidavit supporting the application for the search warrants were false and/or misleading and, thus, the warrants issued were invalid. In particular, the alleged false statement included in the warrant application is that the co-conspirator "has provided information found to be credible by detectives." The omissions about which the defendant complained were:

(1) that it was the co-conspirator who discarded clothing worn during the robberies;

(2) that a different investigator believed the defendant to be incarcerated during two of the four pharmacy robberies in which he was suspected of participating in 2016 (that ultimately turned out to be false); and

(3) that a distinctive, purple gun likely used in the fourth robbery was concealed by the co-conspirator in his holding cell (confirmed by video footage), but when law enforcement officers confronted him, he denied knowledge of it.

At the motion to suppress, the affiant testified repeatedly that the identity of the person who discarded the clothes did not matter to her; instead, what mattered was that clothes were retrieved, determined to be similar to clothes worn by the robbers, and could be tested for DNA. The court also credited the affiant's testimony that she did not learn the co-conspirator had identified himself as the person who discarded the clothes until after police arrested the defendant.

Regarding the defendant's incarceration, she also testified that, although the affiant learned of another detective's belief that the defendant was incarcerated in 2016—during the commission of two robberies sharing a modus operandi with the July 29, 2017, robbery—she testified that she entertained serious doubts about the accuracy of this information and that, nevertheless, she still believed the defendant was involved, whether in person or from jail.

Regarding the co-conspirator's denial of responsibility, a witness testified that it is common for suspects to minimize their role in a suspected offense or deny involvement altogether upon their initial interactions with law enforcement. The affiant also explained that she did not believe that the co-conspirator's statements about the distinctive, purple gun had any bearing on her application for a search warrant.

The district court denied the defendant's *Franks* motion to suppress.

Held: Affirmed. The Court reaffirmed that, under *Franks*, "an accused is generally not entitled to challenge the veracity of a facially valid search warrant affidavit" by way of a motion to suppress. In this case, the Court concluded that the defendant had failed to show reckless disregard for the truth by the affiant. In fact, the Court concluded that including the false information would have made the affidavit misleading, rather than more accurate. Thus, the Court upheld the finding below that there was no *Franks* violation at the intentionality prong and did not reach the *Franks* "materiality" prong.

Regarding the informant's credibility, the Court clarified that, unlike search-warrant applications based on information provided by unidentified CIs, applications based on information provided by cooperating witnesses need not rely on the witnesses' credibility when police independently corroborate the information.

The Court rejected the defendant's attempt to apply the "collective knowledge" doctrine to instances where the officer writing an affidavit does not know something that another officer knows. The Court countered that an officer who does not personally know information cannot intentionally or recklessly omit it, and therefore the collective knowledge doctrine cannot apply in the *Franks* context.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194273.P.pdf

Wingate v. Fulford: February 4, 2021

E.D.Va.: Plaintiff appeals the dismissal of his lawsuit, filed on Fourth Amendment grounds.

Facts: An officer stopped to assist the plaintiff, whose car was stopped on the side of the road. The plaintiff stated that his car was disabled. The officer noticed that the plaintiff was dressed in all black, that his car was running, and that he was parked in an area where there had been several larcenies from vehicles. He demanded that the plaintiff provide identification, citing Stafford County Ordinance § 17–7(c), which makes it a crime "for any person at a public place or place open to the public to refuse to identify himself . . . at the request of a uniformed law-enforcement officer . . . if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification."

The plaintiff refused to provide ID. Another officer arrived and the two officers arrested the plaintiff. The prosecutor later dropped the charge of Failure to ID. The plaintiff sued the officers for violation of his Fourth Amendment rights under 42 U.S.C. § 1983 and for False Arrest and Malicious Prosecution. The district court granted summary judgment against the plaintiff.

Held: Reversed, in part, Affirmed in part. The Court first found that the officer lacked reasonable suspicion to arrest the plaintiff, finding that the officer's initial stop was not justified at its inception. The Court also found that "Qualified Immunity" did not protect the officer from liability for his unlawful stop because a reasonable officer would be on notice that suspicion of criminal activity must arise from conduct that is more suggestive of criminal involvement than the plaintiff's conduct.

The Court then specifically held that the Stafford County ordinance is unconstitutional when applied outside the context of a valid investigatory stop. The Court repeated that "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop."

However, the Court agreed that "Qualified Immunity" did protect the officers regarding their enforcement of the Stafford County ordinance, given that it was presumed to be lawful and, until now, no federal court had prescribed the constitutional limits of § 17–7(c)'s application. The Court observed that a reasonable officer could have inferred—albeit incorrectly—that *Terry's* requirements did not apply to stop and identify statutes rooted in public safety rather than crime prevention. Thus, the Court found that the officers were also entitled to a good faith defense to the plaintiff's false arrest and malicious prosecution claims under Virginia law.

Having ruled that the officer conducted an unconstitutional investigatory stop, the Court reversed and remanded for further proceedings on that one claim.

Full Case At:
https://www.ca4.uscourts.gov/opinions/191700.P.pdf

U.S. v. Myers: January 26, 2021

E.D.Va: Defendant appeals his conviction for Possession with Intent on Fourth Amendment grounds.

Facts: The defendant carried a gun and a large amount of fentanyl for distribution. Officers were conducting surveillance of a bus stop that served ongoing bus service between Norfolk and New York and functioned as an entry point for drugs, as the officers had often seized drugs there on previous occasions. The defendant exited a bus, carrying no luggage, backpack, or bag but only a "dark object." After the defendant looked around, he made a cell phone call and was soon picked up by a silver car.

The car traveled an unusually circuitous route, suggesting to the officers following the vehicle that the occupants knew that they were being followed. Officers stopped the car for speeding and excessively tinted windows. The officers smelled marijuana coming from the inside of the automobile. A search yielded a loaded gun, four cell phones, over 300 grams of fentanyl, and approximately $1,800 in cash. The driver admitted to owning the gun and three cell phones, and the other cell phone and the $1,800 in cash was found on the defendant's person. But neither occupant claimed ownership of the fentanyl, which they found lying on the floorboard behind the passenger seat. Officers arrested both men.

The defendant moved to suppress, contending that the officers lacked probable cause to arrest him for its possession.

Held: Affirmed. The Court agreed that a reasonable officer could conclude

(1) that a crime was being committed in his presence, i.e., possession of fentanyl, and

(2) that the two occupants were involved in a common enterprise.

The Court explained that this "is not a case where 'mere propinquity to others independently suspected of criminal activity' is advanced as the basis for probable cause." The Court concluded that, while it was true that the officers did not have any information as to who owned the fentanyl, they did see a distributable amount of it lying on the floorboard of the automobile behind the passenger seat and reasonably believed that, in the absence of any claim to owning it, the defendant and the driver were in a common enterprise that involved possession of the fentanyl.

The Court repeated that, under *Pringle*, when a law enforcement officer finds illegal drugs in an automobile that the officer has legally stopped and searched and none of the occupants claim ownership of the drugs, it is "entirely reasonable" for the officer to infer that all the automobile's occupants are in a common enterprise and therefore to arrest them on probable cause that they are committing a crime. In *Pringle,* because the three occupants denied ownership of drugs that were found in the automobile, the officer was justified in inferring that all three were involved in illegal conduct, justifying their arrest. In this case, the Court agreed that, while the role of each occupant was not known to the officer, the officer well could have concluded that the circumstances particularized the suspicion as to all three and thus justified their arrest.

Full Case At:
https://www.ca4.uscourts.gov/opinions/184940.P.pdf

U.S. v. Haas: January 27, 2021

E.D.Va: Defendant appeals his conviction for Sex Trafficking and Child Pornography on Fourth Amendment grounds.

Facts: After hiring a woman for sex, the defendant paid the woman to solicit children for sex and for sexually explicit photos. Local police stopped the woman for a routine traffic stop, but she gave a false name to police. Days later, the woman called the police and confessed that she had provided a false name. The woman thereafter worked with federal agents to provide evidence against the defendant. Using her statements, agents obtained a search warrant for the defendant's computers.

The defendant moved to suppress the results of the search warrant. He argued that the search warrant lacked probable cause. He also argued that police recklessly omitted various aspects of the woman's criminal history, including her encounter with the police.

Held: Affirmed. The Court first emphasized that the presence (or absence) of probable cause is not the proper subject of a *Franks* hearing. The Court then repeated that the mere fact that information was omitted from an affidavit cannot alone show recklessness or intentionality; instead, an officer acts with reckless disregard when she fails to inform the magistrate of facts that she subjectively knew would negate probable cause.

In this case, the Court noted that, although the woman's lie to the police occurred in temporal proximity to the investigation, the lie did not concern the investigation itself. The Court also pointed out that there was no evidence that the woman was anything but honest to the federal agents about the false-identity incident. Unlike in *Lull,* the woman's misconduct did not cause the agents to determine that she was unreliable and discharge her from her duties as an informant.

Regarding the agents' failure to include the woman's criminal history in their search warrant affidavit, the Court noted that the defendant presented no evidence that the agent subjectively knew that his failure to include her criminal history in the warrant affidavits would mislead the magistrate and found that the record itself points to the opposite conclusion.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194077.P.pdf

U.S. v. Houston: January 21, 2021
(unpublished)
W.D. N.C.: Defendant appeals his conviction for Possession of a Firearm on Fourth Amendment grounds.

Facts: In 2015, law enforcement officers searched a rental car that the defendant had been operating, discovering a bag containing a firearm. Relying on the 4th Circuit's prior decision in *U.S. v. Wellons*, which held in 2014 that an unauthorized driver of rental car has no legitimate privacy interest in car or containers therein, the district court denied the motion. The defendant appealed.

The U.S. Supreme Court granted certiorari, vacated the decision, and remanded the case for further consideration in light of its decision in *Byrd v. United States*, which overruled *Wellons* in 2018.

On remand, the district court found that the search was governed by the then-binding precedent of *Wellons,* such that the good- faith exception to the exclusionary rule applied.

Held: Affirmed. The Court noted that, at the time of the challenged search, binding precedent in the 4th circuit permitted the search of an unauthorized user's rental car and any containers therein. The Court therefore concluded that the good-faith exception to the exclusionary rule applied and barred suppression of any evidence tainted by any constitutional defect in the search of the rental car.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194024.U.pdf

U.S. v. Brinkley: November 13, 2020

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

Facts: The defendant had an outstanding arrest warrant for possession of a firearm by felon. Officers had no firsthand information about where the defendant resided. Officers tried to locate the defendant and learned of two possible addresses where the defendant may have been residing but selected only one of them to target based on several factors. Officers visited that residence early in the morning. The residents did not open the door for several minutes and the person who answered the door appeared nervous. Officers could hear movement in the apartment. Officers asked about the defendant's whereabouts, and the occupants repeatedly looked back into the apartment.

Officers entered the apartment, found the defendant, and arrested him. They also saw other evidence in plain view and obtained a search warrant for that evidence. The district court denied the defendant's motion to suppress.

Held: Reversed. The Court found that the officers failed to establish probable cause that the defendant would be present in the home when they entered. Because the officers in this case assertedly believed that the defendant resided in the apartment — and entered it pursuant solely to the authority of the arrest warrant — the Court concluded that *Payton's* applied. The Court repeated that, under *Payton,* if equipped with an arrest warrant "founded on probable cause," officers have "the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." The Court distinguished *Steagald*, which held that, absent exigent circumstances or consent, the Fourth Amendment requires police to obtain a search warrant before trying to apprehend the subject of an arrest warrant in a third party's home.

The Court then held that "reasonable belief" under *Payton* amounts to probable cause, and that the police in this case lacked reason to believe the defendant resided in the apartment and would be present when they entered - that is, if the information sufficed for a person of reasonable prudence to believe that Brinkley resided there. The Court acknowledged that "the police need not possess . . . rock-solid indicators of residence in order to form a 'reasonable belief' that a suspect resides at a given

place." The Court wrote that, "when police know a suspect lives somewhere, generic indicia of presence may suggest that he is there, but when police are uncertain about where he lives, the same signs suggest only that someone is there — not necessarily the suspect." The Court continued, "generic signs of life inside and understandably nervous reactions from residents, without more, do not amount to probable cause that the suspect is present within."

In this case, the Court contended that the defendant might well have been transient, under these facts. The Court also criticized the police for did not looking into the address on the defendant's utility bill. The Court complained: "Had the officers ruled out any of these alternatives, it could have bolstered their theory … But because they did not examine any other possibilities, everything hinged solely on their investigation into that one address."

The Court critiqued the officers for not conducting surveillance at the suspected residence, not talking to people at or near the residence to gather information from them, or asking the residents if the defendant resided there. The Court argued: "Though the officers developed a well-founded suspicion that Brinkley might have stayed in the Stoney Trace apartment at times, they failed to establish probable cause that he resided there."

Regarding the residents' behavior when the police arrived, the Court contended that the resident might also have feared for herself. The Court wrote: "Recent events have underscored how quickly police encounters with Black Americans may escalate, at times fatally." In a footnote, the Court wrote: "Two months after this case was argued, police in Louisville, Kentucky, barged into the home of Breonna Taylor … this tragedy is hardly an anomaly."

Judge Richardson dissented, arguing that the officers had probable cause to believe that the defendant lived at the residence, and, based on that belief and information developed after they arrived, they had probable cause to believe that the defendant was present.

Full Case At:
https://www.ca4.uscourts.gov/opinions/184455.P.pdf

Leaders of a Beautiful Struggle v. Baltimore Police: November 5, 2020
979 F.3d 219
Baltimore: Plaintiffs appeal the denial of an injunction against police use of aerial surveillance.

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

- AIR flies only the daytime hours, weather permitting, and never at night.
- AIR uses limited resolution cameras that identify individuals only as pixelated dots in a photograph. Analysts examining these photographs are not able to identify an individual's race, gender, or clothing.

• If a dot is seen entering a building in a photograph, analysts cannot know if the same person is leaving the building when they see a dot leave the building without the use of other surveillance tools.

• The cameras do not utilize zoom, infrared, or telephoto technologies.

• Analysts cannot access photographs until they receive a notification related to the investigation of a specific murder, non-fatal shooting, armed robbery, or carjacking.

• There is no live tracking of individuals. Analysts can only use AIR's photographs to look at past movements.

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

Plaintiffs, in partnership with the ACLU, sought a preliminary injunction to stop the AIR program. The district court denied the preliminary injunction.

Held: Affirmed. The Court explained that "the basic problem with plaintiffs' argument is that people do not have a right to avoid being seen in public places." The Court noted that, in *Carpenter,* the Supreme Court specifically stated that traditional surveillance tools, specifically security cameras, remain lawful.

The Court agreed that there are aerial surveillance programs that would transgress basic Fourth Amendment protections. The Court also agreed that investigative tools, whether aerial or electronic, should not operate without restrictions. However, the Court wrote: "When hundreds of Baltimore residents are killed on their streets each year, their rights to life are not protected. When murders remain unsolved, their rights to liberty are not protected. When criminals can rob Baltimoreans at gunpoint with apparent impunity, their rights to property are not protected.

Judge Gregory dissented, likening this case to *Carpenter.* He concluded that the aerial surveillance program implemented by the BPD violates the Fourth Amendment, and argued that the plaintiffs were entitled to a preliminary injunction to halt its operation.

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

U.S. v. Saunders: October 7, 2020

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

Facts: The defendant sold cocaine from his residence. Law enforcement obtained a Virginia search warrant for the defendant's residence and executed it, recovering cocaine. The defendant moved to suppress and sought a *Franks* hearing, contending that a purportedly false statement was material to the state magistrate's probable cause determination and that the remaining facts in the affidavit were insufficient to establish probable cause. The district court denied the motion to suppress.

Held: Affirmed. The Court ruled that the district court did not err in denying the defendant's request for a *Franks* hearing because, after removing the allegedly false statement or adding the omitted information, the affidavit nevertheless supported a finding of probable cause.

The Court specifically explained that two facts in the Affidavit established probable cause:

(1) the officer who submitted the affidavit received a tip that the defendant's home was a "narcotics house" about two weeks before the search, and

(2) the officer conducted a trash pull at the defendant's home immediately before applying for the warrant and discovered "a large amount of plastic baggies with twisted and torn off corners," with some of those baggies containing a white residue that the officer "believed to be a . . . narcotic,"

The Court noted that in *Gary*, it had ruled that the corroboration of a tip through the discovery of drug trafficking evidence during a trash pull supports probable cause for a search. Thus, the tip and the officer's corroboration of that tip provided a substantial basis for the magistrate's probable cause finding.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194882.U.pdf

U.S. v. Feliciana: September 11, 2020

E.D.Va: Defendant appeals his convictions for Drug Possession and Operating a Vehicle Without a Permit on Fourth Amendment grounds.

Facts: The defendant drove a delivery truck on the George Washington Memorial Parkway, which requires special permits for commercial vehicles. The defendant did not possess the requisite permit, but he did possess marijuana. An officer stopped the defendant and recovered the marijuana. The defendant moved to suppress the stop. At the motion to suppress, the Government did not articulate any specific reason to suspect that the defendant did not possess the requisite permit to drive a commercial vehicle on the Parkway; instead, the basis for the traffic stop was simply that the officer saw a vehicle requiring a permit on the Parkway.

The district court denied the motion to suppress.

Held: Reversed. The Court concluded that the Government did not show that the officer had reasonable suspicion to stop the defendant or that the stop was a valid administrative inspection. The Court likened this case to *Delaware v. Prouse,* and distinguished *Kansas v. Glover*, noting that the officer no reason to believe that the defendant was operating his truck without a permit.

The Court explained that "we can imagine facts to which an officer might testify that would support a particularized objective suspicion that a certain commercial vehicle lacks the required permit." However, in this case the Court criticized the district court for merely assuming that the officer was familiar with what private lands could only be accessed through the Parkway and the frequency with which a special permit would be issued for such access, as well as with the likelihood that a commercial

vehicle requiring a special permit was attempting to access private lands from the Parkway that are not otherwise accessible.

The Court also acknowledged that a warrantless inspection of a pervasively regulated business may be reasonable under the Fourth Amendment if the criteria under *Burger* are met. However, although the Government cited the Federal Motor Carrier Safety Administration (FMCSA) regulations governing the commercial trucking industry (in particular, 49 C.F.R. § 396.9(a)), the Court pointed out that the officer did not stop the defendant pursuant to any FMCSA regulation.

The Court also observed that there was no evidence that the officer was designated by the Virginia State Police to conduct commercial motor vehicle inspections under Section 396.9(a) of 19 Va. Admin. Code § 30-20-230. Lastly, the Court rejected the argument that commercial motor vehicles are subject to stops without warrants or suspicion.

Full Case At:
https://www.ca4.uscourts.gov/opinions/184703.P.pdf

U.S. v. Villavicencio: August 17, 2020
974 F.3d 519
E.D.N.C.: Defendants appeal their convictions for Identity Fraud and Access Device Fraud on Fourth Amendment grounds.

Facts: The defendants used credit card skimming devices to steal credit card numbers and create new cards. An officer stopped them for speeding while they were in a rented car on I-95. The officer, who was aware that I-95 is a frequent corridor for drugs, primarily between Florida and New York, noticed that they had rented the car from the Orlando Airport, to be returned the next day. Considering the travel time from the location of the traffic stop in North Carolina to the Orlando airport was approximately 24-26 hours roundtrip, the officer though that the rental cost of the car, $630.47, was "rather expensive for a one-day trip."

The officer noticed that there were four cell phones in the center console, but only two passengers. The officer later testified that, in her experience, the presence of multiple cell phones often indicates involvement in illegal business or activity.

The officer asked one of the defendants to exit the vehicle and accompany her to her cruiser to verify his information. The officer began verifying the defendant's license and checking for outstanding warrants. While these checks were running, the officer spoke with the defendant about his travel itinerary. The defendant was visibly nervous. In the beginning of the traffic stop, the defendant appeared to understand the officer's directions. However, once inside the patrol car, the defendant "tried or implied that he was starting to have less [of an] understanding" of English. The officer communicated with him in both English and Spanish.

The officer learned that he and the other defendant drove from Florida to North Carolina to visit girls. The defendant could not identify the town they had visited and became increasingly nervous during their conversation. The officer completed all necessary tasks incident to the stop and issued the

defendant a warning ticket. When the officer gave the defendant the warning ticket, she observed that his nervousness did not subside, "as occurs normally."

One of the defendants then consented to a search of the car. The officer discovered a baggie with 100 credit cards, a skimming device, a master key for gas pumps, and a fake identification card.

The defendants moved to suppress the evidence recovered from the search, arguing that the seizure violated the Fourth Amendment because the officer impermissibly extended the stop to investigate matters unrelated to the traffic violation. The district court denied the motion. [*Note: During the appeal, one of the defendants absconded and is now a fugitive, so this ruling only concerns the one defendant*- EJC].

Held: Affirmed. The Court agreed that, under *Rodriguez,* the officer had reasonable suspicion that there were "drugs in this vehicle, possibly concealed," at the time she issued the warning ticket, thereby justifying further detention and a lengthier stop.

The Court agreed that the officer acted lawfully during the stop. For example, the Court acknowledged that an officer may ask about a rental car agreement. The Court also observed that the officer was free to talk to the defendant at least until the moment that all the database checks had been completed.

The Court pointed to several other facts that, under the totality of the circumstances, reasonably aroused suspicion. For example, the Court explained that, while multiple cell phones are not suspicious standing alone, they do contribute to reasonable suspicion. The Court concurred that the defendants' itinerary did not suggest innocent travel. The Court wrote: "common sense suffices to justify this inference that most innocent travelers would not spend $630 to rent a vehicle in Orlando, Florida, proceed to drive most of the night and into the next morning to a sparsely populated area in North Carolina, which they had no familiarity with, to visit girls for approximately 24 hours before driving back to Florida."

In sum, the Court concluded while that the officer articulated several facts that, standing alone are consistent with innocent travel, many of the facts on which she relied, when taken as a whole, supported her reasonable suspicion. Despite the existence of plausible explanations, "the reasonable suspicion standard does not ask what is plausible."

The Court also stated that several facts played no role in determining reasonable suspicion. For example, the Court concluded that the defendant's decision to pull over to the left shoulder as opposed to the right side of the road, while uncommon and generally unsafe, is not a significant indicator of criminal activity. Also, the absence of luggage or provisions was not compelling under the reasonable suspicion analysis. In addition, the minor inconsistencies between the name on the rental agreement and the defendant's driver's license was of minimal value.

Judge Diaz filed a dissent.

Full Case At:
https://www.ca4.uscourts.gov/opinions/184681.U.pdf

U.S. v. Cobb: August 11, 2020

970 F.3d 319
N.D.W.Va: Defendant appeals his conviction for Possession of Child Pornography on Fourth Amendment grounds.

Facts: The defendant murdered his cousin. He claimed that the killing was self-defense. During jail phone calls, the defendant told his father to "get his computer out of his room" and put it in the father's room. He also said "there are some things on there that need to be cleaned up before anyone sees them." Based on these calls, police obtained and executed a search warrant to seize the computer. Police then obtained a second warrant to examine the computer, seeking "Any material associated with the homicide…" and "Any and all other evidence of any other crimes."

An officer executed the warrant and quickly discovered child pornography on the device. The defendant later admitted to a cellmate that he killed the victim because the victim had discovered the child pornography on the defendant's computer and had threatened to turn him in to the authorities.

The defendant moved to suppress the search, arguing that the warrant was not sufficiently particular and, therefore, that the officers could not have been lawfully present at the place where the child pornography was plainly viewed. The defendant argued that the warrant should have described the "types of files sought, the location of the files, the timeframe [and] the relationship between the files and information" that the police had about the murder. The district court found that the evidence was admissible under the "plain view" exception and denied the motion to suppress.

The defendant also argued that the phrase in the warrant seeking "[a]ny and all evidence of any other crimes," standing alone, was overbroad, and therefore rendered the entire warrant invalid. The district court ruled, however, that the constitutionality of the warrant was unaffected by the superfluous language included at the end of the warrant.

[The defendant also pled guilty to second-degree murder and was sentenced to 20 years' imprisonment in state prison in a separate state case.]

Held: Affirmed. The Court held that the district court correctly concluded that the search warrant challenged in this case was sufficiently particular, because it confined the executing officers' discretion by allowing them to search the computer and seize evidence of a specific illegal activity, to wit: the murder in this case.

The Court explained that: "Reasonableness in the description of the place to be searched and the things to be seized is all that the Fourth Amendment demands, and the warrant to search this computer, based upon the circumstances and the type of evidence sought in this case, was sufficiently particular in both respects." The Court observed that the officers had no way of knowing when they applied for the warrant exactly what the evidence was that the defendant sought to destroy, or where the defendant had placed the evidence on the computer.

The Court agreed that the officers had probable cause to believe that the defendant's computer contained evidence pertinent to the murder, and that the defendant's parents were willing to lie, destroy evidence, and manufacture evidence to support the defendant. Accordingly, the Court concluded that more specificity was not required under the Fourth Amendment, nor was limiting the scope of the computer search practical or prudent under the circumstances of this investigation.

The Court repeated 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." However, the warrant need not satisfy both criteria. Even if the Fourth Amendment might require more specificity as to the place to be searched or the items to be seized in some computer searches, the Court reasoned that the Fourth Amendment did not demand that the descriptions of the place to be searched and the things to be seized to be more specific in this case.

The Court rejected the defendant's request, joined by the ACLU, to overrule its decision in *Williams.* The Court repeated that, under *Williams,* "Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied." The Court also repeated that the officer "has a lawful right of access to all files, albeit only momentary," and "when the officer then comes upon child pornography, it becomes immediately apparent that its possession by the computer's owner is illegal and incriminating."

The Court also held that the challenged phrase "[a]ny and all evidence of any other crimes" in the warrant, while overbroad in isolation, was easily and properly severed from the balance of the warrant. The Court also concluded that, rather than invalidate the entire warrant and require suppression of the evidence of child pornography found in plain view on the computer, the challenged phrase was properly treated as merely superfluous and fell within the 'practical margin of flexibility' afforded warrants in cases of this type.

Judge Floyd wrote a dissent, in which he argued that the limiting language that the material had to be "associated with the homicide" did not make the warrant sufficiently particular.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194172.P.pdf

U.S. v. Curry: July 15, 2020
965 F.3d 313
Rev'd En Banc Ruling of September 5, 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. However, a panel of the 4th Circuit reversed, finding 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.

Held: Reversed, Suppression Granted. In an unusually vociferous and fractured 9-6 ruling, the *En Banc* Court held that exigent circumstances did not justify the defendant's suspicionless seizure. In this case, the Court complained that the officers stopped the defendant in an open field, at one of several possible escape routes, in an area that they only suspected to be near the scene of an unknown crime. The Court wrote: "Allowing officers to bypass the individualized suspicion requirement based on the information they had here—the sound of gunfire and the general location where it may have originated—would completely cripple a fundamental Fourth Amendment protection and create a dangerous precedent."

While the Court acknowledged that there is little guidance on when and how the exigent circumstances exception may apply to a suspicionless, investigatory seizure, the Court concluded that the few cases that have extended the exigent circumstances exception to such seizures all involve specific and clear limiting principles that were absent in this case. For example, the Court noted that officers typically have searched for a suspect implicated in a known crime in the immediate aftermath of that crime, and—per that objective—have isolated a geographic area with clear boundaries or a discrete group of people to engage in minimally intrusive searches. In similar cases, law enforcement officers establishing vehicular checkpoints along routes that they reasonably expect will be used by suspects leaving the scene of a known crime. Beyond vehicular checkpoints, the Court found that other courts have required that officers have specific information about the crime and suspect before engaging in suspicionless seizures.

The Court explicitly refused to give any weight to the multiple murders and shootings that had just happened in the housing complex in the previous weeks. The Court expressed concern that "the demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances." Thus, the Court found that the murders and shooting that preceded the shooting in this case, although relevant, did not provide the officers with the type of specific information that would be necessary to justify a suspicionless seizure, even when combined with the other pertinent facts

In a footnote, the Court also explained that the "special needs" doctrine did not apply because special needs cases all involve a critical feature that the Court complained was not present here: programmatic safeguards designed to protect against a law enforcement officer's arbitrary use of unfettered discretion. The Court contended that in all special needs cases, the issue is whether it is impracticable to require a warrant in light of the primary purpose of a programmatic search, which did not apply in an investigatory seizure like the one at issue here.

The Court insisted that "our ruling today will not hinder the police's ability to forcefully respond to emergencies such as active-shooter situations." In another footnote, the Court clarified that it did not intend to suggest that officers who arrive on the scene of a homicide may never rely on the exigent circumstances exception to excuse the ordinary warrant requirement. The Court repeated that, under *Mincey*, in such circumstances, officers may conduct a "prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises." However, the Court distinguished *Mincey* from this case on its facts.

Judge Gregory filed a concurrence in which he wrote about "two Americas," including one in which there is "a long history of black and brown communities feeling unsafe in police presence." Judge Gregory quoted James Baldwin, repeating his statement that "the police are simply the hired enemies of this population." He described as "a central paradox of the African American experience: the simultaneous over- and under-policing of crime."

Judge Gregory specifically criticized the officers' decisions in this case. Reviewing the video, he noted that citizens in the area had attempted to identify the direction of the gunshots to the officer. Judge Gregory wrote that: "The officers ignored the assistance and the shooter got away. Like most citizens, it is likely that residents of the Creighton Court community do not want police officers to be tough on crime, or weak on crime—they want them to be smart on crime."

Judge Wynn also filed a concurrence in which he attacked the science and metrics of "predictive policing." He rejected the other facts in this case as "conjured by the government," and contended that this case was nothing more than "gunshots in a high-crime area." In a footnote, he also referred to the video, writing "the video record in this case demonstrates the belligerent, humiliating, and capricious nature of such stops…Subjecting people in disadvantaged areas to that "too permeating police surveillance" while declining to do the same for those in wealthier communities relegates the less fortunate to second-class status in the eyes of the law.""

Judge Wynn also decried "a line of jurisprudence in this Circuit that lessens constitutional protections for those who choose to own and carry inherently dangerous instrumentalities such as firearms."

Judge Diaz filed another concurrence. Judge Diaz was the only judge in the majority to mention the *Edmond* case, which had formed the basis of the panel's ruling. Judge Diaz acknowledged that, under *Edmond,* police would be justified in detaining a potential suspect as to whom they lacked individualized suspicion as part of an effort to apprehend a dangerous criminal at large—provided, however, that they use an appropriately tailored roadblock. However, he contended that officers must employ a discretionless and systematic method of conducting the suspicionless stops.

In this case, Judge Diaz complained that the officers failed to see whether others were lingering in the wider area where the suspect might have been, or to round up everyone in the field where they focused their efforts, including those closest to the shooting location.

Judge Thacker filed the last concurrence, which Judge Keenan joined. In their view, "the use of predictive policing … is little more than racial profiling writ large." Citing works by the ACLU, the EFF, and others, they repeated the argument that "historic crime data is biased through the practice of racialized enforcement of law, predictive policing will inherently reinforce and perpetrate this structural racism." They also wrote that "it is individual police officers, not a computer program, who abuse their authority

by violating the constitutional rights of citizens such as Billy Curry, based on the simple fact that they committed the offense of "walking while black.""

Judge Wilkinson wrote a lengthy dissent. Like Judge Gregory, he wrote of "two Americas:" "In one America, where citizens possess the means to hire private security or move to safer neighborhoods, the impact of judicial barriers to effective law enforcement may be minimal. In another America, though, people have no choice but to endure the unintended consequences of our missteps, as crime moves to fill the vacuum left by the progressive disablement of the law's protections." He warned that "We are in danger of making law enforcement in our dispossessed communities a thankless task."

Judge Wilkinson complained that "the sole practical takeaway from the majority opinion is that police officers on the scene of an unfolding emergency must sit and wait for identifying information, rather than use discretion and judgment to get control of a possibly deadly event, lest the prevention of a homicide violate the Constitution. This injunction entirely saps predictive policing of its potency, and effectively forecloses the tradeoff— faster responses for fuller information—that innumerable cities have opted for in making their streets safer. This is a mistake."

Envisioning a coming "abandonment" of inner cities by stripping departments of "effective public safety programs" and "a judicial rebuke for even the most professional and minimally-intrusive policework," Judge Wilkinson wrote: "Couple an area's rise in crime with a lack of respect shown by courts for even good policework, and you have an America where gated communities will be safe enough and dispossessed communities will be left to fend increasingly for themselves."

Judge Wilkinson concluded: "The majority has delivered a gut-punch to predictive policing. As the facts here so dramatically show, the effect of its ruling is not to disarm the criminal, but to disable the officer. The majority proceeds under the illusion that law enforcement officers will always be there, just raring to charge in. But that is not true, and it is not what happened here. Yet bound to this false premise, the majority fails to glimpse the reality that continued reversals of this kind will lead to the absence of officers in those very areas where, for good and humane reasons, their presence is needed most."

Judge Richardson also wrote a lengthy dissent that five judges joined. He criticized Justice Diaz for contending that police could not act without "using a roadblock, or, better yet, a perimeter." He wrote: "The threat presented here did not afford officers time to study the problem, await further information, and formulate a discretionless programmatic response (perhaps after forming a committee)."

Judge Richardson expressed concern about two similar situations: "Say law enforcement learns of a shooting in one of several buildings in a complex. Under the majority's rule, the officers would be constitutionally prohibited from stopping and demanding raised hands from fleeing individuals just because the police have doubts about who to search (so no "discrete group") and have no ability to cordon off all modes of egress (so no "controlled area"). Wouldn't it be reasonable for officers to do what they can to respond as the situation evolves?"

Second, Judge Richardson asked: "What if gunshots erupt during a crowded marathon? Today's opinion will prevent officers from simply instructing individuals to raise their hands. Unless, of course, they can pinpoint a discrete group or exert control over the entire area."

Lastly, he asked: "Or take the apparent sounds of shots being fired at a music festival with thousands in attendance, abundant modes of egress, and only so many officers operating with only so

much time. That scenario presents neither a "controlled geographic area" nor a "discrete group of people." Must the officers sit on their hands until enough backup arrives to cover all the exits and establish a secure perimeter?"

He concluded: "Today's decision is a mistake. It will now be harder than ever to safeguard our communities from the most serious of threats. Wherever our citizens and officers find themselves—music festivals, houses of worship, or main streets—they will now be less safe."

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

U.S. v. Mitchell: June 30, 2020
963 F.3d 385
S.D.W.V.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: Officers received a report of a large fight, an assault, and a person with a gun at a bar. An officer quickly arrived on the scene, and a bystander informed him that a black man wearing red pants and a black shirt had a gun and was leaving the scene walking eastbound on a particular street. Another officer heard this report and, within one minute, saw the defendant, who matched that description. The officer stopped and frisked the defendant, found a firearm on his person, and took him into custody. The defendant was a convicted felon.

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

Held: Affirmed. The Court found that it was reasonable for the officers to infer from the dispatch that the person with a gun was "involved" in the fight that resulted in an assault victim. The Court also found that it was reasonable for the officers to infer that the information communicated over the radio about a man with a gun leaving the scene of the crime related to the same person. The Court repeated that "police observation of an individual, fitting a police dispatch description of a person involved in a disturbance, near in time and geographic location to the disturbance establishes a reasonable suspicion that the individual is the subject of the dispatch." Thus, the 911 call and the bystander's tip together provided reasonable suspicion to believe that the departing man with the gun was connected with the illegal activity and justified an investigatory stop.

Regarding the bystander's tip that the officers received at the scene, the Court refused to treat him as an "anonymous" tipster, explaining that he was a bystander at an active crime scene who spoke face-to-face with a police officer and whose basis of knowledge and veracity could be assessed. The Court pointed out that the officers were already aware of a separate, prior report of a person with a gun, which enhanced the reliability of the bystander's tip consistent with that report. The Court also noted that the bystander reported to a police officer in public and in close proximity to the defendant, exposing himself or herself to potential retaliation and thereby increasing his or her reliability. Therefore, the bystander's tip carried sufficient indicia of reliability to form part of the officer's reasonable suspicion

Judge Wynn filed a dissent, arguing that there was not reasonable suspicion to stop the defendant, and complaining "He was simply a man with a gun near a disturbance."

Full Case At:
https://www.ca4.uscourts.gov/opinions/184654.P.pdf

U.S. v. Watkins, et. al.: June 17, 2020 (Unpublished)

W.D.N.C: Defendants appeal their Drug Distribution and Firearms convictions on Fourth Amendment grounds.

Facts: The defendants possessed drugs for sale in their truck and additional drugs and firearms in a nearby hotel room. An officer saw the defendants' vehicle in a parking lot. The officer stopped his own vehicle and approached the defendant's truck on foot. The officer was in uniform, was armed, did not touch the defendants, and did not use any threatening tone or language. According to the video, there was enough room to allow the defendant to drive past the officer's cruiser to exit, if he had tried to do so.

As the officer reached the vehicle, the officer immediately smelled the odor of marijuana coming from the truck. He requested identification from the defendants and called for a K-9 unit to respond. The dog confirmed the presence of marijuana odor. The officers searched the truck and found drugs and paraphernalia. They arrested the defendants, finding a significant amount of cash and a hotel key. Tracing the key back to a hotel room, the officers obtained a warrant for the hotel room and discovered more drugs as well as multiple firearms.

The defendants moved to suppress the evidence, arguing that the officers unlawfully seized them prior to the search of the truck, but the trial court denied the motion.

Held: Affirmed. The Court addressed the question of whether the defendants were actually seized prior to the officer smelling marijuana as he reached the truck, and if so, whether that seizure was supported by reasonable suspicion. The Court held that the defendants were not unlawfully seized prior to the search of the truck, and because there was no initial unlawful search or seizure, the hotel room search was also not unlawful.

The Court pointed out that the officer did not block the defendants' exit from the parking lot, and the rest of his actions were consistent with a routine encounter. Thus, the Court concluded that a reasonable person would have felt free to leave when the officer pulled into the parking lot and began approaching the vehicle. Thereafter, by the time he reached the truck, the officer smelled marijuana, giving him probable cause to detain the occupants and search the vehicle.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194427.U.pdf

Haze v. Harrison: June 8, 2020
961 F.3d 654
E.D.N.C.: Inmate appeals the dismissal of his lawsuit against jail officers on First and Fourth Amendment grounds.

Facts: The defendant was a pretrial detainee. The plaintiff had received contraband through non-legal mail; officials suspected that the plaintiff had also received contraband through legal mail. Staff at the facilities are trained not to open or copy an inmate's legal mail. The plaintiff alleges that on numerous occasions, jail officials opened, copied, misdirected, and otherwise interfered with his mail to and from his lawyer. According to the plaintiff, on seven occasions prison officials opened and copied his outgoing legal mail and forwarded it to the District Attorney's office.

The plaintiff filed a lawsuit under 42 U.S.C. § 1983 seeking damages under the First and Fourth Amendment. The district court granted summary judgment to the defendants. With respect to the First Amendment, the court held that officials had acted only negligently, precluding liability under § 1983.

Held: Affirmed in Part, Reversed in Part, and Remanded.

The Court noted that, even if a prison's policy or practice impinges upon constitutional rights, it remains "valid if it is reasonably related to legitimate penological interests." Therefore, the Court relied upon the four factors under the U.S. Supreme Court's *Turner* case:

(1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;

(2) whether there are alternative means of exercising the right that remain open to prison inmates;

(3) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and

(4) whether there are ready alternatives.

The Court agreed that the plaintiff's previous receipt of prohibited materials justified the opening of his legal mail to check for the presence of contraband. However, the Court criticized the defendant's failure to "explain, as they must, why they did so outside of Haze's presence."

The Court also rejected the argument that the defendant's actions were merely negligent, concluding that a jury reasonably could find that the defendants' conduct was not negligent, but rather constituted a deliberate pattern or practice. The Court pointed out that the defendants' own policy requires officers to open legal mail in the inmate's presence.

However, regarding the plaintiff's Fourth Amendment claim, the Court ruled that the defendants were entitled to qualified immunity, since neither the Fourth Circuit nor the Supreme Court has previously considered the question of whether incarcerated persons have a reasonable expectation of privacy in their legal mail. While the Court acknowledged that an incarcerated person's expectation of privacy in his legal mail is one "that society is prepared to consider reasonable," the Court pointed out that no one had identified a single case, in any Circuit, where interference with an incarcerated person's legal mail was held to be violative of the Fourth Amendment.

Full Case At:

https://www.ca4.uscourts.gov/opinions/187340.P.pdf

Virginia Court of Appeals
Published

Long v. Commonwealth: January 26, 2021

York: Defendant appeals his conviction for Importation and Possession with Intent on Fourth Amendment grounds.

Facts: The defendant was engaged in importing drugs to Virginia and selling them. An investigator spoke with an informant, who was very concerned that the vehicle she co-owned with her daughter, who was then in jail, was being driven around and possibly involved in drug transactions. The informant wanted her vehicle back. The informant had placed a GPS tracker on her car. The investigator verified the location of the car based on toll records and toll video footage.

One night, the informant told the investigator that her daughter – the only other lawful owner of the car – was in jail, but that the GPS showed the vehicle moving around. She reported that the vehicle had stopped in the parking lot of a motel. The investigator located the car and recognized the defendant as the occupant of the passenger's seat of a truck next to the car, based on DMV photos, LInX photos, and evidence obtained from the post-arrest debriefs that he had previously conducted in cases involving drug transactions. He also observed that the driver's seat of the car – the vehicle that was reported missing – was empty. Finally, the investigator recognized the motel as a high-crime location, which he testified that he had visited upwards of thirty times in his career in response to illegal drug transactions.

The investigator requested that a local deputy stop the men. At the suppression hearing, the investigator testified "[I]n my mind – I don't know that I relayed this to dispatch thoroughly, but in my mind, I wanted them to make consensual contact with the suspicious occupied vehicle in the parking lot." A local deputy stopped the men and recovered their drugs. The trial court denied the defendant's motion to suppress.

Held: Affirmed. The Court first held that the trial court did not err in allowing the investigator to testify about the statements that the informant made to him. The Court agreed that the statements were clearly reliable, as the investigator independently corroborated the information through his own observations and through his experience as a member of the regional drug task force. The Court also emphasized that any issue of reliability would go to the weight – not the admissibility – of this evidence.

The Court also held that, considering the totality of the circumstances, the investigator had a reasonable, articulable suspicion that the occupants of the truck may have been engaged in, or were about to engage in, criminal activity at the time of the stop. The Court ruled that the collective knowledge doctrine applied to impute the investigator's reasonable, articulable suspicion to the deputy. In this case, the Court found that the investigator possessed sufficient knowledge to conduct an investigatory stop, and he was not required to communicate all the basis of his knowledge for his

reasonable, articulable suspicion to be imputed under the collective knowledge doctrine. The Court noted that the application of the collective knowledge doctrine depends on the sufficiency of the knowledge possessed by the instructing officer – not on the sufficiency of the facts communicated between the officers.

Furthermore, the Court agreed that the fact that the investigator subjectively intended for the responding officer to initiate a consensual encounter when he asked for a "stop out" had no bearing on the application of the collective knowledge doctrine to justify the stop, and the trial court properly disregarded the investigator's subjective intentions in determining whether the stop was justified under an objective standard of reasonableness.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1971191.pdf

Pick v. Commonwealth: January 12, 2021

Hanover: The defendant appeals his convictions for Internet Child Solicitation, alleging an Unlawful Wiretap.

Facts: The defendant solicited a child online; however, the child was, in fact, an undercover officer. The defendant used a website called "Omegle", where users communicate anonymously with randomly selected strangers.

At trial, the defendant argued that the officer violated the Virginia Wiretap Act, § 19.2-62, contending that the officer was not a party to the Omegle conversations. The defendant argued that, because the chats were between the defendant and a fictitious persona, the officer was not a true party to the conversation because he did not use his true identity.

Held: Affirmed. The Court found that the officer was a "person who was a party to the communication[s]." § 19.2-62(B)(2). As such, he was protected by the consent exception and therefore did not criminally violate § 19.2-62(A).

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1945192.pdf

Saal v. Commonwealth: October 13, 2020
72 Va. App. 413, 848 S.E.2d 612
Virginia Beach: Defendant appeals his conviction for DUI on Fourth Amendment grounds.

Facts: The defendant, driving intoxicated, jumped a curb, nearly hit a large sign, drove across four lanes of traffic, and continued driving on a flat tire. An off-duty officer observed the defendant's driving behavior and notified other officers. A few minutes later, officers arrived at the defendant's

house after midnight and noticed that the defendant's vehicle, parked in the driveway, matched the description and had damage consistent with the crash. The officers walked up the driveway and followed the marked path to the front door of the defendant's home.

Although the exterior lights were off, an interior light was on in the home. The officers knocked at the door. Soon, the defendant voluntarily exited his home and answered questions about the crash. The officers arrested the defendant for DUI and refusal.

The defendant moved to suppress his statements, arguing that the officers violated the Fourth Amendment by entering the curtilage of his home to gather information pertaining to a criminal investigation during pre-dawn hours by conducting a 'knock-and-talk' without a warrant, and by knocking on his door at 12:30 a.m. without a warrant.

At the motion to suppress, the reporting officer testified that she did not believe that anyone had been injured when she called dispatch. A responding officer testified that the report he received only referenced a potential drunk driver and did not indicate that there might have been injuries. The trial court denied the motion to suppress.

Held: Affirmed. The Court repeated that, under *Robinson*, several factors affect the reasonableness of a warrantless nighttime entry into a home's curtilage, including: the time of the approach, whether the officer's approach was open or clandestine, whether the officer confined himself to the driveway and associated pathways where the general public would be expected to go, whether lights were on, and whether cars outside the residence suggested the presence of people who may be awake.

The Court noted that knocking, without more, constitutes a minimal intrusion. The Court also noted that, in this case, the officers confined their movements to the driveway and delineated paths off the driveway that "led to doors that appeared to constitute the normal points of ingress and egress from the house."

Regarding the time of day, the Court explained that "although it is true that many retire for the night and no longer expect to receive visitors well before midnight, circumstances present here would suggest to a reasonable officer that [the defendant] is not one of those people." The Court pointed out that an interior light was on and that the officer knew that the damaged car in the driveway had arrived at the defendant's home in the last fifteen to twenty minutes. Thus, a reasonable officer could conclude that at least some occupants of the house were still awake and active.

In a footnote, the Court acknowledged that, under *Robinson*, a homeowner may limit the implied invitation by installing fencing, gates, or "no trespassing" or "private property" signs to indicate that neither the general public nor a law enforcement officer is invited to approach the home.

In another footnote, the Court also explained that concern for the safety of the driver of the car provided a further justification for concluding that the officer's approach to the house was reasonable. The Court repeated that an individual officer's subjective belief regarding the potential for injuries was irrelevant; the issue is whether a reasonable officer objectively could have believed that someone might have been injured. Here, a reasonable officer could conclude that the driver may have been injured.

The Court concluded: "We do not hold that every knock and talk at 12:30 a.m. is reasonable or even that knock and talks at that hour are presumptively reasonable. Just as the Fourth Amendment's reasonableness standard precludes us from adopting a blanket prohibition on nighttime knock and talks,

it also precludes us from adopting a blanket rule that all knock and talks occurring at 12:30 a.m. are presumptively reasonable. We hold only that the reasonableness question is to be answered by an objective review of all of the facts and circumstances and that such a review here demonstrates that [the officer's] entry upon the curtilage to conduct a knock and talk was reasonable in this case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1091191.pdf

McArthur v. Commonwealth: July 28, 2020
72 Va. App. 352, 845 S.E.2d 249
Richmond: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, drove his girlfriend's car while carrying a handgun underneath his seat. Officers stopped the defendant for an equipment violation.

While one officer returned to the police cruiser with the identification card and obtained criminal and driving information on the defendant from the mobile computer in the police cruiser, the primary officer asked the defendant for consent to search. The defendant refused, stating that the vehicle belonged to his girlfriend. The officer then asked the defendant to exit the vehicle so he could conduct a "protective sweep" of the vehicle. The defendant began to sweat profusely and nervously stated on the phone that "they are locking me up" to his girlfriend. The officer then searched underneath the driver's seat where he found a handgun hidden from view.

Meanwhile, the other officer on the scene had discovered an alert through the Virginia Department of Corrections that the defendant was thought to have been a member of the Crips gang during a previous incarceration. However, the other officer did not inform the primary officer until the search of the vehicle and arrest were complete.

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

Held: Reversed. The Court declined to impute the other officer's knowledge of the defendant's possible gang affiliations to the officer in this case as justification for a protective sweep of the vehicle. Thus, the Court ruled that the trial court erred in failing to grant the motion to suppress.

The Court found that "horizontal" aggregations of knowledge, which are only communicated between officers after a stop, search, or arrest, cannot be subsequently relied upon by an officer as evidence supporting a reasonable articulable suspicion justifying the police action. The Court contrasted this case with *Smith,* where the Virginia Supreme Court had held that a pat down of the defendant's outer clothing and subsequent seizure of a weapon was justified based on information obtained by police databases alerting officers at the scene that the defendant might be armed and dangerous. The Court explained that the key distinction from this case is that the officers who participated in the pat down in *Smith* received the alert that Smith may be armed and dangerous prior to patting down the defendant's outer clothing.

However, the Court repeated that, as it had held in *Edmond*, "an officer is justified in acting upon an instruction from another officer if the instructing officer had sufficient information to take such action himself." The Court cited the 4th Circuit's ruling in *Massenburg*, where that court described a "'vertical' collective knowledge relationship in which [one] officer's conclusion [i]s conveyed" to others who then effect the seizure before distinguishing that relationship from a "'horizontal' collective knowledge relationship in which the knowledge of several officers must be aggregated to create probable cause." The Court adopted the "vertical" collective knowledge doctrine, which "holds that when an officer acts on an instruction from another officer, the act is justified if the instructing officer had sufficient information to justify taking such action herself; in this very limited sense, the instructing officer's knowledge is imputed to the acting officer."

The Court also expressed concern that the expansion of the collective knowledge doctrine to allow for "horizontal" aggregation of knowledge would not only fail to deter future Fourth Amendment violations but may well encourage them.

The Court also rejected the argument that there was independent reasonable suspicion to conduct a protective sweep of the car in this case. The Court pointed out that the officer stopped the defendant for a defective fog light and that the defendant made no furtive movements inside the vehicle and was cooperative and polite. The Court also described that the defendant "reasonably declined" the officer's request to search on the basis that he was not the owner of the vehicle and repeated that "the exercise of one's Fourth Amendment right to decline a warrantless search can never rise to the level of reasonable articulable suspicion that a person is armed and dangerous." Thus, the Court concluded that was unreasonable for the officer to conduct a protective sweep of a vehicle that had been pulled over for a defective fog light when the defendant made no furtive movements around the cabin of the vehicle, was cooperative and polite during the traffic stop, and immediately exited the vehicle at the officer's request.

Before remanding the case, however, the Court also held that the evidence had been sufficient to convict the defendant. The Court explained that, while the defendant's actions inside the vehicle did not rise to the level of reasonable articulable suspicion to justify a warrantless search of the vehicle, the defendant's statements and nervous behavior after following the officer's instructions to step out of the vehicle provide sufficient circumstantial evidence to show that he was aware of the firearm under the driver's seat. The Court agreed that, because the firearm was found underneath the driver's seat, placed in a manner consistent with how someone in the driver's seat might store a firearm, and was easily accessible upon a search beneath the seat, there was sufficient evidence that the firearm was within the defendant's dominion and control.

Full case at:
http://www.courts.state.va.us/opinions/opncavwp/1793192.pdf

Bryant v. Commonwealth: June 16, 2020
72 Va. App. 179, 843 S.E.2d 383
Williamsburg: Defendant appeals his conviction for Possession of Ammunition and Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: The defendant kept drugs and ammunition at his girlfriend's apartment. Officers responded to the apartment for a domestic violence complaint and spoke with the defendant's girlfriend, who was the only person renting the apartment. The defendant gave officers a false identity. The officers arrested the defendant for providing false information.

The defendant's girlfriend gave the officers consent to search the apartment and told the officers that she had other items in the apartment, including shoes in the bedroom area. Officers found a suitcase in the bedroom area; there were no identifying marks or tags on the suitcase. An officer searched the suitcase and found illegal drugs. The officers then obtained a search warrant for a safe that they found next to the suitcase and seized from the residence. When they searched the safe, officers found ammunition and cash.

The defendant moved to suppress the searches. The trial court suppressed certain items found from the search of the apartment foyer. However, the trial court found that the remaining information in the affidavit, the defendant's possession of drugs in the suitcase, the fact that the suitcase was next to the safe, and the defendant's possession of two cell phones and a very large amount of cash incident to his arrest, was sufficient probable cause. The trial court denied the defendant's motion to suppress.

Held: Affirmed. The Court first agreed that a reasonable police officer could have concluded that the defendant's girlfriend had either actual or apparent authority to consent to a search of the suitcase. Second, the Court concluded that the information in the affidavit (excluding what the trial court suppressed) was still sufficient for a finding of probable cause to search the safe.

Regarding the consent-search of the suitcase, the Court concluded that, based on the girlfriend's statements and the fact that she was the sole lessee of the apartment, a police officer could reasonably could have believed that the girlfriend's belongings were in the suitcase and that the suitcase belonged to her. The Court repeated that, when police officers have already obtained consent to search a dwelling, they are not required to seek confirmation of the ownership for every backpack, suitcase, or other closed container they come across during their search.

Regarding the search warrant, the Court held that it was permissible for a magistrate to consider the contents of the suitcase when determining whether there was probable cause to issue a search warrant for the safe located next to the suitcase. The Court agreed that, when a search warrant is based on an affidavit that contains information that was obtained in violation of the Fourth Amendment, a court should exclude the tainted part of the affidavit and determine whether the untainted portion of the affidavit (that was not obtained in violation of the Fourth Amendment) supports a finding of probable cause to issue a search warrant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0221191.pdf

Virginia Court of Appeals
Unpublished

Parrish v. Commonwealth: May 11, 2021

Madison: Defendant appeals his convictions for Possession with Intent to Distribute, Possession of a Firearm by Felon, and related offenses on Fourth Amendment grounds.

Facts: Officers sought to arrest the defendant on an open warrant at a residence of which the defendant was neither an owner nor a renter. When officers approached, they saw the defendant inside and demanded that he come to the door. The defendant refused. Officers entered the residence but did not find the defendant in the residence; however, upon entry, the officers smelled the odor of marijuana and saw a firearm on the kitchen counter. Officers later found the defendant in the backyard hiding under a shed and placed him under arrest. They then obtained a search warrant based on the odor and the firearm.

The defendant moved to suppress on various grounds. Regarding his standing, the defendant testified that he visited the home on an average of twice a week to visit his daughter and would spend the evening there "[m]aybe once a week." He claimed that it was his intention to stay at the residence as a guest on the night of his arrest. He did not pay any bills associated with the residence and his driver's license does not list that address as his home. As far as belongings, he stated that he had a black overnight bag, his wallet, toothbrush, and a change of clothes at the residence.

The defendant's sister and his niece also testified. However, much of their testimony contradicted the defendant's testimony. They testified that the defendant almost always, if not always, stayed at his sister's home.

The trial court denied the motions without reaching the substance of the motions, finding that the defendant did not satisfy his burden of establishing that he had a reasonable expectation of privacy in the residence, and thus, lacked standing to challenge the search. The Court pointed to substantial inconsistencies between the defendant's testimony and the testimony of his sister and niece, both of whom the trial court found to be credible.

Held: Affirmed. The Court held that the evidence adduced at the suppression hearing was such that the trial court's factual finding was not plainly wrong. The Court reaffirmed that the availability of the Fourth Amendment's protections depends on whether the nature and circumstances surrounding a person's presence in the home of another gives rise to a reasonable expectation of privacy in that home. In this case, the Court acknowledged that the trial court found that the defendant's testimony did not conclusively establish that he was, in fact, an invited overnight guest.

The Court agreed that, in this case, the issue was whether the defendant was an invited overnight guest who enjoyed Fourth Amendment protections in the home. The Court explained that, "If it did, he possessed a reasonable expectation of privacy in [the] home and was entitled to have the trial court consider the merits of his suppression motions. If it did not, the trial court correctly declined to reach the merits of those motions."

The Court acknowledged that another court could have found that the fact that not one, but two cars registered to the defendant were parked at the home and that the defendant was sufficiently associated with the residence that law enforcement sought him there were sufficient to demonstrate that the defendant had a reasonable expectation of privacy in the residence.

In a footnote, the Court explained that, although testimony of an owner is not required to establish that one is an overnight guest, and the lack of testimony from an owner does not give rise to any presumption regarding a person's potential status as a guest, such evidence could have served to support the defendant's testimony regarding his frequent overnight stays or conversely, have rebutted it.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0542202.pdf

Commonwealth v. Thompson: March 16, 2021

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

Facts: Police obtained a search warrant for the defendant's residence. The affidavit set forth that police found drugs were on the defendant and in his vehicle. It also included that police found methamphetamine on another individual during a traffic stop and that this individual stated he or she had purchased the methamphetamine within the past twenty-four hours from the defendant's residence.

During a motion to suppress, the officer testified that the defendant's residence had a high volume of traffic, five to ten cars every few hours, at "all hours of the day and night," indicating that drugs were being sold there. The officer had not included that fact in the affidavit.

The trial court ruled that the affidavit in support of the search warrant lacked probable cause, and the good faith exception to the exclusionary rule did not apply.

Held: Reversed, motion to suppress improperly granted. The Court found "little question" that the officer's reliance on the magistrate's probable cause determination was objectively reasonable, and nothing to indicate that he would, or should, have known that the search it authorized was possibly illegal. The Court observed that the facts in the affidavit provided a nexus between the drugs found on the defendant and his home. Regarding the "good faith" inquiry, the Court reasoned that, given the information from the two traffic stops, in conjunction with his knowledge that the defendant was a person of interest due to the suspicious activity at his home, the officer was not objectively unreasonable in relying on the warrant.

In a footnote, the Court explained that, for purposes of a good faith inquiry, the officer could not reasonably be expected to know that the trial court would find that the statement from the unidentified individual about purchasing narcotics from the defendant's residence had no probative value, despite being a statement against penal interest. The Court pointed out that the statement had multiple indicia of reliability, because the individual both was speaking from personal, first-hand knowledge and was making a statement against his or her own penal interest.

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/1166203.pdf

Bagley v. Commonwealth: February 23, 2021

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

Facts: The defendant carried drugs in his vehicle with the intent to distribute them. A police dispatcher sent officers to a specific street address, near the defendant's vehicle, based on the caller's report that people in a white car were "blocking his driveway" and had brandished a firearm at him. When an officer arrived at the address, she determined that the building contained only about four apartments and had an adjacent "parking driveway" for those residents. She noticed the defendant's vehicle and approached.

When the officers shined their flashlights at the defendant's vehicle's front windshield, the defendant made rapid and repeated movements with his hands toward the floorboard area of the car. He then immediately got out of the vehicle and moved quickly toward the nearby apartment building, resisting the officers' attempts to make contact with him.

Officers detained the defendant and conducted a check of the vehicle for weapons. Officers found a bag of cocaine a few inches beneath the driver's seat of the car. This location was the precise area toward which both officers had seen the defendant making furtive gestures as soon as they shined their flashlights at his windshield. The bag appeared to have leaked and spread some of its contents beneath the seat. Officers found more cocaine in another bag on the car floor between the driver's seat and the door jamb, in plain view of anyone entering the driver's side of the car where the defendant had been seated. Officers also more drugs, a scale, and mail addressed to him in the center console

At trial, the Commonwealth's expert witness testified that the drugs, taken together, comprised about 700 individual doses and had a street value of $4,600 to $5,100.

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

Held: Affirmed. The Court first held that the evidence provided reasonable suspicion for a protective sweep of the vehicle for a weapon. The Court found that the protective sweep of the vehicle was justified by the same factors that supported the pat down of his person and the fact that the pat down did not yield a weapon. The Court noted that, under *Michigan v. Long*, police may conduct a protective sweep of the vehicle based on the assumption that when the stop concludes, the individual presumably "will be permitted to reenter his automobile" and "will then have access to any weapons inside."

In this case, the Court reasoned that, after the officers found no firearm when they patted down the defendant, this fact served only to heighten their suspicion that the defendant's furtive movements inside the car, immediately prior to his hasty exit and hurried movement toward the apartment door, indicated possible efforts to hide the firearm beneath the seat and distance himself from it.

Regarding the informant, the Court concluded that the caller was not anonymous. Instead, based on the caller's information and the officer's observations, the Court explained that a reasonable

officer could have inferred that the caller was one of the finite number of residents of the small apartment building and, consequently, was subject to prosecution for giving false information to the police if the report turned out to be false. Thus, although the officer was not permitted to give the tip as much weight as she could have if she had known the caller's precise identity, she was entitled to give it some weight in her assessment of the totality of the circumstances.

Regarding sufficiency, the Court concluded that the defendant's status as the driver of the car, his proximity to the drugs, his furtive movements toward the location where the drugs were found immediately upon the arrival of the police, and his attempt to vacate the car as quickly as he could when he saw them, a reasonable finder of fact could conclude beyond a reasonable doubt that the defendant constructively possessed the cocaine and was guilty of the charged offense.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0249202.pdf

Alford v. Commonwealth: December 15, 2020

Richmond: Defendant appeals his convictions for Possession with Intent to Distribute and Carrying a Concealed Firearm on Fourth Amendment grounds.

Facts: The defendant carried drugs for sale and a firearm while in a supermarket. A confidential, reliable informant called a police officer and informed the officer that "a male known as Mall was in [the store] in possession of a firearm and selling drugs." After confirming with the informant that the firearm had been seen and that the male was still inside, that officer informed police dispatch. An officer responded to the dispatch information, which included the fact that the defendant was possibly a felon.

The officer talked to the cashier, signed the merchant book, surveyed the situation, and then went outside the store again. While inside, the officer had noticed that the defendant was the only person in the store that matched the description given by dispatch. The defendant had been was standing in the center of the aisle leading to the exit, looking at his phone with a second man looking over his shoulder. The defendant was within easy reach of the cash register and cashier. He did not appear, however, to be purchasing anything even though his presence in the narrow aisle made it harder for customers to go into the store, leave the store, or purchase items at the check-out counter. The officer who responded later described the neighborhood as "one of the highest crime areas" in Richmond. He described the supermarket as part of that high crime area and testified that firearms and guns were "a problem" in that area.

Several minutes later, after the officer conferred with other officers outside, the officer reentered the store and saw the defendant in the same place, still looking at his phone, still not purchasing anything, and still with the second man looking over the defendant's shoulder. The officer approached the defendant and asked to speak to him. The defendant started to walk away. The officer then asked the defendant to move farther toward the back of the store. During this interaction, the defendant attempted to put his hands in his pockets several times, despite the officer's instruction to

keep his hands out of his pockets. The officer then patted down the defendant and discovered a firearm and drugs.

Prior to trial, the defendant sought to suppress the firearm and drugs. The trial court denied the motion to suppress.

Held: Affirmed. The Court pointed to the detailed description of the suspect with a gun, noted the defendant matched that description, and observed that no one else in the store at that time. The Court ruled that the trial court could conclude that the officer was aware of the dispatch display's information that the suspect was possibly a felon prohibited from possessing a firearm. Together with the officer's knowledge of the high-crime area and his observations of the defendant's behavior, the Court agreed that the officer had reasonable suspicion to detain and question the defendant.

Justice Huff filed a lengthy dissent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1775192.pdf

Zelaya v. Commonwealth: November 10, 2020

Alexandria: Defendant appeals his conviction for Concealed Weapon on Fourth Amendment and sufficiency grounds.

Facts: The defendant carried a concealed handgun while sitting in a car at an apartment complex with his companions at about 2 o'clock in the morning. A security guard notified police that the car and its occupants appeared to be trespassing and that one of them appeared to have a firearm. An officer arrived and the defendant immediately closed the rear door of the vehicle and his two companions fled from the scene.

The officer approached the defendant, the officer did not observe anything on the defendant's person. The officer ordered the defendant to raise his arms. After the defendant raised his arms, he revealed a firearm, which had been concealed on his waistband.

Held: Affirmed. The Court held that the officer possessed reasonable and articulable suspicion that the defendant was armed and dangerous and involved in criminal activity. The Court also held that the protective measure taken by the officer in commanding the defendant to place his hands on his head, although a "seizure," was not an unreasonable one under the Fourth Amendment.

The Court first agreed that the defendant, at a minimum had reasonable suspicion that the defendant, was involved in some form of criminal trespass. The Court added that, when the defendant's companions fled the scene, that fact provided additional reason to suspect that the defendant and his companions were in a place they were not permitted to be or were engaged in activities that were unlawful. The Court also held that instructing the defendant to place his hands above his head was reasonable.

Regarding sufficiency, the Court held that the trial court properly inferred from the evidence that the defendant's firearm was tucked away around his waistline, that his shirt was covering the firearm prior to him being told to raise his hands above his head, and that it was only the officer's command, instructing the defendant to raise his hands above his head, that revealed the firearm. The Court noted that the firearm became visible to the officer due to the officer's command and that he was unable to see the firearm at any point prior. In this way, the Court found that it was the officer's command that gave him an "exceptional opportunity to view."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1987194.pdf

Arreola v. Commonwealth: November 10, 2020

Hampton: Defendant appeals her conviction for DUI on Fourth Amendment grounds.

Facts: The defendant drove a car while intoxicated. A citizen witnessed the defendant driving dangerously, without lights at night, swerving all over the road, and nearly hitting people. The citizen and a companion immediately got into a vehicle and followed; they called 911 and reported the matter to the police. They repeatedly tried to stop the defendant, but even though the defendant stopped several times, she drove off again. At one point, the defendant struck a telephone pole. The citizen relayed all of this information by phone to the police dispatcher and followed the defendant home.

An officer arrived at the defendant's home. The officer confirmed that the defendant's vehicle had the same license plate number as the citizen had reported and that the defendant had not left the car since stopping in the driveway. Upon approaching the defendant, the officer noticed indicia that she had consumed alcohol: there was a strong alcohol odor, the defendant's speech was slurred, her eyes were watery and bloodshot, and her appearance was disheveled. The defendant failed field sobriety tests and the officer arrested the defendant for DUI.

The defendant moved to suppress, arguing that the officer unlawfully seized her without a warrant within the curtilage of her property when he refused to let her exit the car and go to her home. The trial court denied the motion.

Held: Affirmed. The Court first agreed that, when the officer detained the defendant in her car on her driveway, it was within the curtilage of her home. However, the defendant had conceded on appeal that the police lawfully entered the driveway and approached her vehicle, based on the implied consent of a resident to permit people to approach their home. Thus, the officer did not violate the defendant's Fourth Amendment rights when he ventured upon the driveway.

The Court then concluded that the officer, when he arrived, possessed a reasonable suspicion that the driver of the vehicle recently had committed reckless driving and hit and run, and he was entitled to detain the defendant to investigate. The Court ruled that the officer's actions in detaining the defendant, investigating her suspected criminal conduct, and ultimately arresting her for DUI, all were reasonable intrusions for purposes of the Fourth Amendment.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2074192.pdf

Lovchick v. Commonwealth: October 21, 2020

Fairfax: Defendant appeals his convictions for Abduction, Robbery, Sodomy, Burglary, and Use of a Firearm on Fourth Amendment grounds.

Facts: In 1995, the defendant forcibly entered an apartment, abducted four women at gunpoint, and sexually assaulted the women. Police collected a DNA sample during the investigation. In 2016, the defendant's wife told police that the defendant had confessed to her that he committed these crimes.

To obtain a sample of the defendant's DNA, police collected discarded trash and recyclables from containers on the street outside the defendant's home. DFS found a male DNA profile from that matched the sample from 1995. After receiving the certificate of analysis, police secured a search warrant to obtain buccal swabs and other biological samples from the defendant, and DFS again matched that to the trash sample and the sample from 1995.

The defendant moved to suppress the DNA results, arguing that he had a reasonable expectation of privacy in his DNA and thus the warrantless testing of DNA from his trash and recyclables to develop a profile constituted a search under the Fourth Amendment.

The trial court found that the defendant's trash and recyclables had been placed on a public street for pickup and thus were abandoned property in which the defendant retained no objective privacy expectation. The trial court denied the defendant's motion to suppress.

Held: Affirmed. The Court concluded that, even if the defendant had a subjective expectation of privacy in the information contained in his DNA, such an expectation was not objectively reasonable under the facts of this case.

The Court agreed that when the defendant abandoned the items that carried his DNA, he not only relinquished any objectively reasonable right to privacy in those items, but also any such right to privacy in the DNA profile developable from those items to identify him.

The Court also distinguished the *Davis* case from the 4th Circuit, where DNA from a crime victim was retained and later analyzed without a warrant, and then used to identify that victim as the perpetrator of a separate crime. The Court distinguished that case on its facts and also repeated that 4th Circuit cases do not control in Virginia courts.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1094194.pdf

Williams v. Commonwealth: October 6, 2020

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

Facts: The defendant drove his car while carrying several different illegal drugs for sale. The defendant changed lanes in the road, crossing a single, solid white line immediately prior to an intersection. When the defendant made the lane change, there was a vehicle behind him in the center lane, and another vehicle in the right lane. An officer stopped the defendant for a violation of § 46.2-804. A dog alerted on the vehicle and officers found 31 bags of heroin, 56 bags of cocaine, 14 bags of marijuana, cash and two cellphones.

The defendant moved to suppress, arguing that the stop was not lawful. At the motion to suppress, the officer testified that he believed the defendant's lane change was unsafe because the defendant made the lane change in a "narrow break" in traffic. However, at the end of the hearing, the circuit court did not credit that portion of the officer's testimony, stating: "I wanted to make sure and clear that [the officer] was not stating that he believed the lane change was unsafe because of the location of the other vehicle." The trial court denied the motion to suppress, though, under *Heien*, the officer's mistake of law was reasonable.

At trial, an expert testified that the defendant's drugs worth more than $1,000. He also explained how the defendant's multiple phones and large amount of cash were consistent with distribution.

Held: Reversed. The Court explained that the test for invoking the exclusionary rule is "whether a reasonably well-trained officer would have known that the search or seizure was illegal in light of all of the circumstances." In this case, the Court concluded that the officer's conduct was sufficient to trigger the exclusionary rule, writing: "The statute was not new or recently amended… Thus, there is no explanation for the officer's mistake other than inadequate study of the laws."

The Court acknowledged that, although crossing a single, solid white line is not a per se violation of the law, a lane change may still violate § 46.2-804 if the lane change is made unsafely. However, even though the officer had testified that he stopped the defendant because his lane change was unsafe, the Court, like the trial court, contended that the officer was not stating that he believed the lane change was unsafe. Thus, in the Court's view, the officer's allegedly mistaken belief that §46.2-804 prohibited a lane change over a solid white line was not reasonable because the statute clearly and unambiguously did not prohibit crossing a single, solid white line.

The Court agreed, however, that the evidence was sufficient to prove that the defendant possessed the drugs in the car and that he intended to distribute his drugs. The Court repeated that a court may infer that "drugs are a commodity of significant value, unlikely to be abandoned or carelessly left in an area.'"

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1421192.pdf

Williams v. Commonwealth: June 2, 2020

Lunenburg: Defendant appeals his convictions for Possession with Intent to Distribute and related firearms offenses on Fourth Amendment grounds.

Facts: The defendant, a convicted violent felon, possessed crack cocaine and marijuana for sale, along with a firearm in his residence. In a previous conviction for distribution, the defendant had entered "a Fourth Amendment waiver." The plea agreement specified that law enforcement could only conduct a Fourth Amendment waiver search up to six times per year. Relying on that agreement, officers entered and searched the defendant's residence in March of 2019.

During a motion to suppress, an officer testified that his agency had not recorded a search of the defendant that year and that he was not aware of an investigation of the defendant that year. The officer agreed that there was no database to confirm that no other searches had taken place and stated that he did not know whether there were any other investigations, or whether there was a federal search that year.

The defendant argued that the Commonwealth failed to prove that the search of his home did not exceed the limitation set forth in the plea agreement, but the trial court rejected that argument.

Held: Affirmed. The Court found that the Commonwealth's evidence was sufficient to prove that law enforcement did not exceed the limit of searches allowed per year under appellant's plea agreement when they searched the defendant's home.

The Court first noted that the trial court could rely on the officer's testimony. The Court also concluded that the trial court was permitted to rely on the fact that the defendant did not object to the officer's search as support for the conclusion that the search did not exceed the number of searches allowed per year pursuant to the plea agreement.

Judge Humphreys filed a dissent, contending that the Commonwealth failed in its burden to affirmatively establish that the search and seizure were within the scope of the Fourth Amendment waiver.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0811192.pdf

Involuntary Commitment

Virginia Supreme Court

McLeod v. Commonwealth: April 6, 2021
(Unpublished)
Staunton: Defendant appeals his order of Involuntary Commitment on Dismissal of his Appeal as Moot.

Facts: On April 3, 2019, a special justice granted a petition pursuant to § 37.2-817 for the defendant's involuntary admission and inpatient treatment. The General District Court ordered the

defendant's involuntary admission to Western State Hospital for a period not to exceed 30 days. On April 12, 2019, the defendant appealed the order to the circuit court pursuant to § 37.2-821. However, the hospital discharged him on April 17, 2019. The circuit court cancelled the defendant's appeal hearing and dismissed his appeal.

The defendant objected to the dismissal and demanded a hearing. At a June hearing, the circuit court affirmed its own dismissal, finding that the defendant's appeal was an appeal separate and distinct from the expedited *de novo* appeal procedure set forth in § 37.2-821. The Court found that § 37.2-821 was inapplicable and § 37.2-846(A) provided the proper means for the defendant to challenge the order, but the defendant had not pursued an appeal under that code section.

Held: Affirmed. The Court first found that the procedure, as outlined by the concurring opinion in *Paugh*, satisfies Due Process. The Court then agreed with the circuit court's ruling. The Court found that the defendant was not involuntarily committed in June and did not remain subject to an unexpired commitment order, therefore, § 37.2-821 was inapplicable at the time and the trial court properly dismissed the appeal.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/191009.pdf

Joinder & Severance

Virginia Court of Appeals
Published

Brooks v. Commonwealth: April 12, 2021

Loudoun: Defendant appeals his convictions for Grand Larceny and related offenses on refusal of his Motion to Sever

Facts: The defendant stole tires and rims from many vehicles, selling them through his tire re-sale business. Police executed a search warrant at the defendant's property and located sockets, lug nuts, and lug nut keys, as well as other stolen property. The Commonwealth indicted the defendant with almost two dozen charges regarding half a dozen separate thefts. The defendant objected to joinder because, he argued, the offenses did not constitute a "common scheme or plan" and because justice required separate trials.

At a motion to join the offenses, the Commonwealth presented GPS evidence linking the series of thefts from the defendant's automobile. Police had run that data through Google Earth and verified that the GPS had in fact been located outside the victims' residences at the time the offenses took place. (The Commonwealth ultimately did not to prove that at trial because the defendant asserted—and the circuit court agreed—that the Commonwealth failed to provide any foundation for the accuracy and reliability of Google Earth's locational data). Additionally, five out of the six thefts occurred within an

approximate six-mile radius. In every instance, the defendant stole tires and rims from relatively new, low-mileage SUVs and trucks that had been parked overnight and were subsequently found on gray cinder blocks. The defendant had ignored tires and rims on older, higher-mileage SUVs or trucks in the same area.

The trial court granted the Commonwealth's motion to join the offenses.

Held: Affirmed. In this case, the Court concluded that justice did not require separate trials because the evidence the Commonwealth proffered had multiple "stark similarities" that, assuming a proper foundation was laid, would have been admissible in the other trials under Rule 2:404. The Court agreed that the testimony from other vehicle owners regarding the details of what was taken from their vehicles and how, could have been admissible in separate trials to show, inter alia, motive, identity, knowledge, and criminal intent. Accordingly, since there would have been no additional prejudice to the defendant if the same evidence was admitted in a single trial, the Court ruled that justice did not require separate trials.

Even though the trial court ultimately excluded the GPS data, the Court agreed that the data nevertheless provided a basis for finding a "common scheme" when the trial court decided the motion to sever. The Court repeated that the mere fact that a jury may consider evidence of a defendant's guilt for multiple offenses does not automatically constitute unfair prejudice, "otherwise no joinder of offenses would ever be permissible." The Court rejected the defendant's analogy to the *Minor* case and instead analogized this case to the *Severance* case.

The Court also emphasized that the danger of unfair prejudice can also be mitigated by an instruction to the jury that limits their consideration of other crimes evidence to its proper purposes and application to each offense charged.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0209204.pdf

Jury Selection

Virginia Supreme Court

Bustos v. Commonwealth: April 6, 2021
(Unpublished)
Aff'd Ct. of App. Ruling of December 27, 2019
Fairfax: Defendant appeals his convictions for sexual assault Jury Instruction issues.

Facts: The defendant sexually assaulted the victim. At trial, the defendant objected to granting the model geriatric parole instruction during sentencing. The defendant argued in the alternative that the trial court should have granted an amended instruction, which included a (false) statistic relating to geriatric parole, stating that only 0.1% of eligible offenders actually receive geriatric parole. The trial court refused that instruction. The Court of Appeals affirmed.

Held: Affirmed. The Court wrote: "In light of the General Assembly's apparent acquiescence to the Court's interpretation of § 53.1-40.01, the Court declines Bustos's invitation to revisit the ruling in *Fishback*." The Court noted that the wording of the instruction was practically a verbatim recitation of the statute. The Court found that the defendant was seeking to amend the instruction to inform the jury about a factual matter, which was, by definition, improper. The Court also noted that the defendant's "data" was factually incorrect.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/200160.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/1880184.pdf

Bryant v. Commonwealth: April 8, 2021
(Unpublished)
Bedford: Defendant appeals his conviction for Unreasonable Refusal on *Batson* grounds.

Facts: The defendant unreasonably refused a breath test. At jury selection, prior to trial, after the parties took their peremptory strikes, the trial court seated the selected jurors and dismissed the other jurors in the venire. After the clerk called the names of the jurors, the defendant noticed that the only African American on the venire had been struck by the Commonwealth. The defendant immediately informed the trial court that he had a motion to make outside of the presence of the jury. The trial court then sent the jury to the jury room.

The defendant made a *Batson* objection and the trial court sustained it, disallowing the Commonwealth's previous peremptory strike. The trial court noted that it there were not enough jurors present to start the juror selection process over. The defendant responded that the only remedy he was seeking was to have the juror reseated on the jury; he explicitly stated that he was "not asking for a new jury." The Commonwealth objected to reseating the struck juror, asserting that that juror had already been dismissed from the jury and was aware of that fact. The Commonwealth expressed concern that that would result in the juror being prejudiced against it.

Rather than reseat the juror, the trial court decided to call two new jurors and give each party one more peremptory strike, over the defendant's objection.

Held: Affirmed. The Court repeated that there are two possible remedies for the unconstitutional exercise of peremptory strikes: "reseating persons improperly struck from the jury panel, and discharging the venire and selecting a new jury from a new panel." However, because the defendant himself rejected summoning a new panel, the Court limited its review to whether the trial court properly refused to reseat the improperly struck juror.

The Court examined the factors under *Coleman* and focused on one of them: "the knowledge of the jurors regarding the improper strike." The Court noted that everyone in the courtroom knew who had been struck and who had not. The Court reasoned: "it would not be difficult for her to surmise that

race may have played a part in the decision. Similarly, it would not be difficult for her to surmise that it was the Commonwealth that struck her. Under such circumstances, placing her back on the jury was not a viable option. Therefore, the trial court did not abuse its discretion in refusing to reseat the struck juror."

The Court did not opine on whether the trial court's improvised solution was proper, given that the defendant did not object to the court's remedy. The Court merely cautioned that, in those rare instances where a new *Batson* remedy must be fashioned, that remedy must address the ills that *Batson* was designed to address.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/200897.pdf

Virginia Court of Appeals
Published

Riddick v. Commonwealth: June 2, 2020
72 Va. App. 132, 842 S.E.2d 419
Chesapeake: Defendant appeals his convictions for DUI and related offenses on the trial court's Subject Matter Jurisdiction.

Facts: The defendant drove intoxicated on a suspended license at more than twenty miles per hour over the speed limit and refused a blood test. The district court convicted the defendant of those offenses. The defendant appealed to circuit court, where the court conducted a bench trial. The defendant did not object to the bench trial, but after his conviction, the defendant appealed, arguing for the first time that the trial court lacked subject matter jurisdiction to try him because the record did not reflect that he "entered a knowing and intelligent waiver of trial by jury."

Held: Affirmed. The Court ruled that, despite the deficiency in the record, the trial court had subject matter jurisdiction pursuant to §§ 16.1-132 and 17.1-513 to try the defendant's appeals of his general district court convictions. The Court treated the defect in the record as a waivable procedural error. The Court found that the statutory grant of jurisdiction to the circuit court to hear appeals of criminal and traffic convictions rendered by the general district court was fatal to the defendant's appeal.

In a footnote, the Court rejected the defendant's reliance on the Supreme Court's ruling in *Cave,* instead looking to the *Pure Presbyterian* and *Cilwa* cases. The Court refused to conclude that the jury trial requirements go to subject matter jurisdiction, noting that the Supreme Court did not use the phrase "subject matter jurisdiction" in *Cave*.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1059191.pdf

Virginia Court of Appeals
Unpublished

Clanton v. Commonwealth: May 4, 2021

Petersburg: Defendant appeals his convictions for Murder and related offenses on Refusal to Strike a Juror for Cause.

Facts: The defendant shot and killed two men who giving a ride to him and two friends. The defendant later said that a gang member had ordered him to do it.

At trial, a juror stated that she knew several of the police officers that were going to testify because of her sister's former employment with the police department. The juror stated: "I'm -- I'm, you know, kind of, I guess -- like, I guess I would say loyal to the police because of my sister's work that she did, I guess. But I hope that wouldn't keep me from being impartial with the evidence that we have. I'm biased … you know, on the police side, I guess you would say." She also responded that she did not "want to do a disservice to anybody" after being asked if she could follow the instructions of the court and put aside any "special feelings" she might have had.

When asked by the trial court if her relationship with police witnesses would prevent her from being fair to the Commonwealth or the defendant, the juror responded, "I mean, I guess not. No." When the trial court asked again if she could be impartial to both sides considering her sister's prior work, the prospective juror stated she "hope[d] that wouldn't keep [her] from being impartial." Following this exchange, when asked by the Commonwealth's attorney if she could remain impartial, the juror twice stated that she would "try to be."

When the trial court then asked, "can you put aside any feelings that you have about the loyalty or credibility of police officers and follow the law that I instruct you on, based upon the evidence that you hear in this courtroom?," the juror again responded, "I will try."

Held: Reversed. The Court concluded that all of the juror's responses to the question of whether she could be impartial were equivocal in nature, and thus revealed doubt as to whether she would be able to render a fair verdict. The Court observed that the juror expressed numerous reservations about her ability to serve impartially on the jury in light of her experience and relationships with police. The Court found that her direct statements regarding her loyalty and bias in favor of police, along with her equivocal answers that she would "try" and "hope" to be impartial, created a reasonable doubt as to her qualification to serve as a fair and impartial juror.

The Court repeated that a person is not automatically excluded from a jury because of an association with law enforcement personnel, provided he demonstrates that he can be impartial. In a footnote, the Court distinguished this case from *Keepers*, noting that the juror's statements that were not equivocal in nature did not support the conclusion that she could be fair and impartial, as she pointedly said that she was "loyal" and "biased" in favor of police.

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/1809192.pdf

Purnell v. Commonwealth: June 23, 2020

Richmond: Defendant appeals his convictions for Aggravated Malicious Wounding and Use of a Firearm on Jury Selection issues.

Facts: The defendant shot and severely wounded a person. During voir dire, defense counsel asked: "have you or any of your family members or close friends been the victim of any kind of a crime?" One juror revealed that her best friend had been shot and killed. When defense counsel asked if "that would affect your judgment in this case?", the juror replied, "I'm not sure. I guess I'd have to hear all the facts." Defense counsel also asked if "there anyone here who thinks that it is never okay, under any circumstances, for one person to shoot a gun at another person?" The same juror responded, "I don't believe in violence."

During a sidebar, the Court examined the juror directly and asked her if she could "give the guy a fair trial, and can you listen to the evidence and instructions of the Court, or are you so situated that you can't do that?" She stated: "I can do this, Your Honor." Defense counsel asked whether her experience and beliefs would affect her ability to "give my client a fair and impartial trial, and listen to the evidence?" She stated, "I am not sure." However, when asked if "the fact that there might be evidence of shooting guns in this case, are you able to put that aside and give [the defendant] a fair trial," the juror stated, "Yes. I am able to do that."

After watching and listening to the juror, the trial court had found that the juror's responses were honest. The trial court gave defense counsel the opportunity to bring the juror back to ask her additional questions. Defense counsel, however, did not take that opportunity. The trial court refused the defendant's request to strike the juror for cause.

Held: Affirmed. Viewing the voir dire in its entirety, the Court found that the record supported the trial court's conclusion that the juror could remain fair and impartial. In addition to her statements, the Court also pointed to the juror's tone and demeanor, which the trial court observed and noted in its findings. In the Court's view, the trial court resolved the juror's potentially equivocal statements, and the totality of the voir dire supported the trial court's conclusion that the juror could remain fair and impartial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0679192.pdf

Juror Misconduct

Virginia Court of Appeals
Published

Blowe v. Commonwealth: October 27, 2020

Winchester: Defendant appeals his convictions for Production and Possession of Child Pornography and for Indecent Liberties on Jury Tampering Claims.

Facts: The defendant exploited a child and possessed and distributed child pornography. At sentencing, given the mandatory minimum punishments, the jury had to sentence the defendant to a minimum of thirteen years' incarceration just for the violations of § 18.2-374.1.

During sentencing deliberations, a question arose among the members of the jury regarding the sentences for the two convictions for production of child pornography. Specifically, they asked the courtroom clerk if they could "choose 'nothing' for the second offense." The clerk did not inform the parties or the trial court of the question, and rather than refer the question to the judge, the clerk responded to the jury that they had to sentence the defendant consistent with the instructions that the trial court had given them.

The jury sentenced the defendant to the mandatory minimum with no additional incarceration. After sentencing, the Commonwealth learned about the exchange and shared it with the defendant, who filed a motion to set aside the verdict. At the hearing, the trial court stated that, if the question had been brought to its attention, it "would have given the same exact answer." The trial court denied the defendant's motion to investigate the alleged jury tampering.

Held: Affirmed. The Court first pointed out that the communication, that the jury was required to follow the trial court's instructions regarding sentencing, was not an incorrect statement of the law. The Court then concluded that, given that the jury sentenced him to the absolute minimum amount of incarceration possible under the law, the defendant was not prejudiced by the clerk's communication with the jury.

Initially, the Court agreed that the mere fact of such a communication related to an issue before the jury gives rise to a presumption of prejudice. However, the Court also repeated that the presumption is rebuttable if the Commonwealth can establish that the contact with the juror was harmless to the defendant.

The Court rejected the defendant's argument that, without the clerk's statement, there was a possibility that the jurors would not have been able to reach a unanimous decision regarding the sentence. The Court replied that the possibility of nullification can never be legally cognizable prejudice because Virginia law does not permit juries to engage in the nullification of mandatory minimum sentences.

The Court explained that, if a jury ignores its legal duty to follow the trial court's instructions and attempts to nullify a mandatory minimum sentence set by the General Assembly, a defendant receives no benefit, because in such situations, a trial court is obligated to reject the jury's attempt at nullification and must impanel a new jury to determine punishment within the limits established by the legislature for the crime for which the original jury found the defendant guilty. The Court wrote: "the trial court would have been required to seat a new jury, or juries, on the issue of sentencing only and continue doing so until a jury imposed sentences that included the mandatory minimum sentences of

thirteen years for the violations of Code § 18.2-374.1 and may have imposed combined sentences of 270 years in prison for all of the convictions."

In a footnote, the Court pointed out that, even if the defendant were to have prevailed on his argument, the remedy would have been a new sentencing hearing, but not a new determination of guilt or innocence. Thus, because the defendant received the mandatory minimum sentence, "prevailing on this appellate issue would not have reduced [the defendant's] prison time, but very well may have increased it."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0680194.pdf

Juveniles

U.S. Supreme Court

Jones v. Mississippi: April 22, 2021

Certiorari to the Mississippi Court of Appeals: Defendant appeals his Life Sentence for Murder on Eighth Amendment grounds.

Facts: In 2004, the defendant, who was 15 years old, stabbed his grandfather to death. The trial court sentenced the defendant to life in prison, which was the mandatory sentence under Mississippi law at the time.

In 2012, the U.S. Supreme Court ruled in *Miller v. Alabama* that a child who commits a homicide may be sentenced to life without parole, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment. At a re-sentencing, the trial judge acknowledged his sentencing discretion under *Miller* and again sentenced the defendant to life without parole.

On appeal, the defendant argued that a sentencer who imposes a life-without-parole sentence must also make a separate factual finding that the defendant is permanently incorrigible, or at least provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible. The Mississippi Court of Appeals denied the defendant's appeal.

Held: Affirmed. In a 6-3 ruling, the Court ruled that an on- the-record sentencing explanation with an implicit finding of permanent incorrigibility is not necessary nor required by *Miller*. The Court noted that *Miller* required a discretionary sentencing procedure, but repeated that the *Miller* Court mandated only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a life-without-parole sentence. The Court noted that *Montgomery* unequivocally stated that "*Miller* did not impose a formal factfinding requirement" and added that "a finding of fact regarding a child's incorrigibility . . . is not required."

Justice Thomas concurred, arguing that *Montgomery* was wrongly decided. Justice Sotomayor dissented, arguing that the Court's ruling "guts" *Miller* and *Montgomery.*

Full Case At:
https://www.supremecourt.gov/opinions/20pdf/18-1259_8njq.pdf

Fourth Circuit Court of Appeals

U.S. v. McCain: September 10, 2020
974 F.3d 506
S.C.: Defendant, a juvenile, appeals his life sentence on Eighth Amendment grounds.

Facts: The defendant, while he was 17 and selling heroin, murdered one person and maimed another, believing them to be police informants. The defendant received a mandatory sentence of life imprisonment without the possibility of parole. After the Supreme Court's decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*, the district court conducted a resentencing and again sentenced the defendant to life imprisonment without parole.

In its findings, the district court concluded that "the hallmark features associated with young age," such as impulsivity and lack of maturity, did not play any substantive role in the defendant's crimes. The Court agreed that the defendant was a "capable," "street smart" "heroin dealer" whose crimes "were cold and calculated, targeting two victims, with premeditation, literally executing one victim and maiming another." The district court observed that he "was not abused in his home" or "otherwise impaired through those things, other than things we too often see with people in dysfunctional families." The court examined the defendant's juvenile criminal record, which included attempted armed robbery, burglary, and multiple assaults, and noted that he was "very familiar with [the] criminal justice system" and "able to assist his attorneys, as he was represented by counsel on each of those [prior] cases."

As for rehabilitative potential, the court reviewed a long list of the defendant's serious misconduct since his arrest and turning 18 years old, including stabbing another inmate at least sixteen times, multiple "disturbing" instances of assaulting and threatening other inmates and correctional officers, and sexually assaulting a female inmate while awaiting his resentencing. The district court concluded that his postconviction conduct and antisocial personality disorder diagnosis demonstrated a lack of rehabilitative potential. The district court concluded that he presented "one of those uncommon cases where sentencing a juvenile to the hardest possible penalty is appropriate."

Held: Affirmed. The Court explained that it could not conclude that the district court abused its discretion in determining that the defendant's crimes, "committed when he was 7-and-a-half months shy of his 18th birthday, reflected irreparable corruption rather than "the transient immaturity of youth." While it acknowledged that a sentence of life imprisonment without parole for a juvenile offender should be "uncommon," the Court found that the district court "amply explained why it concluded that "the harshest possible penalty"—life imprisonment without parole—was appropriate."

Full Case At:
https://www.ca4.uscourts.gov/opinions/184723.P.pdf

Private Prosecutors

Virginia Court of Appeals
Published

Price v. Commonwealth: November 4, 2020

Hampton: Defendant appeals her conviction for Assault and Battery on Use of a Private Prosecutor

Facts: The defendant appealed her district court conviction for Assault and Battery to Circuit Court. On appeal, the Commonwealth elected to not to enter an appearance. A private attorney then entered an appearance as a private prosecutor on the victim's behalf. The defendant objected that the attorney serving as a private prosecutor in the trial for assault and battery simultaneously represented the victim in a civil case against the defendant. The trial court overruled the objection.

Held: Reversed. The Court concluded that the simultaneous representation created a conflict of interest in violation of the defendant's due process rights. The Court complained that the attorney simultaneously represented the victim in a civil action against the defendant and sought to prosecute her, and that procedural safeguards were not followed that would have ensured the publicly elected prosecutor remained in control of the case.

When a private attorney steps into the shoes of a public prosecutor, the Court found that that attorney takes on the ethical obligation to maintain impartiality—an obligation that supersedes any interest of a private client that might conflict with the impartial administration of justice. The Court explained, "in short, if it is forbidden to the public prosecutor, it is forbidden to the private prosecutor." Therefore, the Court concluded that a pecuniary or other tangible interest in the outcome of a prosecution—one which corresponds to a factually-related civil case—warrants a private prosecutor's disqualification.

The Court also cautioned that the absence of such an interest does not eliminate the greater ethical conflict that arises whenever an attorney attempts to "serve two masters." The Court expressed concern that a private attorney owes his loyalty to the client; the prosecutor owes his loyalty to the impartial administration of justice. "Any conflict between these loyalties, direct or implied, violates the defendant's due process rights guaranteed under the United States Constitution and the Constitution of Virginia." Therefore, the Court repeated that a trial court can disqualify a prosecutor if that prosecutor "has an interest pertinent to a defendant's case that "may"—not "will"—conflict with the prosecutor's duties.

The Court also refused to find harmless error, on the grounds that this error has "fundamental and pervasive effects" that infect the entire proceeding with prejudice.

In a footnote, the Court cited an opinion of the Attorney General that concluded that, when the Commonwealth's Attorney elects not to prosecute certain charges, courts do not have inherent authority to interfere with that discretion by appointing a private prosecutor. The Court cited the "paramount consideration" that the prosecution of a criminal case be controlled by "an attorney who is responsible to the public."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0343201.pdf

Sixth Amendment: Right to Counsel

Fourth Circuit Court of Appeals

U.S. v. Sturdivant: January 7, 2021
(Unpublished)
W.D.N.C.: Defendant appeals his conviction for Distribution of Fentanyl on Ineffective Assistance of Counsel.

Facts: The defendant distributed Fentanyl, while already on Federal probation for distribution of cocaine and after another, previous South Carolina state conviction for distribution. At sentencing, the government sought a career offender enhancement based on the defendant's prior convictions. However, under South Carolina law, the state sentence had been unconstitutionally enhanced. Although the defendant's attorney was aware of the issue and alerted the trial court to the issue initially, at sentencing he waived the issue, stating that he did not believe the state conviction would make any difference.

One week after his Federal sentencing, the state court vacated the defendant's prior sentence because it was unconstitutionally enhanced and resentenced him, *nunc pro tunc*, to a shorter sentence. As a result, the defendant received a Federal sentence to serve around 8 to 10 years longer than he would have been, had counsel raised the issue prior to his Federal sentencing.

Held: Reversed. Because the defendant's attorney's waiver of his objection, based on the mistaken belief that it would make no difference to his client's sentencing exposure, was based on a fundamental misunderstanding of law and was thus "quintessentially" unreasonable, the Court held that counsel was ineffective. The Court vacated the defendant's sentence and remanded this case for resentencing.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194770.U.pdf

Valentino v. Clarke: August 26, 2020

972 F.3d 560
E.D.Va.: Defendant seeks Habeas relief on Ineffective Assistance of Counsel

Facts: The defendant beat, shot, and robbed a woman in an Alexandria hotel room. He fled, but police tracked him using the victim's cellphone, and arrested him in possession of the victim's stolen phone and the gun used to shoot the victim. The defendant claimed at trial that an unknown assailant sprung upon him, wounding the woman as well as the defendant himself. The defendant entered his own bloody sock into evidence, but neither the Commonwealth nor the defense sought DNA testing for the sock.

After his conviction, the defendant sought habeas relief on ineffective assistance of counsel grounds. The defendant argued that his counsel should have sought forensic testing of items found in the victim's hotel room. The defendant also argued that his counsel should have sought testing of the sock; if the victim's DNA were on the sock, he contended that his counsel could have argued that the victim's DNA could have reached his sock by a transfer of blood from the victim's leg, to the bullet, to the defendant's sock.

The Virginia post-conviction court agreed that the defendant's bloody sock deserved DNA testing. Even so, the court found this failure did not harm the defendant's defense. As for the rest of the defendant's claims, the state court held trial counsel's performance neither deficient nor prejudicial. Thus, the state court denied post-conviction relief without ordering new forensic testing. On review, the federal district court also dismissed the defendant's *habeas* petition.

Held: Affirmed. The Court agreed with the district court that the state's post-conviction adjudication was not unreasonable. The Court wrote: "In the end, Valentino's trial still would have been a credibility competition. As we review the record, we are left with the impression that Islam recounted a coherent and credible series of events—Valentino did not. And finding Islam's DNA on Valentino's sock would not have changed the contours of that contest."

Moreover, the Court argued, the defendant's argument "paints an overly optimistic picture of what forensic testing would have "proved," while downplaying the risk of such testing to the trial strategy his attorney pursued. If Valentino's counsel had requested forensic testing, he would have had to live with the results." The Court repeated that making that kind of decision involves "assess[ing] and balancing [] perceived benefits against perceived risks"—an exercise to which we normally "'afford . . . enormous deference."

The Court also noted that the defendant may have picked up the victim's blood or DNA from their direct physical contact, or he may have picked up the victim's DNA from merely touching objects in the room. The Court wrote: "In this sense, Valentino must take the bitter with the sweet."

Full Case At:
https://www.ca4.uscourts.gov/opinions/187295.P.pdf

Virginia Court of Appeals
Published

Robinson v. Commonwealth: July 2, 2020
72 Va. App. 244, 844 S.E.2d 411
Prince William: Defendant appeals his convictions for Grand Larceny, Robbery, and related offenses on Refusal to Sever the charges.

Facts: The defendant faced indictments for robbery, abduction, and three separate grand larcenies. The defendant initially sought to sever the charges and seek separate jury trials, but ultimately requested a single bench trial. Before the bench trial, defense counsel stated, "Judge, my client is renewing the motion to separate these cases and I think that him [sic] and I might be at an impasse in going forward in this circumstance. I don't think that's what we should do, but I'm just relaying to you what he's asking to do here." The trial court proceeded with a single trial for all charges and convicted the defendant.

Held: Affirmed. The Court explained that whether to file a motion to sever offenses is a classic pre-trial tactical decision, at the core of managing the conduct of the trial, that must be left to the discretion of the lawyer if a defendant is not acting pro se. Because the decision on whether to move to sever the offenses and seek separate trials was a tactical decision properly belonging to a trained and experienced attorney, and it was clear from the record that defense counsel did not move to sever the offenses, the Court concluded that on appeal the defendant's assignment of error was procedurally defaulted.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0154194.pdf

Virginia Court of Appeals
Unpublished

Uzzle v. Commonwealth: December 29, 2020

Norfolk: Defendant appeals his conviction for Rape on Refusal of his Request for New Counsel

Facts: Prior to trial for rape, the defendant requested new counsel, claiming that his current attorney had not adequately prepared him for trial. The trial court gave the defendant and his attorney the time and opportunity to present their arguments about their level of preparedness, and the trial court was convinced by the attorney's presentation. She told the trial court she had met with the defendant and discussed the case, the likely witness testimony, the sentencing guidelines, and the Commonwealth's offer. She represented that the defendant "was completely prepped for this trial" and that she had been ready for weeks. She also explained that a hurricane prevented her from returning to see the defendant just before trial, but because he was already prepared for trial, her inability to visit him on that day did not impact their level of readiness for trial.

The trial court denied the defendant's request. After trial, for the first time, the defendant claimed that his attorney had a conflict of interest, because she had prosecuted him for involuntary manslaughter twelve years earlier. The defendant asserted that this was a "structural error" that required reversal.

Held: Affirmed. The Court repeated that the Sixth Amendment does not guarantee a "meaningful relationship" between an accused and his counsel. In this case, based on the details that defense counsel provided to the trial court about her preparation, the Court refused to say that the trial court abused its discretion in denying the motion for new counsel.

Regarding the alleged conflict, the Court repeated that the trial court's duty to inquire arises when "the trial court knows or reasonably should know that a particular conflict exists." The Court reviewed the law of conflict of interest in detail. In this case, the Court held that the trial court was not obligated to inquire into the potential conflict of interest that the defendant alleged because the trial court was only presented with a "vague, unspecified possibility of conflict." The Court noted that the defendant had not shown how the attorney's representation of him was adversely affected by the alleged conflict.

The Court cautioned that it was not holding that an attorney's former prosecution of a defendant never creates a conflict of interest. In a footnote, though, the Court also noted that, in some rural jurisdictions with few attorneys, there is sometimes little practical choice but to allow former prosecutors to represent defendants and that the particular facts of each case are relevant in determining whether the trial court has a duty to inquire about the existence of an actual conflict.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0386191.pdf

Sentencing

Virginia Court of Appeals
Published

Holloway v. Commonwealth: August 4, 2020
72 Va. App. 370, 846 S.E.2d 19
Norfolk: Defendant appeals the refusal to reconsider his sentence for Substantial Assistance.

Facts: The defendant pled guilty to possession with intent to distribute a Schedule I or II controlled substance, third or subsequent offense, and received the ten-year mandatory minimum sentence. However, one year later, the Commonwealth moved to reconsider the defendant's sentence based on his "substantial assistance" in an unrelated murder investigation.

The Commonwealth and defendant proffered that the defendant had been imprisoned with an inmate who was charged with murder. The defendant was prepared to testify that the inmate admitted to the crime and discussed his defense strategy with the defendant. The defendant was related to a co-

defendant in the murder case. His anticipated testimony corroborated another witness' statements. On the day of trial, the inmate pled guilty, based upon the fact that the defendant and other witnesses were available on the morning of trial to testify.

The court accepted the agreed proffer and did not take any exception to the merits of the defendant's cooperation and whether the cooperation was sufficient under § 19.2-303.01. However, the court found that the statute did not give it the authority to go below the ten-year mandatory minimum specified by § 18.2-248(C). The court dismissed the motion to reconsider.

Despite the Commonwealth's position before the trial court, on appeal, the Attorney General contended that the trial court correctly ruled that it did not have authority to consider a sentence reduction.

Held: Reversed. The Court held that the trial court erred by dismissing the motions to reconsider, without determining whether the defendant provided substantial assistance to the Commonwealth pursuant to § 19.2-303.01, warranting a reduction in his ten-year mandatory sentence. The Court examined the terms of the statute and pointed out that § 19.2-303.01 provides that "[n]otwithstanding any other provision of law or rule of court . . . the sentencing court may reduce the defendant's sentence" following imposition if the defendant provides substantial assistance to the Commonwealth. Contrary to the trial court's conclusion, the Court found that § 19.2-303.01 authorized the trial court to reduce a mandatory minimum sentence for a violation of § 18.2-248, subsequent to its imposition, if it found the defendant provided substantial assistance to the Commonwealth.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1575191.pdf

Virginia Court of Appeals
Unpublished

O'Neal v. Commonwealth: January 12, 2021

Pulaski: Defendant appeals the revocation of his probation on the terms of his probation

Facts: While on probation for 2008 convictions for Forgery and Uttering, the defendant was banned from two middle schools after approaching two female students and calling them "pretty" and "sexy." During a psychosexual evaluation, the defendant admitted being sexually attracted to female minors. He also admitted writing a "love letter" to a nine-year-old girl.

The defendant then incurred new convictions for various fraud offenses in 2011 and 2012. After several more probation violations, the trial court included the following condition for the defendant's supervision, stating that the defendant was:

> ORDERED to have absolutely no contact with any females under the age of eighteen (18) years, no texting, no internet, [and] he is further ORDERED to complete the Sexual Offender

Awareness Program with the Department of Corrections and must attend each and every treatment session.

Returned to probation, the defendant admitted to his probation officer that he had been communicating with another minor by phone. Later, he also admitted that he owned a cell phone with internet service and had spoken to an eleven-year-old girl several times. After that, the defendant also acknowledged that he had various social media accounts and had been in contact with a fourteen-year-old girl by phone and in person. The Court had the defendant arrested for violating probation, but released the defendant on bond.

While on bond, the defendant admitted to his probation officer that he had been using a cell phone with internet service and accessing Facebook. He also acknowledged that he obtained pictures of children by misrepresenting his identity on Facebook. The probation officer again searched the defendant's cell phone and found several pictures of minors, including an image of a naked female who appeared to be between fourteen and sixteen years old.

At the final revocation hearing, the defendant contended that that the court erred by imposing specific probation conditions which prohibit him from having contact with females under the age of eighteen, texting, and using the internet, because those conditions were unrelated to his underlying larceny and fraud convictions. The trial court rejected that argument, concluding that probation conditions could address a probationer's pedophilia to prevent victimization of children, regardless of the probationer's underlying convictions.

Held: Affirmed. The Court wrote: "Clearly, based on appellant's troubling background and behavior on probation, the court did not abuse its discretion by imposing specific probation conditions prohibiting appellant from having contact with underage girls, texting, and using the internet."

The Court repeated that states may restrict the exercise of a First Amendment right through specific, "narrowly tailored" actions, including imposition of probation conditions. The constitutional validity of content-neutral restrictions is determined by conducting an "intermediate scrutiny" analysis, whereby the state action "must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1962193.pdf

Swinea v. Commonwealth: December 22, 2020

Chesapeake: The defendant appeals his conviction for Drug Possession on Refusal to Grant a Deferred Disposition and sufficiency.

Facts: An officer arrested the defendant on an outstanding warrant. Incident to arrest, the officer searched the defendant and found an Adderall pill, cut in half in the defendant's watch pocket. At trial, the defendant claimed that he had requested a painkiller from the mother of his children because of "excruciating pain." He claimed that she gave him the pill at a convenience store parking lot but

mistakenly believed it was an over-the-counter medication. The mother also testified and told a similar story, albeit with significant differences.

At trial, in rebuttal, the Commonwealth introduced expert testimony that street users of Adderall often cut the pills in half to allow them to get two hits from one tablet, often carry other, legal medications with their contraband medications, and often store small amounts of controlled substances in the watch pockets of their pants.

At trial, the defendant also argued that the Commonwealth failed to prove he was aware of the drug's nature and character. The trial court rejected the defendant's claims, noting that the defendant did not take the pill despite his claim of pain. Instead, the defendant wrapped the pill and placed it in his pocket.

The defendant requested a deferred disposition. However, the trial court rejected his request, noting the defendant's criminal history, which revealed multiple offenses tied to the defendant's "failure to respect the authority of courts and/or obey conditions imposed upon him." The defendant's criminal history also revealed that he previously had been granted a deferred disposition/first offender status for a domestic assault and battery charge and that he failed to meet the terms and conditions imposed as a result.

Held: Affirmed. The Court agreed that the facts inferentially support the conclusion that the defendant was aware of the nature and character of the Adderall he admittedly possessed. Regarding the sentence, the Court also pointed out that each of the defendant's previous offenses, let alone the totality of them, would allow a reasoned decisionmaker to conclude that the defendant had failed to "demonstrate a likelihood of being able to adhere to the terms and conditions of probation"

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0105201.pdf

Green v. Commonwealth: December 22, 2020

Chesterfield: Defendant appeals the modification of her sentence on jurisdictional grounds.

Facts: The defendant violated probation on her convictions for fraud and felony failure to appear. As part of a sentence, the Court ordered the defendant to complete the rehabilitative Community Corrections Alternative Program ("CCAP"). However, the program found the defendant "medically unsuitable." Probation notified the Court, explaining that the defendant had not received any institutional violations or conducts, had participated in her programming, and had completed a few community service hours.

At a show cause hearing, both parties agreed that they were jointly moving to modify the defendant's sentence to eliminate the CCAP requirement, give her an active sentence of twelve months and credit for time served (those being coterminous), and place her back on supervised probation. The trial court entered an order to that effect. The defendant then appealed, claiming the Court lacked jurisdiction.

Held: Affirmed. The Court rejected the defendant's attempt to "approbate and reprobate" by taking inconsistent positions. The Court also found that the trial court had subject matter jurisdiction over the show cause hearing violation. The Court explained that, even when a defendant's violation is not willful and was due to the subsequent inability of the inmate to do so resulting from an unforeseen medical condition, the inmate necessarily will be subjected to a show cause hearing at which the trial court has the discretion to revoke all or part of the inmate's suspended sentence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1640192.pdf

Thompson v. Commonwealth: November 4, 2020

Chesapeake: Defendant appeals his convictions for Indecent Liberties, Child Pornography, and Child Solicitation on Amendment of a Sentencing Order.

Facts: The defendant solicited a child and possessed child pornography. The trial court found the defendant guilty and sentenced the defendant. The trial court issued series of sentencing orders, all of which contained clerical errors. For example, the trial court first issued a sentence for child pornography in excess of the statutory maximum. The trial court then mistakenly confused the indecent liberties conviction with the child pornography conviction and, instead of reducing the child pornography sentence, erroneously reduced the indecent liberties sentence.

When the Court sought to correct the errors, the defendant objected on jurisdictional and Double Jeopardy grounds, arguing that the court had lost jurisdiction to increase his sentence.

Held: Affirmed. The Court found that the provisions of § 8.01-428(B) apply, and thus the trial court had jurisdiction to modify the orders to have the record accurately reflect its rulings. The Court repeated that any amendment or *nunc pro tunc* entry should not be made to supply an error of the court or to show what the court should have done as distinguished from what actually occurred. The Court explained that a court's authority in this connection extends no further than the power to make the record entry speak the truth.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1567191.pdf

Sullivan v. Commonwealth: October 20, 2020

Stafford: Defendant appeals her sentence for Drug Possession on Denial of a Deferred Disposition and Refusal to Permit Withdrawal of a Guilty Plea.

Facts: The defendant possessed several drugs along with drug paraphernalia. The defendant agreed to plead guilty to possession of a Schedule I/II controlled substance and possession of drug paraphernalia in exchange for the Commonwealth's agreement to move to nolle prosequi two additional charges. Pursuant to the plea agreement, the defendant waived her right to withdraw her guilty plea, both in writing and also orally during her plea colloquy.

Approximately two months after the trial court accepted her plea and pronounced her guilty – and after a written order of guilt was entered – the defendant informed the trial court that she wished to request a deferred disposition under § 18.2-251. The trial court found that it had already found the defendant guilty and refused the request. The defendant then moved to withdraw her guilty plea, but the trial court also refused that request as well.

Held: Affirmed. The Court first held that the trial court did not err in refusing to grant the defendant's request for a deferred disposition. The Court explained that, under the plain language of § 18.2-251, trial courts are not permitted to make deferred dispositions under this statute once the court has entered a judgment of guilt. In this case, the Court noted that the defendant did not request a deferred disposition until two months after she was found guilty and a judgment of guilt had been entered in an order of conviction.

In addition, because the defendant expressly waived her right to withdraw her guilty plea and confirmed through the plea colloquy with the trial court her understanding of her waiver of her right to withdraw her guilty plea, the Court did not find error in refusing the defendant's motion to withdraw her guilty plea. The Court noted that the plea agreement was explicit, and also that the trial judge reviewed the waiver provision with the defendant and confirmed that the defendant understood it and wanted to waive her right to withdraw her guilty plea.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1039194.pdf

Trial Issues

Virginia Supreme Court

Bustos v. Commonwealth: April 6, 2021
(Unpublished)
Aff'd Ct. of App. Ruling of December 27, 2019
Fairfax: Defendant appeals his convictions for Sexual Assault regarding Jury Instruction issues.

Facts: The defendant sexually assaulted the victim. At trial, the defendant objected to granting the model geriatric parole instruction during sentencing. The defendant argued in the alternative that the trial court should have granted an amended instruction, which included a (false) statistic relating to geriatric parole, stating that only 0.1% of eligible offenders actually receive geriatric parole. The trial court refused that instruction. The Court of Appeals affirmed.

Held: Affirmed. The Court wrote: "In light of the General Assembly's apparent acquiescence to the Court's interpretation of § 53.1-40.01, the Court declines Bustos's invitation to revisit the ruling in *Fishback*." The Court noted that the wording of the instruction was practically a verbatim recitation of the statute. The Court found that the defendant was seeking to amend the instruction to inform the jury about a factual matter, which was, by definition, improper. The Court also noted that the defendant's "data" was factually incorrect.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/200160.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/1880184.pdf

Fourth Circuit Court of Appeals

U.S. v. Doe: June 17, 2020
962 F.3d 139
E.D.N.C.: Defendant appeals the denial of his motion to seal his own court records.

Facts: The defendant was involved with, and provided information about, members of an interstate drug-trafficking organization and individuals committing home invasion robberies. The defendant cooperated, provided useful information, and received a reduced sentence as a result.

The defendant, now a federal inmate, moved to seal the order that provided him with a reduced sentence, fearful that other inmates would use online legal research services to discover the district court's order and, consequently, his cooperation. The defendant argued that the district court unnecessarily exposed him to harm by issuing an order that referred to his cooperation with the government.

The district court summarily denied the defendant's motion.

Held: Reversed and remanded. The Court concluded that the district court ignored facts showing that the defendant faces a heightened risk of harm in prison and failed to consider the increased risks that all government cooperators now face due to the advent of electronic filing and the use of the Internet to identify cooperators. Accordingly, the Court reversed and remanded with an order to seal the district court's original order.

The Court explained that, even assuming the First Amendment right of access applies, "[t]he mere existence of" such a right "does not entitle the press and public to access in every case." Instead, under the First Amendment, the district court's order regarding a sentence reduction should be sealed only if:

(1) closure serves a compelling interest;

(2) there is a 'substantial probability' that, in the absence of closure, that compelling interest would be harmed; and

(3) there are no alternatives to closure that would adequately protect that compelling interest.

The Court concluded that that protecting cooperators from harm is a compelling interest that can justify sealing.

The Court reviewed a 2016 report by the Committee on Court Administration and Case Management of the Judicial Conference of the United States ("CACM Report"), which evaluated the need to protect government cooperators in federal prisons. The Court found it "alarming" that the CACM Report reported 571 instances of harms or threats—physical or economic— to defendants and witnesses between the spring of 2012 and the spring of 2015, including 31 murders of defendant cooperators. Moreover, the report detailed "363 instances in which court records were known by judges to [have been] used in the identification of cooperators." The CACM Report recommends that "courts restructure their practices so that documents or transcripts that typically contain cooperation information" are automatically placed in a sealed supplement.

The Court noted that redaction cannot protect the defendant himself because redacting the order would merely "flag the filings in his case." The Court also noted that, in this case, there is no reason to believe that the defendant's cooperation is already a matter of public record.

The Court also pointed out that the Eastern District of North Carolina already has a standing order that requires automatic sealing of substantial assistance motions for an extendable period of two years. The Eastern District of North Carolina had concluded that "[c]ase-by-case review would not work."

The Court cautioned that its opinion does not require other districts to implement the sort of automatic sealing procedures recommended by the CACM Report or adopted by the Eastern District of North Carolina. The Court wrote: "Courts can and should continue to consider possible alternative responses to the violence cooperators and their families face in federal prisons and elsewhere. But where, as here, the risks facing cooperators have already led a district to take blanket measures, courts within the district should act consistently with the concerns underlying that policy."

Judge Richardson dissented, objecting a categorical rule that demands sealing without regard to the specifics of a given case.

Full Case At:
https://www.ca4.uscourts.gov/opinions/196152.P.pdf

Virginia Court of Appeals
Unpublished

Jones v. Commonwealth: June 2, 2020

Spotsylvania: Defendant appeals his convictions for Indecent Liberties on Amendment to the Indictment.

Facts: The defendant sexually assaulted a child while the two were sleeping in the same bed. On more than one occasion, the defendant put the victim's penis in his mouth while the victim was attempting to sleep. The victim was under the age of eighteen.

The Commonwealth indicted the defendant for Carnal Knowledge of a Child in violation of §18.2-63. At trial, after the Commonwealth presented evidence and the defendant made a motion to strike, the Commonwealth moved to amend the indictment to "unlawfully and feloniously taking custodial indecent liberties with a minor," a violation of § 18.2-370.1. The trial court, over the defendant's objection, granted the Commonwealth's motion and amended the indictment.

Held: Affirmed. The Court repeated that in evaluating an amendment to the indictment, the Court does not compare the elements of the offense, but the underlying conduct. A variation in the required intent to be proven does not change the general nature or character of the offense. The Court noted that the evidence necessary to prove criminal conduct under both statutes was identical. Thus, because "the underlying conduct of both charges was essentially the same, and the purpose and subject matter of each charge were similar," the Court found that the trial court did not err in allowing the amendment.

In a footnote, the Court declined to consider whether custodial indecent liberties is a lesser-included offense of carnal knowledge.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1151192.pdf

Withdrawal of Guilty Plea

Virginia Court of Appeals
Published

Delp v. Commonwealth: June 30, 2020
72 Va. App. 227, 843 S.E.2d 758
Roanoke: Defendant appeals his convictions for Burglary, Larceny and Possession of a Firearm by Felon on refusal to appoint a new attorney.

Facts: The defendant, a felon, stole a firearm during a burglary. While pending trial, the defendant asked for new court-appointed counsel, claiming that his counsel failed to inform him of the evidence the Commonwealth had against him. In denying the request for new counsel, the trial court directed defense counsel to share that information with the defendant.

Some months later at a "no contest" plea colloquy, the defendant confirmed that his counsel had done as instructed. The defendant also responded affirmatively when asked if he was "satisfied with the assistance of his attorney." The trial court expressly found that the defendant's pleas and waiver of rights, including the right to appeal, were entered into knowingly, voluntarily, and intelligently. The defendant agreed that he fully understood the nature and effect of his plea and of the penalties that may be imposed upon his conviction and of the waiver of trial by jury and of appeal" when he entered his pleas.

On appeal, the defendant argued that the trial court erred in failing to conduct a sufficient and specific inquiry into his request for a new court-appointed attorney, implying that such an inquiry would have revealed sufficient problems to require his motion for a new attorney be granted.

Held: Affirmed. The Court concluded that the defendant's pleas waived his appeal. The Court expressed concern about allowing the defendant to "contradict the 'admissions [he] made upon entry of a voluntary plea of guilty.'

The Court repeated that historically, Virginia has treated a guilty plea as an appeal waiver. The Court recognized that appeal waivers can be valid and that a defendant's appeal waiver can result in him giving up "some, many, or even most appellate claims."

In a footnote, the Court discussed whether the U.S. Supreme Court's ruling in *Class* applies in Virginia. While the Court declined to answer that question, the Court noted that "an argument can be made" that *Class* does not apply to state criminal proceedings. The Court noted that the U.S. Supreme Court, in *Class,* found that a guilty plea does not, by itself, bar direct appeal of constitutional claims in certain circumstances. However, under *Class*, a guilty plea still implicitly waives some claims, including some constitutional claims. The Court pointed out that *Class* concerned Rule 11 of the Federal Rules of Criminal procedure.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1539193.pdf

Virginia Court of Appeals
Unpublished

Sullivan v. Commonwealth: October 20, 2020

Stafford: Defendant appeals her sentence for Drug Possession on Denial of a Deferred Disposition and Refusal to Permit Withdrawal of a Guilty Plea.

Facts: The defendant possessed several drugs along with drug paraphernalia. The defendant agreed to plead guilty to possession of a Schedule I/II controlled substance and possession of drug paraphernalia in exchange for the Commonwealth's agreement to move to nolle prosequi two additional charges. Pursuant to the plea agreement, the defendant waived her right to withdraw her guilty plea, both in writing and also orally during her plea colloquy.

Approximately two months after the trial court accepted her plea and pronounced her guilty – and after a written order of guilt was entered – the defendant informed the trial court that she wished to request a deferred disposition under § 18.2-251. The trial court found that it had already found the defendant guilty and refused the request. The defendant then moved to withdraw her guilty plea, but the trial court also refused that request as well.

Held: Affirmed. The Court first held that the trial court did not err in refusing to grant the defendant's request for a deferred disposition. The Court explained that, under the plain language of § 18.2-251, trial courts are not permitted to make deferred dispositions under this statute once the court has entered a judgment of guilt. In this case, the Court noted that the defendant did not request a deferred disposition until two months after she was found guilty and a judgment of guilt had been entered in an order of conviction.

In addition, because the defendant expressly waived her right to withdraw her guilty plea and confirmed through the plea colloquy with the trial court her understanding of her waiver of her right to withdraw her guilty plea, the Court did not find error in refusing the defendant's motion to withdraw her guilty plea. The Court noted that the plea agreement was explicit, and also that the trial judge reviewed the waiver provision with the defendant and confirmed that the defendant understood it and wanted to waive her right to withdraw her guilty plea.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1039194.pdf

CRIMES & OFFENSES

Accessory & Principal Liability

Virginia Court of Appeals
Unpublished

Humphrey v. Commonwealth: October 27, 2020

Norfolk: Defendant appeals his convictions for Malicious Wounding, Attempted Robbery, and Use of a Firearm on sufficiency of the evidence.

Facts: The defendant and another man arranged a robbery, during which the defendant's accomplice shot the victim in the face. The victim had offered her iPhone for sale online and responded to a Facebook message seeking to buy the phone. When the victim arrived at the purported buyer's home, the defendant was waiting. He identified his co-defendant as the son of the person who contacted her about purchasing the iPhone.

The co-defendant approached the victim and, after a brief conversation, presented a firearm and tried to rob the victim. When the victim ducked and begged "don't shoot," the co-defendant shot her in her face.

The parties fled to the defendant's home. When police arrived, clothing very similar to the description of the suspects' clothing during the crimes was recovered from the floor of a bedroom inside the home. Police found the loaded handgun used to shoot the victim concealed under a mattress in the same bedroom. DFS discovered the defendant's DNA on the magazine of the firearm.

Held: Affirmed. The Court found that the evidence was sufficient to demonstrate that the defendant acted as a principal in the second degree. The Court noted that the defendant committed an overt act knowingly in furtherance of those crimes, and that he shared in the co-defendant's criminal intent. For example, the Court concluded that the defendant's presence at the address provided by the Facebook messages was a circumstance which, in conjunction with the other evidence presented at trial, tends to prove that the defendant knew about his co-defendant's criminal plan and shared the criminal intent.

In footnotes, the Court explained that it did not need to reach or address whether the defendant could also have been convicted for each of the crimes based on co-conspirator liability or based on a concert of action.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1678191.pdf

Abduction

Virginia Court of Appeals
Published

Boyd v. Commonwealth: July 2, 2020
72 Va. App. 274, 844 S.E.2d 425
Chesapeake: Defendant appeals his conviction for Parental Abduction on sufficiency of the evidence.

Facts: The defendant took his son out of state in violation of a court order. In 2011, a Pennsylvania court had entered an order awarding the defendant's ex-wife primary custody of their children. Although the defendant was permitted to have custody of the children on certain days, the order required the defendant to notify his ex-wife if he desired to exercise his custody option. One day, the defendant picked up his son from school in Virginia and took him to Pennsylvania. That day was not one of the defendant's designated dates and the defendant did not contact his ex-wife before taking the child from school, nor did he contact her after he returned to Pennsylvania with his son.

The defendant did not advise the school, DSS, or the police officer investigating the missing person report of his plan to take his son to Pennsylvania. Once there, he did not seek an emergency hearing granting him custody of his son while the child abuse case was investigated. He kept his son in Pennsylvania for fifteen days and did not return him until his wife obtained an order from the Pennsylvania court mandating him to bring his son to Virginia.

At trial, the defendant explained that his son had told him that the mother had "grabbed a switch and [hit him] with it a few times," leaving marks and that she threw a vacuum cleaner at his chest twice. The defendant argued that "the threat of harm that could befall his son left [him] with little choice but to protect his son from further harm."

Held: Affirmed. In construing the term "wrongful" as applied in Va. Code § 18.2-49.1(A), the Court found that "wrongful" means unlawful or contrary to the law. The Court concluded that, despite the defendant's attempt to justify his actions, the evidence was manifest that he acted in direct contravention of the Pennsylvania custody order. Accordingly, the evidence was sufficient.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1681191.pdf

Virginia Court of Appeals
Unpublished

Lydon v. Commonwealth: July 21, 2020

Prince William: Defendant appeals his conviction for Abduction with Intent to Defile on sufficiency of the evidence.

Facts: The defendant trapped a woman in the men's restroom in the evening at their workplace. Having cornered her in the closed restroom, he grabbed her, picked her up, and placed her on the bathroom sink, and then sexually assaulted her.

The trial court convicted the defendant of both Aggravated Sexual Battery and Abduction with Intent to Defile. At trial, the court rejected the defendant's argument that he restrained the victim only to the extent necessary to commit the accompanying sex offenses and therefore there was not an independent basis to support the abduction conviction.

Held: Affirmed. The Court held that the record supported the conclusion that the defendant restrained the victim to a greater degree than necessary to accomplish the aggravated sexual batteries. The Court pointed out that the crimes could have been accomplished with the victim standing on the ground, since she was already pinned in place in the men's restroom and unable to escape. The Court found that, by lifting her off her feet and perching her on the sink, the defendant made the victim's escape even more difficult, increasing the degree of restraint. As in *Bell,* the Court concluded that the defendant's actions resulted in additional restraint greater than the detention intrinsic to or incidental in the specific sexual offenses committed in the restroom.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1436184.pdf

Arson

Virginia Court of Appeals
Unpublished

Blanding v. Commonwealth: December 15, 2020

Dinwiddie: The defendant appeals his conviction for Arson on sufficiency of the evidence

Facts: The defendant set fire to his fiancé's home after an argument. The defendant and the victim had just reunited, but on the day of the fire, the defendant had been drinking at a bar and was angry with the victim. At trial, an FBI CAST analyst testified that the cell phone data showed the defendant near the bar just before the fire, around the victim's home when the fire started, and then back at the bar after the fire.

The victim's daughter arrived home to discover the fire. The house was locked when the residents had left, and no evidence indicated a forced entry. The defendant later admitted that he had gone to the home but claimed that he did so only to collect clothes. Investigators discovered that, on the nightstand in the master bedroom from the defendant had removed his clothing, there was a red gas can and an open beer bottle wrapped in a brown paper bag. While at the house, the defendant had put his dog outside before returning to the bar.

When the victim phoned him crying and reported that their house was on fire, he did nothing more than call her a "crazy b&*$#." When the defendant called her back that night and inquired about the fire, he asked only about the condition of the house, not about her children or the pets, and he refused to tell her his location. Later, the victim's mother saw the defendant's truck driving slowly by the house at about 4:00 a.m., but the defendant immediately fled instead of stopping to check on the condition of the house or its residents.

Held: Affirmed. The Court agreed that the evidence was sufficient to prove that the defendant was guilty. The Court explained that the defendant had the motive and opportunity to set the fire, and other evidence supported the finding that he was in fact the person who did so. The Court also noted that no evidence established that anyone else with a motive could have entered the locked residence and started the fire that night. The Court also pointed to the defendant's decision to put his dog outside and his responses upon learning about the fire, which also implicated him as the criminal agent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1339192.pdf

Assaults

Virginia Court of Appeals
Published

Barnett v. Commonwealth: April 6, 2021

Roanoke: Defendant appeals his conviction for Mob Assault on sufficiency of the evidence.

Facts: The defendant exchanged angry words with the victim in a parking lot after a road-rage incident. The defendant went home, gathered two friends, and returned to confront the victim. The men located the victim, confronted him, and physically attacked him, punching and kicking the victim. The victim, however, was carrying a handgun and shot the defendant and one of the other attackers. The men then retreated, but stayed at the scene until the third attacker, who was also armed, shot the victim about a minute later. At trial, the parties stipulated that the gunshot wound that the third attacker inflicted on the victim was the only injury suffered by the victim that constituted the felony charge of wounding by mob.

Held: Affirmed. The Court ruled that the evidence was sufficient to find that the mob had not disassembled at the time that the third attacker shot the victim. The Court noted that, instead of leaving, the defendant remained in the area with the other attackers until the third attacker effected the mob's purpose of injuring the victim.

The Court also agreed that the evidence was also sufficient to establish that the defendant continued to share the mob's intent to injure the victim. The defendant neither abandoned nor contradicted the mob's intent prior to the third man shooting the victim.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0487203.pdf

Fletcher v. Commonwealth: November 10, 2020

Spotsylvania: Defendant appeals his convictions for Carjacking and Attempted Malicious Wounding on sufficiency of the evidence.

Facts: The defendant attacked a woman after he attempted to speak with the victim, but she refused. He followed closely behind her in his car onto a rural road and accelerated past her before slamming on his brakes and forcing her to stop. He blocked her car and approached wearing gloves and carrying a tire iron. He aggressively yelled at her to get out, and he repeatedly struck her window with the tire iron, damaging the window.

The victim explained at trial that even if she could have extricated her car from the ditch, she would not have been able to drive forward because the defendant had blocked her in. The victim testified that the defendant hit her driver's side window repeatedly with so much force that she expected it to shatter.

Held: Affirmed. The Court held that the evidence was sufficient to establish the crimes of carjacking and attempted malicious wounding.

The Court held that a reasonable fact finder could conclude that the defendant seized control of the victim's vehicle as required by the carjacking statute. The Court pointed out that, in this case, the defendant seized control over the victim's car by blocking it into a ditch, which effectively prevented the victim from driving away. The Court distinguished the *Keyser* case, where the defendant at no point performed any action which effectively gave him control over the car.

The Court also concluded that the defendant's unprovoked actions — following the victim down a rural road, tailgating her, blocking her car in a ditch, and using a tire iron to repeatedly strike the window next to her head — supported the trial court's conclusion that the defendant had the specific intent to maliciously wound her. The Court agreed that the trial court could reasonably find that the defendant used an object as a deadly weapon, and thereby infer that he acted with malicious intent. The Court pointed out that the lack of threatening statements alone would not necessarily negate malicious intent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1736192.pdf

Virginia Court of Appeals
Unpublished

Lightfoot v. Commonwealth: April 6, 2021

Westmoreland: Defendant appeals his convictions for Assault on Law Enforcement and Obstruction of Justice on sufficiency of the evidence.

Facts: The defendant committed a traffic violation in view of an officer, who stopped her vehicle. The officer ordered the defendant to stay in her car while he completed his investigation, but the defendant exited her car and declared that "I do not have to get back in my car." The officer followed and ordered the defendant to return to her car, but she refused. He told her she was obstructing justice and she responded: "I guess I'm obstructing justice then." The officer then told her she was under arrest. The defendant turned around, balled up her fists, and stated, 'I will f%*# you up.'" The defendant then punched the officer six times in the face.

At trial, the defendant argued that she had the right to use reasonable force to resist an unlawful arrest.

Held: Affirmed. The Court agreed that the officer had probable cause to arrest the defendant for obstruction after the officer told her multiple times to stay with her vehicle, but she refused to obey his commands and continued walking toward the store – preventing the officer from completing his investigation and duties during the traffic stop. The Court also noted that the defendant stated openly that she was obstructing justice. Consequently, the Court concluded that the defendant was not resisting an unlawful arrest – instead she committed an assault on a law enforcement officer.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0313202.pdf

Benniefield v. Commonwealth
And
Woodbury v. Commonwealth: September 29, 2020

Richmond: Defendants appeal their convictions for Murder, Malicious Wounding, and Use of a Firearm on sufficiency of the evidence.

Facts: The defendants beat one victim and shot and killed a second victim. The defendants confronted the first victim in a laundromat regarding some allegedly stolen property. Defendant Woodbury began punching the victim; when the victim tried to escape, defendant Benniefield pushed

the victim back towards defendant Woodbury. Later, the defendants chased down a second victim and, during the chase, defendant Benniefield shot and killed the second victim.

At trial, the Commonwealth presented several surveillance videos that depicted the attacks. A police detective testified that he had known defendant Woodbury for eight-to-ten years and had "no doubt" that he was the person depicted in the surveillance footage. He also identified defendant Benniefield in the footage. Other witnesses also testified that the defendants had been investigating who stole property from them in the days before the murder.

Held: Affirmed. The Court agreed that a rational trier of fact could have found that the Commonwealth established the defendants' identities beyond a reasonable doubt.

Regarding defendant Benniefield's role in the assault at the laundromat, the Court also agreed that a rational trier of fact could have found that his shoving the victim was voluntarily and intentionally done to prevent the victim from escaping.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0001202.pdf

Carter v. Commonwealth: August 20, 2020

Lynchburg: Defendant appeals her conviction for Assault on Law Enforcement on sufficiency of the evidence.

Facts: An officer responded to the defendant's home based on a 911 call. When the officer arrived at her home, he encountered a disorderly situation involving the defendant, who was just inside her open door, and other people on her front porch. The officer attempted to determine whether a crime had occurred. Instead of cooperating with the officer, the defendant attempted to shut the door on him and retreat into her home.

The defendant battered the officer by slamming his foot in the door multiple times before he seized her and placed her in handcuffs. The defendant attempted to handcuff the defendant, but she resisted and began fighting against him. While the officer tried to get the defendant under control so that he could continue to investigate the incident, the defendant elbowed him three times and hit him in the chest and arm.

At trial, the defendant made three arguments. First, she argued that her physical acts of violence toward the officer were defensible because she was using reasonable force to expel a trespasser. Second, she contended that because the officer was not acting within the scope of his law enforcement duties at the time, she could not be guilty of assault and battery of a law enforcement officer. Third, she argued that she was justified in striking the officer because she was resisting an illegal arrest.

Held: Affirmed. The Court first pointed out that the defendant battered the officer before telling him to leave. The Court explained that the common law right of a landowner to expel a trespasser is

contingent on the landowner ordering the trespasser to leave her property. Consequently, the defendant's actions could not constitute a legitimate exercise of her common law right to expel a trespasser.

Further, the Court ruled that the officer was acting within the scope of his law enforcement duties when the defendant assaulted him. The Court found that the officer's effort to prevent the defendant from retreating into her home so that he could investigate the incident was reasonable given the circumstances.

Finally, the Court concluded that the defendant was not permitted under the law to physically resist the officer's attempt to detain her as he investigated the circumstances surrounding the call for service to that location. The Court held that the defendant's acts of assault and battery against the officer, meant to facilitate her attempted retreat from him, were efforts to resist an investigative detention, not an arrest.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1559193.pdf

Malicious Wounding

Keller v. Commonwealth: May 18, 2021

Newport News: Defendant appeals his conviction for Aggravated Malicious Wounding on Jury Instruction and sufficiency grounds.

Facts: The defendant verbally assaulted his girlfriend in the parking lot of a restaurant and kicked her car. When a bystander spoke up and tried to defuse the argument, the defendant shot him in the head. The victim survived but suffered permanent injuries. At trial, the defendant contended that he had been drinking all day and that he merely intended to fire "warning shots" because the victim had used "salty language."

At trial, the defendant asked for and received a "heat of passion" instruction. However, the Commonwealth also requested an instruction, lifted from language in *Williams v. Commonwealth*, that stated: "Where it is not the victim of the crime who provoked the defendant's heat of passion, the evidence will not support a finding of heat of passion." The defendant objected, arguing that the instruction was misleading because it essentially required the victim "to be the initial trigger for [the defendant's] heat of passion," and it did not allow for heat of passion to be triggered by one person initially and then increased or triggered again by another person while still in the heat of passion. The trial court overruled the objection.

Held: Affirmed. The Court first found that the trial court did not err when it gave the Commonwealth's instruction. The Court repeated heat of passion requires that the victim be the one to provoke the defendant's heat of passion. The Court noted that the instruction did not refer to or require

the "initial" provocation to come from the victim, nor did the instruction preclude a jury from considering whether subsequent acts contributed to or caused the defendant's heat of passion.

The Court then agreed that the evidence was sufficient to prove malice. The Court found that the defendant's testimony that he intended the shots as warning shots did not negate the element of malice. Rather, as in *Williams*, the conscious decision to fire warning shots to scare the victim was evidence "that the act of shooting was done 'with a sedate, deliberate mind, and formed design,' rather than 'on impulse without conscious reflection.'" The Court analogized this case to Watson-Scott, finding it reasonable to conclude that the defendant acted with malice when he fired multiple shots from a weapon in the direction of others.

The Court repeated that words alone are never sufficient provocation and pointed out that the victim did not threaten or act aggressively towards the defendant. For the Court, the fact that the victim was fifteen feet away, spoke only words, and took only a step or two towards the defendant did not amount to a level that "reasonably produces fear that causes one to act on impulse without conscious reflection."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0740201.pdf

Burglary

Virginia Court of Appeals
Published

Green v. Commonwealth: June 16, 2020
72 Va. App. 193, 843 S.E.2d 389
Suffolk: Defendant appeals his convictions for Burglary and Violation of a Protective Order on sufficiency of the evidence.

Facts: The day after an angry outburst, the defendant forced entry into the victim's apartment and damaged personal property inside, including by urinating and defecating on clothes and in a suitcase. The victim obtained a preliminary protective order that ordered the defendant, in relevant part, to "have no contact of any kind" with the victim. A few days later, the defendant posted a message to his Twitter account stating: "Someone tell my BM she was a bird for me." The victim read the message. At trial, she explained that "BM" was an abbreviation for "baby mama," meaning her.

Before trial, the defendant pled guilty to common law trespass. He then argued that the trial court could not find him guilty of burglary after it had accepted his guilty plea to common law trespass, which is excluded from the burglary statute, as a basis for the break-in. The defendant also contended that the evidence was insufficient to support his conviction for violation of a protective order because the Commonwealth failed to prove that he made a "contact" with the subject of the order. The trial court convicted the defendant of trespass, burglary, destruction of property, and violation of a protective order.

Held: Affirmed. The Court first held that the trespass conviction did not preclude the conviction for statutory burglary because the record supported the trial court's finding that the defendant entered the residence with the intent to commit another misdemeanor in addition to trespass. Further, the Court held that the evidence was sufficient to support the finding that the defendant contacted the victim and thus violated a provision of the protective order.

Regarding the burglary conviction, the Court noted that the trial court convicted the defendant of property damage for destruction that he caused after he broke into the apartment. The fact that the defendant entered the property intending to commit a trespass, in the Court's view, did not preclude the conclusion that he also intended to commit the misdemeanor of damaging property within the apartment.

Regarding the protective order conviction, the Court noted that neither the plain language of the statute nor the plain meaning of the word "contact" limits a "contact" to a direct one. Further, the Court found nothing to suggest that the prohibited "contact" cannot be through a social media platform. In a footnote, the Court cited several cases where other jurisdictions have held that prohibited contact can occur through social media platforms under certain circumstances.

The Court observed that the defendant intentionally directed the communication to the victim by using the public forum available through Twitter. The Court concluded that the defendant's message itself reflected the defendant's intent to contact the victim through others. The Court argued that the defendant's indirect contact was all that was required to convict the defendant of violating the protective order.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0589191.pdf

Virginia Court of Appeals
Unpublished

Wright v. Commonwealth: April 6, 2021

Fairfax: Defendant appeals his convictions for Burglary and Grand Larceny on sufficiency of the evidence.

Facts: The defendant violently kicked in the exterior door to the victim's garage and the door from the garage to the interior of the house. He then ransacked and stole their property. There was no evidence of any motive for the breaking and entering other than the theft. Two days later, someone in the neighborhood recognized the defendant carrying a backpack that belonged to the victim. Police stopped the defendant, searched him and the bag, and recovered nearly all the stolen property from the defendant.

At trial, the defendant claimed that he found the credit cards, gift cards, and jewelry stolen from the victims on the street a few minutes before the police stopped him.

Held: Affirmed. Regarding the Grand Larceny, the Court found that the defendant's "story strains credulity." Regarding the Burglary, in the absence of some other evidence elaborating on the breaking and entering, the Court explained that a rational fact finder could conclude that the two were committed at the same time. The Court noted that nothing about the breaking and entering indicated the presence of two or more people.

The Court also ruled that the evidence was sufficient to justify an inference that the same individual committed the breaking and entering and the theft at the same time. The Court rejected the defendant's analogy to the *Finney* case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2060194.pdf

Smith v. Commonwealth: December 22, 2020

Chesapeake: Defendant appeals his convictions for Burglary and Destruction of Property on sufficiency of the evidence.

Facts: The defendant broke into a shed and stole three items from the victim, including a "high-end" bicycle. The shed was built on cinder-block piers, had not been moved in the twenty-eight years since it was built, and was equipped with electricity. The victim had last checked the items four days before discovering that the shed lock had been broken and that the items were missing. Two days after the victim discovered the theft, the defendant pawned the bicycle for $40 at a local pawn shop. The pawn shop witness recalled that there was another person in the defendant's vehicle, but the witness only interacted with the defendant.

Held: Affirmed. The Court first found that the evidence was sufficient to establish that the shed was permanently affixed to realty. The Court distinguished the case from *Finney* and agreed that the evidence justified the inference that the defendant committed both the breaking and entering and the theft at the same time, as part of a criminal enterprise.

The Court also observed that, even though the influence of larceny does not apply to destruction of property, the destruction of property logically occurred simultaneously with the breaking and entering, as the lock was destroyed when the shed was broken into. Thus, although the larceny inference, by itself, is not enough to sustain a conviction for the destruction of property, the inference along with the other evidence was sufficient in this case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0228201.pdf

Carjacking

Virginia Court of Appeals
Published

Fletcher v. Commonwealth: November 10, 2020

Spotsylvania: Defendant appeals his convictions for Carjacking and Attempted Malicious Wounding on sufficiency of the evidence.

Facts: The defendant attempted to speak with the victim, but she refused, so he attacked her. He followed closely behind her in his car onto a rural road and accelerated past her before slamming on his brakes and forcing her to stop. He blocked her car and approached wearing gloves and carrying a tire iron. He aggressively yelled at her to get out, and he repeatedly struck her window with the tire iron, damaging the window.

The victim explained at trial that even if she could have extricated her car from the ditch, she would not have been able to drive forward because the defendant had blocked her in. The victim testified that the defendant hit her driver's side window repeatedly with so much force that she expected it to shatter.

Held: Affirmed. The Court held that the evidence was sufficient to establish the crimes of carjacking and attempted malicious wounding.

The Court held that a reasonable fact finder could conclude that the defendant seized control of the victim's vehicle as required by the carjacking statute. The Court pointed out that, in this case, the defendant seized control over the victim's car by blocking it into a ditch, which effectively prevented the victim from driving away. The Court distinguished the *Keyser* case, where the defendant at no point performed any action which effectively gave him control over the car.

The Court also concluded that the defendant's unprovoked actions — following the victim down a rural road, tailgating her, blocking her car in a ditch, and using a tire iron to repeatedly strike the window next to her head — supported the trial court's conclusion that the defendant had the specific intent to maliciously wound her. The Court agreed that the trial court could reasonably find that the defendant used an object as a deadly weapon, and thereby infer that he acted with malicious intent. The Court pointed out that the lack of threatening statements alone would not necessarily negate malicious intent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1736192.pdf

Child Abuse & Neglect

Virginia Court of Appeals

Unpublished

Cobb v. Commonwealth: April 27, 2021

Norfolk: Defendant appeals her conviction for Child Neglect on Fifth Amendment and Sufficiency grounds.

Facts: Rescue personnel responded to the defendant's residence to find her seventeen-month-old child on a tile floor, nonresponsive with "agonal respirations." The child's body was cold to the touch and "completely limp" when the medic lifted him. The child was severely malnourished and weighed fourteen pounds and eight ounces. The defendant appeared indifferent to the child

Hospital staff found injuries in multiple planes of the child's body, with varying levels of penetration into his face. Doctors found numerous brain injuries and several injuries to the child's abdomen, including his liver. At trial, doctor testified as an expert that the breadth of the child's injuries was uncharacteristic of a single impact. The child remained in the hospital for a month and two days.

At the hospital, police interviewed the defendant. They did not tell the defendant that she was under arrest or suspected of an offense. At the time, they were conducting a preliminary investigation to try and understand what happened to the child and communicated that to the defendant. Two CPS workers were present during the interview. Although the door of the room was closed, it was not locked. The defendant was not threatened or forced to speak with the detectives. The detectives did not tell the defendant that she could not leave. The interview lasted forty minutes. The defendant was free to leave.

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

At trial, the doctor testified that the child's ear bruises indicated "some type of significant and direct trauma to the ear." Similarly, the doctor testified that abdominal injuries are "fairly rare in children as far as accidental injuries go" because they require direct trauma to usually protected areas. The doctor also noted that it takes significant force to cause bruising to the abdomen because it is very soft; Such injuries raise concern for "non-accidental or otherwise inflicted trauma because of the force it takes."

The defendant claimed that the child was injured because of a fall and because the child's sibling struck him with a toy. However, the doctor explained that a fall and being struck by a toy fire truck did not sufficiently account for the extent of injuries because bleeding in the child's brain was widespread in multiple locations, and "we don't expect to see that kind of distribution of bleeding when there is a single impact."

The trial court found that the defendant was the child's parent and responsible for his care. The trial court also found that the defendant was either "the one striking this child," or she permitted "his condition to deteriorate and allowed" the trauma identified.

Held: Affirmed. Regarding the defendant's *Miranda* claim, the Court found that a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter. Accordingly, the Court concluded that the interview at the hospital was a consensual encounter.

The Court also agreed that the evidence was sufficient to find the defendant guilty.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0180201.pdf

Blackmon v. Commonwealth: February 2, 2021

Chesterfield: Defendant appeals his conviction for Felony Child Neglect on sufficiency of the evidence.

Facts: The defendant delayed taking his four-month-old child for medical care for several weeks after the child suffered retinal and subdural hemorrhages, consistent with an "acceleration-deceleration injury." The injury caused veins the child's head to tear and bleed onto the surface of his brain, causing a very significant traumatic brain injury. At trial, Dr. Robin Foster testified that earlier treatment "would have improved the outcome" because less of the child's brain tissue would have been damaged.

At the hospital, the defendant admitted that his child "hadn't been acting right" for three weeks before his wife brought him to the emergency room. The defendant stated that, approximately "a month-and-a-half" prior, he had noticed that the child's head was deforming, growing soft and "mushy," and looking like an "alien." According to the defendant, the child's behavior and physical condition continued to deteriorate for about a week prior, and for a "couple days" that week the child was unresponsive, projectile vomiting, whimpering but not crying, and not eating well.

At trial, the defendant testified that he knew as early as October that his wife was not bringing the child to his scheduled doctor's appointments and lying to the defendant about going. At trial, the trial court found that the defendant knew that his wife wasn't going to scheduled doctor's visits and that "she was lying to [the defendant] about what was happening and from that [the defendant] did nothing." The trial court found that the defendant "did nothing" to obtain proper medical care for the child even though he knew that the four-month-old child needed it.

Held: Affirmed. The Court found the evidence sufficient to establish that the defendant willfully disregarded warning signs that his child needed medical care.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0151202.pdf

Conspiracy

Virginia Court of Appeals
Published

Richard v. Commonwealth: December 8, 2020

Floyd: Defendant appeals her conviction for Conspiracy to Distribute a Controlled Substance on sufficiency of the evidence.

Facts: The defendant's confederate offered to purchase a car from an undercover officer in return for methamphetamine. The undercover officer arranged the deal to lure the confederate, who was wanted, out of hiding. The confederate and the officer made the agreement without the defendant's involvement. The confederate then recruited the defendant to help deliver the drugs in exchange for the car. The two developed a detailed plan where the defendant would drive them to the pre-determined location, hold the methamphetamine on her person, and, if the confederate got robbed, the defendant would drive away but return later to pick him up. The defendant was also prepared to contribute cash for the car.

Police arrested both the defendant and the confederate at the scene just before the deal took place. At trial, the defendant argued that a single buyer-seller transaction may not constitute a conspiracy. The defendant also offered a jury instruction based on the *Zuniga* case, which stated:

"A single buyer-seller relationship may constitute a conspiracy only if:

"(1) the seller knows the buyer's intended use; and

"(2) that by the sale, the seller, intends to further, promote and cooperate in the venture."

The trial court refused the instruction.

Held: Reversed. The Court agreed that a rational trier of fact could have found the elements of shared intent, preconcert, and connivance in a plan to distribute methamphetamine, thereby concluding that the defendant conspired to distribute methamphetamine in exchange for a car. However, the Court also held that there was more than a scintilla of evidence to support the proffered instruction and the jury should have been given the opportunity to determine if the evidence supported its application.

The Court repeated that a simple narcotics transaction can give rise to a conspiracy; If the participants agree and plan to commit the crime in advance of the transaction such that the transaction is not spontaneous and share the same criminal objective, they are guilty of conspiracy regardless of whether it is ever consummated. On the other hand, if the agreement to make the exchange occurs at essentially the same time as the transaction itself, the Court noted that the transaction is sufficiently spontaneous to conclude that the participants did not share the same intent and engage in preconcert and connivance, there is no conspiracy. The Court summarized by explaining that a simple drug transaction is marked by spontaneity, while the essence of conspiracy is an agreement at least somewhat in advance of the transaction.

In this case, the Court agreed that the evidence was sufficient to prove a conspiracy. The Court repeated that, when one buyer knows that the other buyer intends to possess the substance with intent to distribute it, the first step in the test is met. In this case, the Court pointed out that the defendant intended to distribute the methamphetamine in exchange for the car. The Court also repeated that evidence that the defendant expected to share in the proceeds of the accomplice's sale will support the conspiracy conviction. In this case, the defendant cooperated in the venture and expected to share in the proceeds of the distribution by becoming a co-owner of the car until she could pay her confederate back.

However, the Court agreed that the defendant was entitled to the proffered jury instruction. The Court did point out, though, that the defendant left out the word "illegal" before the words "intended use."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1722193.pdf

Contributing to the Delinquency of a Minor

Virginia Court of Appeals
Published

Spell v. Commonwealth: December 15, 2020

Stafford: Defendant appeals her conviction for Contributing to the Delinquency of a Minor on sufficiency of the evidence.

Facts: The defendant drove while intoxicated on Lorazepam. She picked up her children from school. During the trip, one of her children became frightened by the defendant's reckless driving and called several family members for help before calling police. The child explained that the defendant drove into oncoming traffic and "looked really sleepy and wasn't really focused . . . like someone who just woke up from a really long nap." At trial, the child also testified that the defendant was weaving and that she rear-ended another car when driving out of a parking lot.

The defendant drove the car home, parked, and went inside with both children while the one child was still on the phone with 911. After the defendant and her children went into their home, an officer arrived on scene. He conducted field sobriety tests, which the defendant failed, and arrested the defendant. A blood test was negative for alcohol, but at trial a forensic chemist testified that the level of Lorazepam in the defendant's blood was consistent with a minimum therapeutic dose to treat anxiety.

At trial, a jury convicted the defendant of Contributing to the Delinquency of a Minor under 16.1-228.

Held: Reversed. The Court held that the evidence was insufficient to prove that the child was a "child in need of services" as contemplated by § 18.2-371. The Court concluded that the evidence failed to prove that the child needed "treatment, rehabilitation or services not presently being received" and failed to prove that court intervention was "essential" to resolve the threat of the defendant's erratic driving.

The Court observed that the blood test results revealed no alcohol and only a minimal dosage of Lorazepam. Without evidence demonstrating that the defendant operated the vehicle in violation of the instructions accompanying the prescription medication, or evidence indicating that the defendant planned to drive the children again while in the same condition, the Court refused to say that the danger posed to the child was ongoing.

The Court cautioned that, while any assistance provided during a 911 call is emergency police assistance, it is not "treatment, rehabilitation or services" as contemplated by § 16.1-228. The Court also found that, even if the assistance provided during a 911 call could be considered "services," the child had access to those "services" while she was in the car because she called 911 and spoke with dispatch. Therefore, the 911 call cannot be considered "treatment, rehabilitation or services not presently being received."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0024204.pdf

Credit Card Offenses

Virginia Court of Appeals
Unpublished

Benthall v. Commonwealth: July 28, 2020

Arlington: The defendant appeals his convictions for Credit Card Theft on sufficiency of the evidence.

Facts: The defendant possessed eleven credit cards in the names of five different people other than himself. An officer arrested him for public intoxication and discovered the cards. The defendant refused to say why he possessed the cards. Police determined that at least some of them had been stolen from a victim's car.

At trial, the parties agreed on and the Court provided the following instruction: that the Commonwealth had to prove:

> (1) That [the defendant] took, obtained, or withheld a credit card from the possession, custody, or control of [the victim], or that [the defendant] received a credit card from another knowing that it had been taken, obtained, or withheld from the possession, custody, or control of [the victim]; and
> (2) That the taking, obtaining, or withholding was without the consent of [the victim]; and
> (3) That the taking, obtaining, or withholding was with intent to use it, to sell it, or to transfer it to a person other than [the victim].

At trial, the defendant argued that the Commonwealth failed to prove that he unlawfully obtained the credit cards or that he intended to use them.

Held: Affirmed. The Court began by finding that the jury instruction in this case was erroneous. The Court repeated that the statute does not require a specific intent if the crime is "completed upon" the unlawful taking, obtaining, or withholding. Instead, the statute requires specific intent only if a defendant is accused of receiving the credit card. However, in this case, the Court pointed out that the jury was instructed that proof that the defendant acted with specific intent was required only if the

defendant was the person who took, obtained, or withheld the credit cards and not if he merely received the credit cards from another knowing that they had been taken.

In this case, under the alternative "receiving" offense, the instruction did not require that the defendant have any specific intent. Under both theories, the instruction posited that the cards were taken, obtained, or withheld from the victim with the intent to use, sell, or transfer them. However, only the first theory, that the defendant was the one who took, obtained, or withheld the cards, tied that specific intent to the defendant. In contrast, the second theory required that the unidentified person who took the cards did so with the intent to use, sell, or transfer them.

However, the Court also repeated that when the parties agreed on the instruction and the court gave it without objection, the instruction became the law of the case. Thus, in this case, even though the Commonwealth did not present evidence that the defendant was the individual who took the victim's credit cards from her car weeks before they were discovered in his possession, the Court found that the jury could have found the defendant guilty under the theory that he received the credit cards knowing that they had been taken, obtained, or withheld from the victim's possession.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0929194.pdf

Destruction of Public Records

Virginia Supreme Court
Rompalo v. Commonwealth: May 20, 2021
Affirmed Ct. of App. Ruling of June 2, 2020 – original cite: 72 Va. App. 147, 842 S.E.2d 426
Fairfax: Defendant appeals her conviction for Destroying a Public Record on sufficiency of the evidence.

Facts: The defendant wrote on several documents in her divorce file at the clerk's office. At trial, the Commonwealth presented evidence that the documents had lost their value because they could no longer be certified as original documents. The defendant argued that the word "fraudulently" in the statute applies to both "secrete" and "destroy" and that the Commonwealth was therefore required to prove not just that she destroyed the public records, but that she did so fraudulently. The trial court disagreed and refused the defendant's proposed jury instruction.

Held: Affirmed. The Supreme Court simply issued an order, affirming the conviction "for the reasons stated in the opinion of the Court of Appeals."

In their ruling, the Court of Appeals had concluded that the plain language of § 18.2-107 supports the trial court's interpretation that the word "fraudulently" applies only to the word "secrete." Thus, the Court explained, the plain language of the statute indicates that there are three alternative ways to violate it: to (1) steal, (2) fraudulently secrete, or (3) destroy a public record. The Court of Appeals had pointed out that the General Assembly chose to place the modifier before the second word in the series, rather than the first, which indicates it did not intend the modifier to apply to all the words in the series.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1200941.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1717184.pdf

Destruction of Property

Virginia Court of Appeals
Unpublished

Smith v. Commonwealth: December 22, 2020

Chesapeake: Defendant appeals his convictions for Burglary and Destruction of Property on sufficiency of the evidence.

Facts: The defendant broke into a shed and stole three items from the victim, including a "high-end" bicycle. The shed was built on cinder-block piers, had not been moved in the twenty-eight years since it was built, and was equipped with electricity. The victim had last checked the items four days before discovering that the shed lock had been broken and that the items were missing. Two days after the victim discovered the theft, the defendant pawned the bicycle for $40 at a local pawn shop. The pawn shop witness recalled that there was another person in the defendant's vehicle, but the witness only interacted with the defendant.

Held: Affirmed. The Court first found that the evidence was sufficient to establish that the shed was permanently affixed to realty. The Court distinguished the case from *Finney* and agreed that the evidence justified the inference that the defendant committed both the breaking and entering and the theft at the same time, as part of a criminal enterprise.

The Court also observed that, even though the influence of larceny does not apply to destruction of property, the destruction of property logically occurred simultaneously with the breaking and entering, as the lock was destroyed when the shed was broken into. Thus, although the larceny inference, by itself, is not enough to sustain a conviction for the destruction of property, the inference along with the other evidence was sufficient in this case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0228201.pdf

DUI and Refusal

Virginia Supreme Court

Green v. Commonwealth: April 15, 2021

York: Defendant appeals his conviction for Refusal on Denial of his Motion to Strike

Facts: The defendant refused to take a blood or breath test in violation of § 29.1-738.2, after an officer arrested him for operating a boat while under the influence of alcohol. At trial, the defendant objected to the lawfulness of his arrest and sought to introduce evidence that it had not been supported by probable cause. The trial court, however, sustained the Commonwealth's objection that the defendant had failed to raise his "motion or objection . . . in writing, before trial," pursuant to § 19.2-266.2(A)-(B).

Held: Reversed. The Court first held that the implied-consent law found in § 29.1-738.2 applies only when the defendant has been lawfully and timely arrested for one of the requisite offenses. Thus, the Court explained, if the defendant was not lawfully arrested, the statute did not deem him to have implicitly consented to participate in a blood or breath test and he could not have committed an offense by refusing to do so.

The Court then held that the trial court erred when it found that the defendant had been required to challenge the lawfulness of his arrest prior to trial pursuant to § 19.2-266.2. The Court then reasoned that the applicability of the implied-consent statute is not a constitutional question but is a statutory one.

Justice Kelsey wrote a vociferous dissent, in which Justices Lemons and Chafin joined.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1191735.pdf

Goldberg v. Commonwealth: December 3, 2020
(Unpublished)
Virginia Beach: Defendant appeals his conviction for DUI on sufficiency of the evidence.

Facts: The defendant drove his vehicle while intoxicated on the shoulder, drifted repeatedly in and out of the oncoming lane of traffic, and drove down the center of two lanes. An officer stopped the defendant and found that the defendant had a strong odor of alcohol, had bloodshot eyes, occasionally slurred his words, and was unable to walk or stand without swaying. He admitted to drinking alcohol earlier in the evening. A breath test conducted over an hour after the stop showed that his blood alcohol level was .09. The trial court admitted the results of an HGN field test at trial over the defendant's objection.

The Court of Appeals affirmed, assuming without deciding that the HGN evidence was inadmissible, and concluded that the remaining evidence was sufficient to prove the defendant's guilt.

Held: Affirmed. In a short, unpublished opinion, the Supreme Court agreed with the Court of Appeals that any potential error in the admission of HGN testing was harmless. Like the Court of Appeals, the Supreme Court declined to examine the admissibility of the HGN test.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/191701.pdf

Drugs

Possession with Intent to Distribute

Virginia Court of Appeals
Unpublished

McLaurin v. Commonwealth: November 4, 2020

Prince William County: The defendant appeals his convictions for Possession with Intent to Distribute and Possession of Drugs on sufficiency of the evidence.

Facts: Police executed a search warrant at the defendant's residence and, in a particular bedroom, found marijuana and other drugs along with drug paraphernalia and handgun magazines. The defendant was not present when police executed the warrant. At trial, the evidence linking the defendant to the bedroom was an active summons showing that the defendant lived at the address, an expired identification card bearing the same address, and an undated DMAS card. The summons was about one month old.

Held: Reversed. The Court complained that the record was "devoid of any direct evidence that [the defendant] was ever in the apartment." The Court compared this case to *Garland*, *Drew*, and *Cordon*, and in this case contended that there was no evidence that the defendant had a possessory interest in the apartment, kept his clothes there, or had ever identified the bedroom was "his."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1728194.pdf

Williams v. Commonwealth: October 6, 2020

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

Facts: The defendant drove his car while carrying several different illegal drugs for sale. The defendant changed lanes in the road, crossing a single, solid white line immediately prior to an intersection. When the defendant made the lane change, there was a vehicle behind him in the center lane, and another vehicle in the right lane. An officer stopped the defendant for a violation of § 46.2-804. A dog alerted on the vehicle and officers found 31 bags of heroin, 56 bags of cocaine, 14 bags of marijuana, cash and two cellphones.

The defendant moved to suppress, arguing that the stop was not lawful. At the motion to suppress, the officer testified that he believed the defendant's lane change was unsafe because the defendant made the lane change in a "narrow break" in traffic. However, at the end of the hearing, the circuit court did not credit that portion of the officer's testimony, stating: "I wanted to make sure and clear that [the officer] was not stating that he believed the lane change was unsafe because of the location of the other vehicle." The trial court denied the motion to suppress, though, under *Heien*, the officer's mistake of law was reasonable.

At trial, an expert testified that the defendant's drugs worth more than $1,000. He also explained how the defendant's multiple phones and large amount of cash were consistent with distribution.

Held: Reversed. The Court explained that the test for invoking the exclusionary rule is "whether a reasonably well-trained officer would have known that the search or seizure was illegal in light of all of the circumstances." In this case, the Court concluded that the officer's conduct was sufficient to trigger the exclusionary rule, writing: "The statute was not new or recently amended… Thus, there is no explanation for the officer's mistake other than inadequate study of the laws."

The Court acknowledged that, although crossing a single, solid white line is not a per se violation of the law, a lane change may still violate § 46.2-804 if the lane change is made unsafely. However, even though the officer had testified that he stopped the defendant because his lane change was unsafe, the Court, like the trial court, contended that the officer was not stating that he believed the lane change was unsafe. Thus, in the Court's view, the officer's allegedly mistaken belief that §46.2-804 prohibited a lane change over a solid white line was not reasonable because the statute clearly and unambiguously did not prohibit crossing a single, solid white line.

The Court agreed, however, that the evidence was sufficient to prove that the defendant possessed the drugs in the car and that he intended to distribute his drugs. The Court repeated that a court may infer that "drugs are a commodity of significant value, unlikely to be abandoned or carelessly left in an area.'"

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1421192.pdf

Patton v. Commonwealth: July 7, 2020

Henrico: Defendant appeals his conviction for Possession with Intent to Distribute Cocaine on sufficiency of the evidence:

Facts: The defendant carried cocaine for sale in his vehicle. An officer saw the defendant speeding and signaled for the defendant to stop. The defendant drove past ten houses before entering the driveway of a house and parking the car behind the house. The officer became suspicious when he saw the defendant reach down to the right of the driver's seat.

The officer located a firearm in the car. After removing the defendant from the car, the officer was standing next to the defendant between a trashcan and the rear of a police car when he heard a thud from the rubber trashcan. No one else was in the area. The officer immediately looked to the ground where he saw two plastic bags that contained cocaine. Two officers had surveyed the area moments before, and neither officer had seen anything on the ground before. At trial, the defendant contended that the evidence did not exclude the "very real possibility" that the drugs were there prior to his being near the trashcan.

At trial, an expert testified that, based on his training and experience, the quantity of drugs recovered was inconsistent with personal use; the expert explained that he had never seen a single user with that amount of cocaine.

Held: Affirmed. The Court noted the defendant's reluctance to cooperate with the police, his furtive gestures, the location of the cocaine in close proximity, and the fact that the two baggies were not on the ground when the officers first inspected the area. The Court also pointed out that no one would carelessly or deliberately leave drugs valued at $500 on the ground. The Court agreed that the defendant was aware of the presence and character of the cocaine and that he continuously and consciously possessed it until he threw the two baggies to the ground near the trashcan.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1494192.pdf

Bower v. Commonwealth: June 9, 2020

Augusta: Defendant appeals her conviction for Possession with Intent to Distribute on sufficiency of the evidence.

Facts: An officer saw the defendant, who was wanted on a warrant, leave her house, and drive away. The officer stopped the defendant and searched her car. The officer found a bag containing empty plastic baggies, needles, a spoon with residue and another bag that had a crystal substance in it which the Department of Forensic Science determined to be .693 grams of Methamphetamine.

Police obtained a search warrant for the defendant's residence. The defendant's home contained empty plastic bags and a quantity of a "fake meth" substance. At trial, an officer testified that such "cutting agents" would be used to "make [drugs] go further." The defendant, who possessed over $1,600 in cash despite having been unemployed for several months, also told police that she had been buying about an ounce of methamphetamine every two to four days and that she would keep some, sell the remainder, and thus provide for her own drug use while "making a profit."

Held: Affirmed. The Court specifically pointed to, in a footnote, the presence of clean, empty baggies in the same location as the defendant's methamphetamine, which the officer testified were consistent with drug repackaging and resale, and the defendant's own admission to selling quantities of less than one ounce of methamphetamine. Even though the defendant also possessed items which arguably were evidence of her personal use of methamphetamine— spoons and syringes—the Court noted that such evidence of her personal use of the drug is not dispositive with respect to her intent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0707193.pdf

Possession

Virginia Court of Appeals
Unpublished

Powell v. Commonwealth: April 12, 2021

Lynchburg: Defendant appeals his conviction for Drug Possession on Sufficiency of the Evidence.

Facts: Defendant possessed Methamphetamine. An officer stopped the defendant for a traffic violation and located the drug. The officer asked the defendant what the substance was, and the defendant stated "cocaine, I guess." The defendant stated that he did not "normally use" but that he had "been having some rough times" and "just been having a lot going on."

At trial, the defendant argued that the evidence did not show that he had knowledge of the nature and character of the substance.

Held: Affirmed. The Court held that, although the defendant misidentified the substance, his statements indicate that he was aware that the substance in his possession was in fact a controlled substance. The Court repeated that a defendant need know only that he is possessing a controlled substance to be guilty of violating § 18.2-250; the Commonwealth does not need to prove that a defendant knew he was possessing a specific controlled substance.

The Court expressed disbelief in the defendant's "hypothesis of innocence that he got into a car that he did not own, was unaware of the contents of the plastic container, and, in an attempt to be honest with the police, he made a guess as to its contents."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0055203.pdf

Swinea v. Commonwealth: December 22, 2020

Chesapeake: The defendant appeals his conviction for Drug Possession on Refusal to Grant a Deferred Disposition and sufficiency.

Facts: An officer arrested the defendant on an outstanding warrant. Incident to arrest, the officer searched the defendant and found an Adderall pill, cut in half in the defendant's watch pocket. At trial, the defendant claimed that he had requested a painkiller from the mother of his children because of "excruciating pain." He claimed that she gave him the pill at a convenience store parking lot but mistakenly believed it was an over-the-counter medication. The mother also testified and told a similar story, albeit with significant differences.

At trial, in rebuttal, the Commonwealth introduced expert testimony that street users of Adderall often cut the pills in half to allow them to get two hits from one tablet, often carry other, legal medications with their contraband medications, and often store small amounts of controlled substances in the watch pockets of their pants.

At trial, the defendant also argued that the Commonwealth failed to prove he was aware of the drug's nature and character. The trial court rejected the defendant's claims, noting that the defendant did not take the pill despite his claim of pain. Instead, the defendant wrapped the pill and placed it in his pocket.

The defendant requested a deferred disposition. However, the trial court rejected his request, noting the defendant's criminal history, which revealed multiple offenses tied to the defendant's "failure to respect the authority of courts and/or obey conditions imposed upon him." The defendant's criminal history also revealed that he previously had been granted a deferred disposition/first offender status for a domestic assault and battery charge and that he failed to meet the terms and conditions imposed as a result.

Held: Affirmed. The Court agreed that the facts inferentially support the conclusion that the defendant was aware of the nature and character of the Adderall he admittedly possessed. Regarding the sentence, the Court also pointed out that each of the defendant's previous offenses, let alone the totality of them, would allow a reasoned decisionmaker to conclude that the defendant had failed to "demonstrate a likelihood of being able to adhere to the terms and conditions of probation"

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0105201.pdf

Imitation Substances

Virginia Court of Appeals
Unpublished

Taylor v. Commonwealth: July 28, 2020

Roanoke: Defendant appeals his conviction for Possession with Intent to Distribute an Imitation Controlled Substance on sufficiency of the evidence.

Facts: The defendant offered to sell heroin to an undercover police officer. The defendant boasted over the phone about his alleged heroin product, and claimed that it was "raw," "came straight from New Jersey," and "did not contain any Fentanyl." Officers arrested the defendant when he arrived at the deal. When officers seized the substance that the defendant was carrying, the defendant claimed that the baggie contained "Benefiber" and he had intended to mix it with cocaine (yet to be obtained from another dealer) and sell it to the officer. Upon further testing, the substance was confirmed to contain no meaningful quantity of any controlled substance, and according to expert testimony, "appeared to be something similar or that of like corn syrup solids such as baby formula."

At trial, the defendant argued that the substance recovered was not an "imitation controlled substance" under the statute because it fell under an exception set forth in § 18.2-247(B)(ii)(1), the "introduction into commerce" exception. That exception covers a substance that "was introduced into commerce prior to the initial introduction into commerce of the controlled substance which it is alleged to imitate."

Held: Affirmed. The Court first pointed out that § 18.2-263 specifically provides that the Commonwealth is not required to "negative any exception" contained in § 18.2-247; instead, the defendant bears the burden of proof. The Court noted that the defendant introduced no evidence as to when any substance at issue — heroin, corn syrup, or baby formula — was introduced into commerce (either when they were brought to market or when he purchased the substance he possessed),

In this case, the Court pointed out that the defendant possessed a substance that resembled heroin, was packaged to resemble heroin, and he arranged to sell it as heroin. The Court also agreed that it was clear through both his words and actions that the defendant specifically intended that the officer believe he was purchasing heroin from the defendant.

In a footnote, the Court complained that it could not envision how "this exception could protect anyone who "s[old], g[a]ve, or distribute[d]" an imitation controlled substance from criminal liability, as they would need to have possessed the intent to represent that the product was a controlled substance. Absent this necessary mens rea — meaning an individual sold a legal substance, representing it to be that legal substance — such a defendant could plainly not be found guilty of selling an imitation controlled substance, because it was not "alleged to imitate" a controlled substance. It appears, therefore, that the legislature included the "introduction into commerce" exception to protect manufacturers of a legal substance who continue to manufacture it even after a controlled substance similar in appearance is introduced." The Court cautioned, however, that its own footnote was mere conjecture and dicta.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1197193.pdf

Eluding

Virginia Court of Appeals
Unpublished

Francis v. Commonwealth: November 17, 2020

Dinwiddie: Defendant appeals his conviction for Eluding on Double Jeopardy grounds.

Facts: The defendant led police on a multi-jurisdictional, high-speed chase that began in Chesterfield and continued into Dinwiddie County. In Chesterfield, an officer saw the defendant weaving in and out of traffic, using both the right and left shoulders, and driving over 90 miles per hour. In Dinwiddie, the officer observed the defendant pass a car in the right lane by driving onto the right shoulder of the interstate and merging back into the right lane from the shoulder in front of the car, cutting it off. The defendant reached speeds of 180 miles per hour before capture.

The defendant pled guilty to felony eluding in Chesterfield. Thereafter, the defendant moved to dismiss his eluding charges in Dinwiddie, arguing that the charges violated his Double Jeopardy rights. The trial court rejected his argument.

Held: Affirmed. The Court concluded that the evading and eluding in Chesterfield and Dinwiddie counties each were separate and distinct acts. In this case, the Court noted that there were multiple victims in different jurisdictions. The Court observed that the victim in Dinwiddie was a driver that the defendant cut off; that victim was different from the other victims driving in Chesterfield.

The Court distinguished the *Thomas* case but cautioned that a chase could be a continuing offense. "We do not hold here that every police chase that crosses jurisdictional lines would create the requisite separate acts to support more than one eluding conviction."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1674192.pdf

Embezzlement

Virginia Court of Appeals
Unpublished

Kanu v. Commonwealth: November 24, 2020

Loudoun: Defendant appeals his convictions for Embezzlement on the "Single Larceny Doctrine."

Facts: The defendant embezzled money from his employer on twenty separate occasions in a single month, stealing cash from a cash drawer and covering his thefts with fraudulent transactions. The

defendant confessed, telling the loss prevention officer, the police, and the trial court that he took the money to pay for school expenses. The Commonwealth indicted the defendant for three counts of felony embezzlement: one count covering eight transactions between August 20 and September 5, 2018, totaling $1,146.69; a second count covering seven transactions between September 6 and September 9, totaling $849.13; and a third count covering five transactions between September 10 and September 15, totaling $763.21.

At trial, the trial court rejected the defendant's argument that the "single larceny doctrine" applied and that the evidence comprised one continuing fraudulent scheme, and that there was no evidence presented of separate intents or impulses to justify three distinct acts of felony embezzlement.

Held: Affirmed. The Court noted that no Virginia appellate court has explicitly held that the single larceny doctrine applies to embezzlement. In this case, the Court found that the evidence was sufficient to prove that the defendant had a separate impulse to steal each time he took money; the Court refused to address whether the single larceny doctrine should be expanded to cover embezzlement charges.

The Court noted that the Commonwealth was not required to prove that the defendant acted with a distinct impulse to steal for each count of embezzlement charged. The Court pointed out that the Commonwealth could have charged the defendant with twenty individual acts of embezzlement, but instead it permissibly aggregated those individual acts into three counts of felony embezzlement, each occurring within a six-month time frame.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1729194.pdf

False Pretense & Fraud

Virginia Court of Appeals
Published

Smith v. Commonwealth: December 1, 2020

Stafford: Defendant appeals her conviction for Defrauding an Innkeeper on sufficiency of the evidence

Facts: The defendant lived at a hotel for about a year, paying a daily rate but receiving a bill once per week. After the defendant failed to keep up with payments, she lost her "preferred" rate of $40 a day, and her daily room rate increased. The defendant made two payments for the room at the new rate. However, she then stopped paying for her room, and nevertheless remained there for an additional twenty-two days without paying anything for the room over that period of time or thereafter.

One night, the defendant departed furtively from the hotel without paying any of her outstanding balance. She later testified that she did so because she believed she had already paid

enough money. Although she secured a job within a few weeks after leaving the hotel, she never made any effort to pay her outstanding hotel bill and ignored attempts by the hotel to contact her.

At trial, the defendant sought to cross-examine the hotel staff about what actions he typically took regarding other clientele with unpaid hotel bills. The trial court sustained the Commonwealth's objection to that testimony.

Held: Affirmed. The Court first held that the evidence established that the defendant formed the requisite intent to defraud the hotel owner, agreeing that the evidence proved that the defendant did not intend to pay for the last three weeks of her stay at the hotel, which established that she "put up" there with the requisite intent to defraud. The Court also held that the trial court did not abuse its discretion by excluding evidence about other guests' unpaid bills on relevance grounds.

The Court observed that the meaning of the phrase "put up" in § 18.2-188 had not been analyzed. Interpreting the statute, the Court held that "put up" means to "lodge" or reside in a hotel. The Court concluded that "put up" and its usage elsewhere in the Virginia Code near the time of the statute's enactment in 1894 indicate that the term applies to any period for which one arranges to lodge at a hotel.

The Court noted that the defendant paid by the week, though her room was charged daily, and she received a reduced daily room rate as a result. Consequently, the Court explained that a conviction under the statute did not require proof that the defendant had the intent to defraud when she first checked in at the hotel. Instead, the Court found that the Commonwealth was required to prove only that she had the necessary criminal intent prior to any one of her daily transactions with the hotel to support the single count of defrauding an innkeeper.

Regarding intent, the Court found that the defendant's admission that she believed she had paid "enough money," coupled with her furtive nighttime departure, avoidance of hotel management's attempts to contact her after she left, and failure to make any additional payments on her outstanding balance despite her savings and new job, clearly established that she never intended to pay for her last three weeks of occupancy.

Regarding the excluded evidence, the Court agreed that the witness' testimony about how he typically handled the unpaid hotel bills of other guests was not relevant to the case. The Court explained that past practices with other individuals have no bearing on the defendant's intent to defraud or the time at which she formed that intent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1146194.pdf

Virginia Court of Appeals
Unpublished

Sarka v. Commonwealth: February 23, 2021

Chesapeake: Defendant appeals his conviction for Failing to Return Leased Property on sufficiency of the evidence.

Facts: The defendant rented an expensive, large piece of equipment from an equipment rental business. The rental agreement was for a two-hour rental. The defendant reviewed and signed a document with both an incorrect name and an incorrect and incomplete address. The defendant never returned the equipment. Employees were unable to contact him at any of the phone numbers he provided, as well as phone numbers they discovered on their own.

The business sent the defendant a demand letter, but the defendant did not respond. The defendant did not make any additional payments after acquiring possession of the equipment. Someone other than the defendant finally returned the equipment nearly a year later. The defendant made no rental payments after the return.

At trial, a witness from the business presented their records regarding the rental. The paperwork called the rental an "open rental" and reflected a different return date than the date to which the parties had agreed. The witness testified that he was "not familiar" with the process for updating the date on a rental agreement in the computer system and indicated that "it may automatically update."

The defendant argued that, regardless of any express rental period, the business' course of performance demonstrated that the agreement was merely a "revolving contract that continued to accrue charges based on the length of time that" the defendant held the property, under the Uniform Commercial Code.

Held: Affirmed. The Court ruled that, based on the terms of the rental agreement, the demand letter, and the circumstantial evidence showing the defendant's evasive and uncommunicative conduct, a reasonable factfinder could conclude that the defendant had fraudulent intent in failing to return the rented property within thirty days after expiration of the rental period. The Court also noted that the content of the demand letter, mailed to the address given by defendant, was sufficient to establish prima facie evidence of his intent to defraud under Code § 18.2-118(B).

Regarding the UCC, the Court observed that, pursuant to the Virginia UCC, the express terms of a written rental agreement comprise the primary resource for determining the scope of the agreement. The Court explained that the trial court was not required to find that the demand letter demonstrated a course of performance in which the rental company allowed the defendant to retain the equipment months past even an "estimated" return date without communication or payment.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0165201.pdf

Maad v. Commonwealth: January 19, 2021

Frederick: Defendant appeals his convictions for Larceny by False Pretense on sufficiency of the evidence.

Facts: The defendant owned and operated an automobile dealership. The defendant bought cars that had liens on them, did not pay off the liens, but still sold those vehicles, even though he did not hold the title to those vehicles. As of February 2018, the defendant had sold at least 70 vehicles without title. A DMV investigator warned the defendant that his conduct was unlawful, but the defendant continued.

When customers attempted to contact him, the defendant avoided phone calls and gave unreliable answers. He sometimes falsely told customers that their loan been paid off. Regarding the victims in this case, the defendant never took steps to initiate the process of transferring title, nor did he request more time from the DMV to get the titles. For example, when the defendant sold one victim a pickup that was a trade-in, he had not paid off the loan on the pickup; Rather, he used the proceeds to fund other parts of his car business.

Although the buyer's orders required the defendant to pay the sales tax and licensing fees, and he collected money for that purpose, he did not remit that money to the DMV. At trial, the defendant testified that he had no intention of using those funds to do so because all the money coming in was destined for his "most pressing" obligations.

At trial, the defendant contended that his promise to pay off the loans on the vehicles that the victims traded in, even if false, was a promise or reference to a future event, and therefore, was insufficient to support his convictions. He also argued that the evidence did not exclude the reasonable hypothesis of innocence that he had simply made bad business decisions without intending to defraud anyone.

Held: Affirmed. The Court found that the evidence was sufficient to demonstrate that the defendant made false representations as to past or existing facts and he had an intent to defraud. The Court observed that the defendant repeatedly sold vehicles to which he did not have, and could not get, clear title. The Court noted that the defendant knew that he would not be able to pay the liens off and transfer clear title without some sort of outside intervention.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0162204.pdf

Firearms and Weapons Offenses

Fourth Circuit Court of Appeals

Harley v. Wilkinson: February 22, 2021

E.D.Va: Plaintiff appeals dismissal of his lawsuit regarding his disqualification from Possession of a Firearm due to a Domestic Violence conviction.

Facts: In 1993, the plaintiff pleaded guilty to misdemeanor assault and battery of a family member, in violation of § 18.2-57.2, based on an altercation he had with his then-wife. As a result of this conviction, he is prohibited for life under 18 U.S.C. § 922(g)(9) from possessing a firearm unless he obtains a pardon or an expungement of his conviction.

The defendant filed a lawsuit contending that 18 U.S.C. § 922(g)(9) violates his Second Amendment rights and is unconstitutional as applied to him. The plaintiff argued that he no longer should be subject to the prohibition because he has demonstrated good behavior during the 27 years since his conviction.

Held: Affirmed. The Court held that 18 U.S.C. § 922(g)(9) is constitutional as applied to the plaintiff. Adopting a test from other circuits, the Court applied "intermediate scrutiny," finding that the government bears the burden of establishing a reasonable fit between the challenged law and a substantial governmental objective.

Using a two-prong approach, the Court first assumed, without deciding, that domestic violence misdemeanants are entitled to some degree of Second Amendment protection. The Court declined to read into 922(g)(9) an exception for good behavior or for the passage of time following a disqualifying conviction for a misdemeanor crime of domestic violence. However, based on the risk of escalating violence by domestic violence misdemeanants would be increased by their having access to firearms, the Court ruled that the question whether to restore the plaintiff's ability to obtain a firearm is a matter of public policy entrusted solely to Congress.

Full Case At:
https://www.ca4.uscourts.gov/opinions/191632.P.pdf

Virginia Supreme Court

Myers v. Commonwealth: May 13, 2021

Suffolk: Defendant appeals his conviction for Carrying a Concealed Handgun, Second Offense, on sufficiency of the evidence.

Facts: The defendant carried a concealed handgun in his backpack inside his vehicle. Officers approached his vehicle and, detecting the odor of marijuana in the vehicle, searched it. The front pocket of the defendant's backpack was unzipped, but the back pocket, which was closest to the seat, was zipped completely shut. Officers located a concealed handgun inside. The trial court rejected the defendant's argument that he was lawfully carrying the handgun under § 18.2-308(C)(8), and the Court of Appeals affirmed.

Held: Reversed. The Court held that the defendant was entitled to the protection of subsection (C)(8)'s exception to criminal liability for carrying a concealed weapon because the handgun was secured in a container within his personal, private vehicle.

The Court first addressed the burden of proof regarding the exception in § 18.2-308(C)(8). The Court concluded that none one of the exceptions in subsections B, C, or D serve as a negative element of the offense of carrying a concealed weapon. Instead, the Court found that these exceptions list affirmative defenses that a defendant must either raise or waive.

Thus, the Court explained that the defendant has the burden of production on a subsection C defense, which requires the defendant to present more than a scintilla of evidence (either from his own case-in-chief or from the prosecution's) that if believed by the factfinder, could create a reasonable doubt as to the defendant's guilt. The Court then explained that, if the defendant presents such evidence, the Commonwealth must then shoulder its burden of persuasion — requiring proof sufficient under the reasonable-doubt standard to permit a rational factfinder to reject the defense and to find the defendant guilty.

The Court then examined the legislative history of the exception in (C)(8). The Court noted that when the General Assembly first passed the subsection (C)(8) in 2010, the bill initially required the handgun to be "locked in a container or compartment" within the vehicle. The Court then observed that the Governor sent the bill back to the legislature with the recommendation to substitute "locked" with "secured," which became the final language.

The Court concluded that the ordinary meaning of "secured" (when it is not considered an exact synonym of "locked") includes a fully latched rigid container as well as a fully zipped soft container, such as one made of cloth, canvas, or leather. In this case, the Court found that the defendant's handgun was no less "secured" in his zipped backpack than it would have been in a latched gun case. The Court reasoned that the ordinary way that one fastens a backpack is to fully zip its opening so that no one can reach inside. Thus, the defendant lawfully possessed the handgun secured in a backpack in his personal, private vehicle.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1200165.pdf

Virginia Court of Appeals
Unpublished

Williams v. Commonwealth: December 29, 2020

Stafford: Defendant appeals his conviction for Carrying a Concealed Weapon on sufficiency of the evidence.

Facts: The defendant concealed brass knuckles that also contained a folding knife within. He used it to threaten a ten-year-old child who was playing football outside the defendant's house. At trial, a police officer testified that brass knuckles are used to inflict pain upon another.

At trial, the defendant admitted that he knew brass knuckles were illegal and that his knuckle knife could be used as a weapon in the same way as brass knuckles. The defendant claimed that he purchased this knuckle-knife in the case of an automobile accident, so he could "bust the window out."

Held: Affirmed. The Court held that the evidence was sufficient to support the trial court's conclusion that the knuckle knife has substantially similar characteristics to metal knucks; thus, § 18.2-308(A) proscribed the defendant from carrying the weapon about his person, hidden from common observation.

The Court reviewed the test under *Farrakhan*, which determines whether an item is prohibited as a concealed weapon. First, the item must be a weapon; that is, "the item must be designed for fighting purposes or commonly understood to be a 'weapon.'" Next, if the item is a weapon, "it must then be determined if the item possesses similar characteristics to the enumerated items in Code § 18.2-308(A), thus, making its concealment prohibited."

The Court noted that § 18.2-308(A)does not define "metal knucks," but noted that the *Rice* case equated brass knuckles with metal knucks. The Court defined "Brass knuckles" as "a piece of metal designed to fit over the fingers as a weapon for use in a fistfight," and explained that brass knuckles are a weapon because they are designed for fist-fighting purposes. Reviewing the officer's testimony and the defendant's testimony at trial, the Court held that there was sufficient evidence to support the conclusion that the defendant's knuckle knife was a weapon.

The Court then held that the defendant's weapon was '"substantially similar' to one of the weapons enumerated in § 18.2-308(A). The Court pointed out that the defendant's knuckle knife had similar characteristics of metal knucks: there was a grip for the hand to fit in, with a large block of metal or other material that extended well above the holder's hand, and this weapon also had a knife blade that appeared to fold in.

The Court also concluded that, even though the addition of a blade is not included in the definition of metal knucks, this differing characteristic did not disqualify the weapon as a "weapon of like kind."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0224204.pdf

Easterling v. Commonwealth: August 4, 2020

Danville: Defendant appeals his conviction for Possession of a Machine Gun and Possession of a Firearm by Felon on sufficiency of the evidence.

Facts: An officer responded to a possible shoplifting. The officer watched the defendant enter a vehicle and sit behind the driver's seat. Another individual walked to that vehicle as well. The officer learned that the men were the shoplifting suspects and spoke to them. While standing outside the defendant's vehicle, the officer saw a firearm magazine sticking out from under the driver's seat "where you could see it in plain view." The officer seized the magazine and found a handgun behind it. The handgun had been specially modified to fire fully-automatic (i.e. modified to be a machine gun). The magazine was a special magazine that held up to 25 cartridges. The defendant is a felon.

Later, at the Magistrate's office, when the officer was describing the firearm to the magistrate, the defendant asked, "How does that make a Glock fully automatic?" At that point, the officer had not mentioned the model of the firearm.

Held: Affirmed. The Court quoted § 18.2-292, which provides that: "The presence of a machine gun in any room, boat or vehicle shall be prima facie evidence of the possession or use of the machine gun by each person occupying the room, boat, or vehicle where the weapon is found." The Court concluded that, given the "dangerous and unusual" nature of machine guns (especially with such a long magazine like the one here that could hold at least 20 to 25 rounds of ammunition), it is extremely likely that an individual occupying a vehicle in which a machine gun is found would know of its presence and nature.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1444193.pdf

Homicide

Virginia Court of Appeals
Published

Dandridge v. Commonwealth: January 12, 2021

Chesterfield: Defendant appeals his convictions for Murder on Jury Instruction issues.

Facts: During a parking lot dispute, the defendant shot a man repeatedly, killing him. The defendant alleged that the victim attacked him, punching the defendant in the face while the defendant was still sitting in the car, and then tried to drag the defendant out of the car by his feet. After a struggle over a gun, the defendant fired four shots, killing the victim. At trial, the defendant testified he was afraid for both himself and his mother, who was clutching her chest.

At trial, the defendant requested jury instructions for both the lesser-included offenses of second-degree murder and voluntary manslaughter and for self-defense. The trial court gave the jury instructions on self-defense and second-degree murder but refused the instruction on voluntary manslaughter.

Held: Reversed. The Court concluded that there was credible evidence that the defendant was provoked to fear or anger, or both, by the victim's initial attack in the car and the defendant's perception that the victim was coming to attack again. Thus, the Court found that the trial court should have instructed the jury on voluntary manslaughter, and it was the jury's purview to determine if the last shot fired was done so with malice or with heat of sudden passion.

The Court pointed out that the trial court gave a self-defense instruction; the Court explained that it would be an unusual scenario in which the evidence supports a self-defense instruction but not a

voluntary manslaughter instruction. Therefore, for the Court, the trial court's approval of the self-defense instruction supported the conclusion that there was more than a scintilla of credible evidence that the killing was not done with malice, and the voluntary manslaughter instruction was thereby required. Moreover, the Court found that the jury's rejection of the defendant's self-defense theory did not preclude its consideration of a voluntary manslaughter theory.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0177202.pdf

Larceny & Receiving Stolen Property

Virginia Court of Appeals
Unpublished

Edwards v. Commonwealth: December 1, 2020

Henry: Defendant appeals his conviction for Receiving Stolen Property on sufficiency of the evidence.

Facts: The victim suffered a theft of several items, including an ATV and a leaf blower. Police found the ATV across the street from the defendant's home and then learned that the defendant had been seen transporting the leaf blower from his barn to a vehicle. Police interviewed the defendant. The defendant first claimed that, about 11 days after the theft, he was shown a leaf blower by someone who, police learned, was also involved in the transportation of the stolen property. He also said that around the same time, he received a leaf blower from another man, who police also found was involved with the theft. However, changing his story a few weeks later, the defendant re-approached the police to "clear the air" and claimed that it was someone else who presented him with a leaf blower.

Held: Affirmed. The Court found that the observation of the defendant transporting stolen items, along with his recent possession of the stolen property and the discrepancies in the defendant's statements to police, permitted a rational trier of fact to find the defendant guilty of receiving stolen property.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0464203.pdf

Obstruction of Justice & Resisting Arrest

Virginia Court of Appeals
Published

Lopez v. Commonwealth: March 2, 2021

Chesapeake: Defendant appeals his convictions for Assault on Law Enforcement, Escape, Impeding, and related offenses on sufficiency of the evidence.

Facts: The defendant fought officers who were attempting to arrest him on an outstanding capias. The matter underlying the capias was a failure to comply with conditions related to a charge of assault and battery. Police dispatch had sent the officers to the area near the defendant's residence because of a loud party complaint. The officers wore their full uniforms and badges. When officers learned that the defendant was wanted, they told him that he was under arrest, instructed him to turn around and place his hands behind his back, and the officers tried to place him in custody, as the capias commanded them to do.

At that point, the defendant pulled away from the officers while staring at them and threatening, "I'm telling you right now, you ain't doing nothing. Don't do this to yourself." The defendant pulled away from the officers' grasp and shoved one of them before engaging in a violent struggle with an officer inside his residence, where the defendant shoved the officer's chest, grabbed his stun weapon, lunged toward the officer, charged the officer as the officer retreated, shoved his face, tried to grab his head and take him to the floor, and shoved him toward the stairs, knocking him to the ground.

At trial, the defendant argued that he was merely trying to retreat and avoid being hurt by the officers. The defendant argued that he was not guilty of escape from custody because no evidence supported a finding that he was charged with a criminal offense at the point of his initial arrest.

Held: Affirmed. Regarding the impeding conviction, the Court concluded that, based on the evidence, proof of the defendant's intent to impede the officers from arresting him—performing their official duties—may be inferred from his threatening statements and his conduct.

Regarding the escape conviction, the Court found that "on a charge of criminal offense" in §18.2-478 includes a capias for contempt of court, provided the capias specifies a criminal statute, which was, in this case, § 18.2-456. The Court noted that the failure to comply with conditions related to a charge of assault and battery was clearly a criminal offense.

Regarding the assault on law enforcement conviction, the Court also found the evidence sufficient.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0266201.pdf

Peters v. Commonwealth: August 4, 2020
72 Va. App. 378, 846 S.E.2d 23
Buena Vista: Defendant appeals his conviction for Attempting to Prevent a Lawful Arrest on sufficiency of the evidence.

Facts: The defendant made an illegal turn, nearly crashed into another car, and then ran a red light and sped away. While police were pursuing him, the defendant collided with a police car and exited his vehicle. The officer drew his firearm and told the defendant, "Stop!" and "Show me your hands!" The officer then switched to his taser. The defendant ran and the officer chased him. The officer warned the defendant multiple times that he would use the taser, yelling, "Taser! Taser! Taser!" The officer used the taser. The defendant fell and the officer restrained him.

Among the charges that the defendant faced at trial was resisting arrest under § 18.2-460(E). At trial, the only element of § 18.2-460(E)(ii) that the defendant challenged in his arguments to the trial court is that the officer had "the immediate physical ability to place [the defendant] under arrest." However, the trial court found that the elements of the statute were satisfied "when the officer repeatedly kept saying give me your hands" and the defendant "would not comply with the order to put his hands behind his back."

Held: Affirmed. Initially, the Court found that the trial court erred by holding simply that the defendant's refusal to place his hands behind his back was sufficient for a conviction under § 18.2-460(E). Nevertheless, the Court held that the evidence was sufficient, concluding that find that the officer had the immediate physical ability to place the defendant under arrest.

In a footnote, the Court also agreed that, in this case, the officer communicated to the defendant that he was under arrest, thus also satisfying that element of the statute. Although the officer did not explicitly say "arrest," the Court pointed out other states have also held that an officer is not required to actually say the word "arrest" to communicate to an individual that he is under arrest.

The Court also declined to reach the question of whether a conviction could also be upheld under subsection (i) of the statute because satisfying either of the two subsections of the statute is enough for a conviction, given that the two subsections of the statute are written in the disjunctive.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1001193.pdf

Virginia Court of Appeals
Unpublished

Lightfoot v. Commonwealth: April 6, 2021

Westmoreland: Defendant appeals his convictions for Assault on Law Enforcement and Obstruction of Justice on sufficiency of the evidence.

Facts: The defendant committed a traffic violation in view of an officer, who stopped her vehicle. The officer ordered the defendant to stay in her car while he completed his investigation, but the defendant exited her car and declared that "I do not have to get back in my car." The officer followed and ordered the defendant to return to her car, but she refused. He told her she was obstructing justice and she responded: "I guess I'm obstructing justice then." The officer then told her

she was under arrest. The defendant turned around, balled up her fists, and stated, 'I will f%*# you up.'" The defendant then punched the officer six times in the face.

At trial, the defendant argued that she had the right to use reasonable force to resist an unlawful arrest.

Held: Affirmed. The Court agreed that the officer had probable cause to arrest the defendant for obstruction after the officer told her multiple times to stay with her vehicle, but she refused to obey his commands and continued walking toward the store – preventing the officer from completing his investigation and duties during the traffic stop. The Court also noted that the defendant stated openly that she was obstructing justice. Consequently, the Court concluded that the defendant was not resisting an unlawful arrest – instead she committed an assault on a law enforcement officer.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0313202.pdf

Gordon v. Commonwealth: November 17, 2020

Rockbridge: Defendant appeals his conviction for Felony Obstruction on sufficiency of the evidence.

Facts: While facing charges of child sexual assault, the defendant planned an escape from jail and flee the Commonwealth. He created weapons and developed a plan to incapacitate guards. Part of his plan was to prepare writings that he would leave behind in his cell— writings that would be found upon his escape and would serve as diversions to aid his flight. When the authorities searched the defendant's cell prior to his planned escape, they found several written documents. Among those writings were numerous threats, together with statements indicating that after the defendant had escaped, he would linger in the area long enough to carry out those threats.

Specifically, the defendant threated the case investigators that he knew where they lived, that their "day [was] comin soon," that they should "look over [their] shoulder[s] or [their] love one's," and that "I am like lightin you will never know when I will strike you or someone you love." Additional threats were directed at those the defendant accused of "[t]ellin lies on me." The writings stated that "rose's are red lier is a peace of shit," "[p]eople whitchin everyone that done me wrong," "[i]f you done me wrong that you will be dealt with," and "you will never know when. It will be SO if you done me wrong you mite keep lookin over your shoulder."

At trial, the defendant contended that he took no action to communicate his threats to the investigators or the victim. The court, though, rejected the defendant's argument that, without a showing that he attempted to send his threats to the investigators and the victim, the Commonwealth could not prove that he had the requisite intent to intimidate or impede them.

Held: Affirmed. The Court found that the trial court did not err in finding the evidence sufficient to convict the defendant of obstruction of justice with respect to the victim and the investigators. The Court concluded that the defendant's written threats, together with his plan for how they would be

received and the response they would provoke, demonstrated that the defendant intended his threatening writings to intimidate or impede the investigators and the witness whom the defendant accused of lying about him to police. The Court repeated that it is the threats made by the offender, coupled with his intent, that constitute obstruction; the resulting effect of the offender's threats is not an element of the crime, and thus the offense is complete when the attempt to intimidate is made.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1284193.pdf

Perjury

Virginia Court of Appeals
Unpublished

Jordan v. Commonwealth: March 2, 2021

Fredericksburg: Defendant appeals her conviction for Perjury on sufficiency of the evidence.

Facts: Officers responded when the defendant refused to leave a restaurant after being asked to do so. They did not arrest the defendant. Several days later, the defendant filed petitions for a protective order against both officers, alleging "[i]illegal stalking and targeting of Petitioner, abuse of power, unlawful conduct, violations of civil rights." At the hearing, the defendant testified multiple times that one of the officers called her a "whore." She testified that one of the officers "fe[d her] some sort of verbal threat" and that made comments and used verbal threats and body language to "connote[] domination." The court denied the protective order.

The Commonwealth indicted the defendant for perjury. At trial, the Commonwealth introduced the body camera footage, which demonstrated that the defendant had fabricated her story. On appeal, the defendant argued that there was no evidence that her false statements were "material."

Held: Affirmed. The Court noted that the defendant had failed to raise the materiality issue before the trial court. Nevertheless, the Court wrote that "nowhere does the record affirmatively establish that Jordan made no material false statements."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0648202.pdf

Probation Violation

Virginia Court of Appeals
Published

Hill v. Commonwealth: May 18, 2021

Arlington: Defendant appeals his Probation Revocation on Jurisdictional grounds.

Facts: In 2015, the trial court sentenced the defendant for Unlawful Wounding, imposing a three-year sentence with all but six months suspended for three years, to include three years of supervised probation. In 2018, the trial court found the defendant had violated the conditions of his probation. The court revoked and re-suspended all but one year and placed him on probation for two years. However, the trial court did not explicitly re-suspend the original sentence for a definite period. In 2020, the circuit court found the defendant had violated his probation again and ordered that the remaining balance of his sentence be executed.

The defendant argued that, at the time of his second probation violation, the trial court no longer had jurisdiction to revoke his suspended sentence. He asserted that the three-year period of suspension prescribed in the 2015 order remained in effect and had expired by February 2019 when he violated his probation. The defendant argued that the trial court limited its own active jurisdiction to consider this violation by its failure to expressly make the period of suspension concurrent with the period of probation. In rejecting the defendant's argument, the trial court cited the second sentence of § 19.2-306(A) as authority.

Held: Affirmed. The Court reasoned that, because probation must occur alongside a coordinate suspended sentence, in the absence of a specific period of suspension in the 2018 order, the defendant's sentence was implicitly suspended for the duration of his probationary period.

The Court explained that § 19.2-306(A) does not require that a period of suspension of a sentence be specified, as a court retains authority to execute a suspended sentence for any violation that occurs either during the period of probation or the period of suspension or, if neither was specified, during the maximum statutory period for the offense for which a defendant might have been sentenced to be imprisoned. The Court, however, acknowledged that the trial court mistakenly invoked a part of the statute that did not apply to this case, finding instead that the first, not second, sentence of § 19.2-306(A) controlled.

The Court further explained that the period of suspension is simply a statement of the period for which the court has deferred the execution of any suspended portion of a sentence. The Court wrote: "While many courts inartfully use the terms "probation" and "good behavior" interchangeably, the only real distinction in a defendant's probationary status is whether they will be supervised by a probation officer or not." Thus, "the term of any suspended sentence is inferentially de facto coextensive with any period of probation because no other inference from the language of § 19.2-306(A) makes sense."

In a footnote, the Court also acknowledged that the 2015 order stated that the defendant was on probation for three years from his "release from confinement." The defendant had also argued below that "confinement" only referred to state confinement. However, because the trial court interpreted its own order and stated that "release from confinement" meant the defendant's probation was to begin upon release from all confinement, not only state prison, the Court deferred to the trial court's interpretation of its own order.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0562204.pdf

Virginia Court of Appeals
Unpublished

Turner v. Commonwealth: December 8, 2020

Portsmouth: The defendant appeals the Revocation of his Probation on admission of Hearsay testimony.

Facts: While on probation for attempted abduction, the defendant violated probation by leaving Virginia without permission, failing to maintain contact with his probation officer, and then earning an assault charge in Ohio. Prior to his probation revocation hearing, the probation officer who supervised the defendant and wrote the report ("the author") left the office. At the time of his hearing, the probation office did not know of the author's whereabouts.

At the hearing, a substitute probation officer testified, over the defendant's objection. The substitute officer identified the defendant based on a photo in the probation file and testified that although he never personally had contact with the defendant, his office did. The violation report contained the same indictment number and Department of Corrections number as on the probation conditions signed by the defendant. The substitute officer confirmed that the defendant's assault charge in Ohio was still pending as of the revocation hearing.

The trial court accepted that the author was no longer employed by the Chesapeake probation office and that his whereabouts were unknown. The trial court rejected the defendant's argument that he had a due process right to cross-examine the author.

Held: Affirmed. The Court held that the trial court had sufficient credible evidence to support a finding of good cause for dispensing with the defendant's right to confront the author and allowing the testimony of the substitute probation officer. Initially, the Court criticized the trial court for not making specific findings on the record. The Court repeated that, when a court dispenses with the due process right of confrontation, it should state for the record the specific grounds upon which it has relied for 'not allowing confrontation' to facilitate effective appellate review of that decision.

In this case, the Court applied both alternative tests under *Henderson* for determining whether denial of the confrontation right comports with constitutional due process: the "reliability test" and the "balancing test". The Court agreed that the substitute author's testimony concerning the violation report satisfied the "reliability test" because it contained "substantial guarantees of trustworthiness" under *Henderson*. The Court also agreed that the trial court's decision satisfied due process under the balancing test.

The Court agreed that the defendant's interest in cross-examining the author was outweighed by the Commonwealth's interest in prosecuting the case without the author's in-court testimony. Furthermore, the Court agreed that the substitute officer's testimony had substantial guarantees of

trustworthiness sufficient to outweigh the defendant's interests in confronting the author. The Court also noted that the consistency within the documentation further supported a finding that the substitute testimony was reliable.

The Court concurred that the author was not indispensable to the case. In addition, the Court noted that the substitute officer's testimony was not a "mere summary" of the author's probation report, but rather contained a degree of his own personal knowledge. the substitute officer was able to personally investigate the status of the defendant's assault charge in Ohio and corroborate the defendant's failure to apprise the probation office of his whereabouts.

Additionally, the Court observed that the violation report was based on the author's firsthand knowledge as the defendant's probation officer. Because the violation report was based on that firsthand knowledge, and not statements from other victims or witnesses, the substitute author's testimony contained only one level of hearsay, rather than "multiple layers of hearsay" that would be less trustworthy under *Henderson*.

The Court also repeated that the defendant's "failure to offer contradictory evidence" also factored into the reliability of testimonial hearsay.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1867191.pdf

Robertson v. Commonwealth: October 20, 2020

Arlington: Defendant appeals the revocation of his probation on sufficiency of the evidence.

Facts: While on probation for attempted rape and for breaking and entering to commit rape, the defendant refused to disclose any information regarding his sexual history or participate in related group assignments as part of his sex offender treatment. In particular, the defendant refused to answer any question on the sexual history disclosure form and stated that he was invoking the Fifth Amendment to argue that he could not be required to do so.

During a probation violation hearing, the defendant's treatment provider testified that substantial completion of the form is necessary to develop individualized treatment plans for patients. The trial court ordered the matter continued and ordered the defendant to answer the questions that were not self-incriminating. After repeated continuances over a six-month period, the defendant finally answered enough questions for the treatment to continue.

The trial court found the defendant in violation of his probation for refusing to answer the non-incriminating questions in the sexual history disclosure form required by his sexual offender treatment program. The trial court revoked the suspended sentence and re-suspended the entirety of the defendant's sentence.

Held: Affirmed. The Court found that the trial court did not abuse its discretion in finding the defendant in violation of the terms of his probation for failing to answer the questions the defendant

agreed were non-incriminatory. The Court did not consider the defendant's Fifth Amendment arguments because it found that the defendant waived those arguments.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0318194.pdf

Clemons v. Commonwealth: July 21, 2020

Portsmouth: Defendant appeals the revocation of his probation on refusal to run his sentences concurrently.

Facts: The trial court convicted the defendant of grand larceny and larceny with the intent to sell or distribute and sentenced him to two years of incarceration on each conviction. The court suspended all but ninety days of each sentence upon the condition that the time to serve for larceny "shall run concurrently" with the time to serve for larceny with intent to sell.

The defendant violated probation. After revoking the defendant's suspended sentence, the trial court resuspended all but three months "to serve on each count upon the condition" that "this sentence shall run consecutively with all other sentences." The defendant objected that his sentences should have run concurrently.

Held: Affirmed. The Court repeated that if a trial court resuspends any or all of the sentences, it has "the discretion to impose different conditions on the resuspension of those sentences." In this case, the Court concluded that the language of the original sentencing order unambiguously evinced the trial court's intent to impose concurrent sentences only for the active portions of the defendant's sentences, as a condition of the defendant's suspended sentences, and to impose consecutive terms for the suspended sentences. The Court ruled that the trial court exercised its discretionary prerogative upon the resuspension of the defendant's sentences to impose a different condition on the suspension.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1675191.pdf

Wallace v. Commonwealth: July 21, 2020

Culpeper: Defendant appeals the revocation of his suspended sentence, arguing that the sentence was excessive.

Facts: The defendant received a suspended sentence for Possession of Cocaine. In the ten years since he initially was sentenced, the trial court formally found that the defendant violated the conditions of his suspended sentence on six occasions. After the defendant's sixth official violation, the trial court did not immediately impose a sentence, but rather, gave the defendant another chance. Despite having

been warned that failure to comply would result in the entire remaining sentence being imposed, the defendant again violated probation, missing appointments, failing to appear for court repeatedly, testing positive, and incurring new convictions. The trial court revoked the remainder of the defendant's sentence.

Held: Affirmed. The Court agreed that the conditions the trial court imposed when it suspended portions of the defendant's sentence over time were reasonable and that the defendant repeatedly violated those conditions. With that established, the Court found that the trial court properly revoked the remaining two years left on the original sentence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1631194.pdf

Singleton v. Commonwealth: July 7, 2020

Arlington: Defendant appeals the Revocation of his Suspended Sentence on admission of a Drug Field Test and sufficiency of the evidence.

Facts: While on probation, the defendant sold PCP-laced cigarettes. A police officer surreptitiously observed several instances where the defendant sold cigarettes to a person. In each case, the officer could smell the odor of PCP. In the last instance, the defendant fled into a building. When police apprehended him, they recovered cigarettes and cash, but no PCP. They could no longer smell the odor of PCP. However, an officer recovered a vial of PCP on the ground a few feet from where the officers apprehended the defendant.

The Commonwealth introduced evidence of the field-test to prove that the item was PCP. The defendant objected, but the trial court ruled that the test was approved by the Department of Forensic Science (DFS) and "for that reason alone" was "reliable enough, at least, for the preliminary consideration." The trial court explained that "like anything with a relaxed standard, it can be admitted and may provide a little weight, depending upon the totality of the circumstances."

Held: Affirmed. The Court held that the trial court did not err in admitting the field test results and held that the evidence was sufficient to show that the defendant violated the good behavior condition of his suspended sentences. Regarding the field test, the Court repeated that there is a strong public interest in receiving all evidence relevant to the question whether a probationer has complied with the conditions of probation.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0605194.pdf

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

Protective Orders

Virginia Court of Appeals
Published

McGowan v. Commonwealth: November 24, 2020

Hampton: Defendant appeals his conviction for Assault Violating a Protective Order Resulting in Bodily Injury on sufficiency of the evidence.

Facts: The defendant forcibly entered the victim's house without permission and in violation of a protective order. He attacked and bit the victim on her knee. The victim screamed in pain when the defendant bit her, but the bite did not break her skin. Police responded and interviewed the victim. She lifted her pantleg and allowed a police officer to photograph her knee, which had an area of discoloration, although she later testified that the discoloration was caused by a skin condition.

The trial court convicted the defendant of § 16.1-253.2(C), which punishes anyone who "commits an assault and battery upon any party protected by the protective order resulting in bodily injury to the party."

Held: Affirmed. The Court held that the plain, obvious, and broad meaning of "bodily injury" in §16.1-253.2(C) is "any bodily damage, harm, hurt, or injury; or any impairment of a bodily function, mental faculty, or physical condition." Regarding the lack of "bite marks," the Court explained that the Commonwealth was not required to prove that the victim suffered "any observable wounds, cuts, or breaking of the skin" to sustain a conviction. The Court relied on the fact that the victim screamed when the defendant bit her, evidencing pain and hurt, and the fact that she allowed a police officer to document the location of that hurt within hours of the offense.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0436201.pdf

Green v. Commonwealth: June 16, 2020
72 Va. App. 193, 843 S.E.2d 389
Suffolk: Defendant appeals his convictions for Burglary and Violation of a Protective Order on sufficiency of the evidence.

Facts: The day after an angry outburst, the defendant forced entry into the victim's apartment and damaged personal property inside, including by urinating and defecating on clothes and in a suitcase. The victim obtained a preliminary protective order that ordered the defendant, in relevant part, to "have no contact of any kind" with the victim. A few days later, the defendant posted a message to his Twitter account stating: "Someone tell my BM she was a bird for me." The victim read the message. At trial, she explained that "BM" was an abbreviation for "baby mama," meaning her.

Before trial, the defendant pled guilty to common law trespass. He then argued that the trial court could not find him guilty of burglary after it had accepted his guilty plea to common law trespass, which is excluded from the burglary statute, as a basis for the break-in. The defendant also contended that the evidence was insufficient to support his conviction for violation of a protective order because the Commonwealth failed to prove that he made a "contact" with the subject of the order. The trial court convicted the defendant of trespass, burglary, destruction of property, and violation of a protective order.

Held: Affirmed. The Court first held that the trespass conviction did not preclude the conviction for statutory burglary because the record supported the trial court's finding that the defendant entered the residence with the intent to commit another misdemeanor in addition to trespass. Further, the Court held that the evidence was sufficient to support the finding that the defendant contacted the victim and thus violated a provision of the protective order.

Regarding the burglary conviction, the Court noted that the trial court convicted the defendant of property damage for destruction that he caused after he broke into the apartment. The fact that the

defendant entered the property intending to commit a trespass, in the Court's view, did not preclude the conclusion that he also intended to commit the misdemeanor of damaging property within the apartment.

Regarding the protective order conviction, the Court noted that neither the plain language of the statute nor the plain meaning of the word "contact" limits a "contact" to a direct one. Further, the Court found nothing to suggest that the prohibited "contact" cannot be through a social media platform. In a footnote, the Court cited several cases where other jurisdictions have held that prohibited contact can occur through social media platforms under certain circumstances.

The Court observed that the defendant intentionally directed the communication to the victim by using the public forum available through Twitter. The Court concluded that the defendant's message itself reflected the defendant's intent to contact the victim through others. The Court argued that the defendant's indirect contact was all that was required to convict the defendant of violating the protective order.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0589191.pdf

Rape & Sexual Assault

Virginia Supreme Court

Haas v. Commonwealth: March 25, 2021
Vacated but Affirmed Court of Appeals Ruling of October 29, 2019
Chesterfield: Defendant appeals his convictions for Child Sexual Assault on denial of Impeachment Evidence.

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.

The defendant appealed to the Court of Appeals, asserting among other things that the circuit court had erred by excluding the witness’ proffered testimony. In a published opinion, *Haas v. Commonwealth*, 71 Va. App. 1 (2019), a panel of the Court of Appeals ruled that the statement was not admissible impeachment evidence under Rules 2:607, 2:608, or 2:610, or *Clinebell v. Commonwealth*, 235 Va. 319 (1988). Accordingly, it affirmed the circuit court’s judgment.

Held: Affirmed. The Court vacated the judgment of the Court of Appeals in part, affirmed it in part, and affirmed the judgment of the circuit court. Assuming without deciding that the Court of Appeals erred by ruling that the witness’ statement was inadmissible, the Court held that any such error was harmless. The Court therefore did not reach the Court of Appeals’ analysis of Rules 2:607, 2:608, and 2:610, and *Clinebell*. Rather, the Court vacated that portion of the published opinion and deferred its consideration of that matter to another day.

The Court pointed out that the defendant’s hypothesis of innocence “requires someone to have deposited his ejaculate on Fox’s bed sometime in February, at least a month before S.D. made any accusation about him and any investigation began, or to have preserved it elsewhere to be deposited there later, so that police would discover it in the course of such an investigation.”

The Court concluded that any error by the Court of Appeals in affirming the circuit court’s ruling excluding the proffered testimony was harmless. The Court reasoned that the jury’s decision to acquit the defendant on charges based solely on the victim’s uncorroborated testimony but to convict him when her testimony was corroborated by other evidence further indicates that, had the witness’ proffered testimony been admitted, it would not have affected the outcome.

The Court of Appeals had 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 Supreme Court did not review or reach the Court of Appeals’ ruling on the admission of the refusal to comply with a court order. The Court of Appeals had 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. The Supreme Court did not vacate that portion of the Court of Appeals’ ruling.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1191580.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0621182.pdf

Virginia Court of Appeals
Published

Nottingham v. Commonwealth: May 25, 2021

Virginia Beach: Defendant appeals his convictions for Rape, Sexual Assault, Malicious Wounding, and related offenses on Jury Instruction and Impeachment issues.

Facts: The defendant sexually assaulted a woman at gunpoint and struck her in the head with the firearm, drawing blood. Police responded and investigated. At the hospital, the SANE examiner noted many external injuries, as well as significant genital injuries, including eight distinct lacerations that the examiner immediately observed upon her examination. The victim described the pain from these injuries as ten out of ten.

At trial, the defendant attempted to introduce a videotape of the victim's statement to police and to the SANE examiner as impeachment evidence to demonstrate the difference between the victim's demeanor at trial, where she was upset and crying, and her alleged "prior inconsistent demeanor" during the interview. The defendant claimed that the victim, on video, was laughing and appeared relaxed, which reflected a "prior inconsistent demeanor" compared to her affect at trial when she "became quite emotional during her testimony." Although the court excluded the videotape, it permitted the defendant to question the officer concerning the victim's demeanor during the interview and, in closing argument, to contrast it with her demeanor on the witness stand. The officer testified that during the interview, the victim appeared "calm," did not cry, and in fact "laughed a couple of times."

At trial, the Commonwealth requested a jury instruction on *Fisher v. Commonwealth*, 228 Va. 296 (1984), that "[a] rape conviction may be sustained solely upon the testimony of the victim. There is no requirement of corroboration." The trial court granted the instruction over the defendant's objection.

Held: Affirmed. The Court first held that the court did not abuse its discretion in granting the jury instruction, as it was an accurate statement of the law. The Court repeated that an instruction that refers to specific evidence does not automatically amount to an improper emphasis, as long as the instruction does not suggest that the specific evidence compels a particular finding. Because the instruction correctly stated the law applicable to this issue and was supported by the evidence, the Court ruled that the trial court did not err in granting the instruction.

Regarding the video, the Court ruled that the court did not abuse its discretion in excluding the victim's videotaped interview and instead allowing the detective to testify about the victim's demeanor. The Court noted that the video included footage of the victim interacting with the SANE nurse and talking on her cell phone and pointed out that the defendant had made no effort to redact irrelevant or inadmissible hearsay material from the recording. The Court observed that the trial court's ruling enabled the defendant to present evidence of the victim's prior demeanor to the jury while preventing admission of other inadmissible evidence included within the full videotape.

In a footnote, the Court specifically noted that it was not addressing whether the evidence of a witness' "prior inconsistent demeanor" is inadmissible under Virginia Rule of Evidence 2:608(b)(1), which precludes introduction of "specific instances of the conduct of a witness . . . to attack or support credibility."

http://www.courts.state.va.us/opinions/opncavwp/0340201.pdf

Blackwell v. Commonwealth: February 23, 2021

Petersburg: Defendant appeals his convictions for Filming a Non-consenting Minor on sufficiency of the evidence.

Facts: The defendant filmed an eight-year-old child in various stages of undress by putting his phone underneath her bedroom door. The child's mother discovered the videos and contacted police, who forensically extracted two videos. At trial, the defendant contended that there was no evidence that the child was a "nonconsenting person" under § 18.2-386.1. The trial court found that the child was nonconsenting based on her age.

Held: Affirmed. Applying § 18.2-386.1, the Court ruled that the evidence in this case was more than just sufficient to allow a reasonable factfinder to conclude that the eight-year-old victim was a "nonconsenting person."

The Court first found that the trial court erred in relying on the age of the victim alone in explaining its rationale for finding that the victim was a "nonconsenting person." The Court acknowledged that a person under the age of eighteen can be either a nonconsenting person or a consenting person (noting, in a footnote, that at common law, a female could enter a binding marriage at age twelve)

The Court examined § 18.2-386.1's prohibition on recording someone who is undressed and in private and concluded that only a person who affirmatively consents falls outside of the statute's prohibition. The Court observed that, "in the case of surreptitious photographs and videotapings, oblivious to the creation of the image, the subject of a secret photograph or videotape has not consented to it, but also has had no opportunity to evince, by word or action, a refusal to be photographed or videotaped."

In this case, the Court also reasoned that an eight-year-old is unlikely to agree knowingly and voluntarily to pose nude or semi-nude of her own free will. In this case, the Court found that the best evidence of the lack of the victim's consent was the nature of the videos themselves. The Court wrote: "Nothing in the video suggests that the victim was aware of the filming; she does not stare at the camera or otherwise act in a manner suggesting that she is posing for the camera. Given the difficulties, ranging from issues with lighting to difficulties with camera angles, inherent in trying to videotape a subject from under a closed door, it flies in the face of human experience that a person would choose that method of filming if the subject knowingly and voluntarily had agreed to pose for the videos of her own free will."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0328202.pdf

Reckless Driving

Virginia Court of Appeals
Published

Cady v. Commonwealth: August 11, 2020
72 Va. App. 393, 846 S.E.2d 30
Fauquier: Defendant appeals his conviction for Reckless Driving on sufficiency of the evidence.

Facts: The defendant struck and killed a motorcyclist while driving at noon on a clear day on a straight roadway. The defendant claimed that he did not see the motorcycle and made no statements tending to show inattentiveness, intoxication, or fatigue. The defendant had been driving at a constant speed, two miles over the posted speed limit, and was not swerving. Investigators found no evidence of any distractions in the defendant's car, and there was evidence that the defendant's cell phone was not in use in the moments before the crash.

At trial, the defendant offered an expert to testify about the concept of "situational blindness," which is "the phenomenon of looking somewhere but failing . . . to recognize or notice or process exactly what's there." A jury convicted the defendant of reckless driving.

Held: Reversed. Repeating that, under *Powers,* a conviction for reckless driving cannot be based upon "speculation and conjecture" as to what caused a crash, the Court concluded that "the dearth of evidence establishing recklessness in this case required the fact-finder to improperly speculate as to what caused appellant to strike the motorcycle."

The Court emphasized that "it is incumbent upon the Commonwealth to show that disregard through evidence of appellant's actions." The Court argued that the defendant's failure to stop before he hit the motorcycle established simple negligence, not recklessness.

Judge Russell filed a dissent. While he agreed that a momentary failure to keep a lookout is insufficient to establish the requisite recklessness, in this case he contended that a reasonable fact finder could and did find that the defendant's failure to keep a proper lookout was not partial and momentary, but rather, was total, complete, and lasted for at least ten seconds and for more than one eighth of a mile.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1595194.pdf

Robbery

Virginia Court of Appeals
Unpublished

Winfield v. Commonwealth: February 16, 2021

Dinwiddie: Defendant appeals his convictions for Robbery on sufficiency of the evidence.

Facts: The defendant and his confederate robbed two convenience stores near one another in five hours and in a very similar manner. The defendant's role was as "getaway driver." The defendant drove to the first store and parked at one of the gas pumps farthest away from the store. While the defendant remained in the car and never pumped any gas, his confederate entered the store, robbed it, and fled to the car with the stolen money and items in her hand. On video, the vehicle immediately left at a higher rate of speed than what would be normal.

Hours later, the defendant drove to another store and waited in the car while his confederate entered the store and robbed it. After his confederate sprinted away from the store, witnesses noted that the vehicle "was basically rolling before she got in it." On video, the vehicle away from that "parking lot quicker than when it came in."

The defendant claimed he did not know that his confederate had planned to rob the stores.

Held: Affirmed. The Court agreed that the facts show that the defendant knew what his confederate was doing and had just done. The Court concurred that the defendant's actions were "all indicative of a person who knew what was going to happen and a person who knew how to exit with the primary actor in the robbery in a quick manner and to make a quick escape from each of these two locations." The Court also explained that the defendant's actions show a pattern and a modus operandi.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0626202.pdf

Keith v. Commonwealth: November 17, 2020

Danville: Defendant appeals his convictions for Robbery on sufficiency of the evidence.

Facts: The defendant robbed and murdered two people, shooting and killing them in their car. The defendant had told people that he "was going to get" one of the victims and sought a firearm for that purpose. He killed the victims almost immediately after he entered the victims' car and left the car shortly after he shot the victims. The defendant took jewelry from the male victim and a phone from the female victim. After killing the victims, the defendant told others that he had killed them, and had "done what he had to do." He told someone that he had obtained counterfeit money and a necklace. He told another person that he had to kill one victim because she was "a witness."

The defendant stored the stolen necklaces at another person's apartment and later asked her to get them for him. He also expressed his desire to "clear" the stolen Phone.

The defendant argued that the evidence indicated that any larceny that occurred was an opportunistic afterthought to murders committed for other reasons, and therefore he was not guilty of the robberies.

Held: Affirmed. The Court held that the evidence was sufficient to prove that the defendant had the intent to steal the jewelry and cell phone prior to or during the killings, and thus was guilty of the robberies. The Court found that the defendant's taking of the items themselves, during or shortly after the killings, provided a reasonable inference that he had the intent to steal those items prior to or during the commission of the violence. The Court agreed that the defendant's desire to "clear" the stolen phone indicated that he wanted it for personal use or to resell it. Thus, the Court agreed that the trial court could have reasonably inferred that robbery was, at least in part, the motive for the killings, in contrast with the *Branch* case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1921193.pdf

EVIDENCE

Experts

Virginia Court of Appeals
Published

Kilpatrick v. Commonwealth: May 4, 2021

Bedford: Defendant appeals his conviction for Internet Solicitation of a Minor on denial of Expert Testimony.

Facts: The defendant sexually solicited an undercover officer who was posing as a 13-year-old child on the Internet. At trial, the defendant attempted to offer expert testimony from a forensic psychologist who would have testified that, after conducting a psychological evaluation, he concluded that the defendant was not a pedophile. The defendant sought this testimony to support his argument that he did not believe that the person with whom he engaged in electronic communications was a minor and to show that he lacked a motive to solicit a minor. The defendant assured the trial court that the expert would not offer any opinion on the defendant's mental state at the time he was alleged to have committed the offenses.

The trial court barred this testimony, ruling that it would amount to an expression of an opinion on an ultimate issue of the case and thereby invade the exclusive province of the jury.

Held: Reversed. The Court held that the expert's testimony that the defendant was not a pedophile, while relevant to the ultimate issue of the defendant's mental state at the time of the alleged offenses, did not express an opinion on that issue and would not have invaded the province of the jury. The Court therefore held that the expert should have been permitted to introduce this testimony.

The Court focused on the fact that § 18.2-374.3 expressly conditions a defendant's guilt on his knowledge of the victim's age. The Court speculated that, by using the diagnostic criteria of a pedophile, the expert would have provided information that could have aided the jury's determination of the defendant's claim that he did not believe the officer to be a minor and that he was not motivated to seek minors.

The Court adopted a distinction from the 9th and 11th Circuits: between testimony that expresses an opinion on a defendant's mental state at the time of the offense (which the Court found improper) and testimony that simply has relevance to that issue (which the Court found proper). Thus, the Court reaffirmed that such expert testimony would not be admissible in crimes that involve actual or attempted physical contact with a minor, since a defendant's knowledge of the victim's age need not be shown to prove the defendant's guilt.

Expanding on this distinction, the Court wrote: "When an expert testifies that a defendant is not a pedophile in these kinds of cases, the only conceivable purpose for which he or she would do so is to offer character evidence on behalf of the defendant to prove the defendant acted in conformity with that character trait on a particular occasion—i.e., to prove the defendant likely did not rape, sexually

assault, or sexually batter a minor because the defendant is not a pedophile." The Court then explained: "by holding that profile evidence is admissible where a defendant is charged under Code § 18.2-374.3, this Court does not decide whether profile evidence is admissible when a defendant is charged with sex crimes involving actual or attempted physical contact with a minor, and therefore leaves any contribution to the debate between the majority and minority of state jurisdictions on that question for another day."

In a footnote, the Court pointed to the second sentence of Rule 2:704(b), which states: "This Rule does not require exclusion of otherwise proper expert testimony concerning a witness' or the defendant's mental disorder and the hypothetical effect of that disorder on a person in the witness' or the defendant's situation." The Court explained that, as long as the expert testifying on mental disorders does not directly opine on whether a defendant could have formed the requisite intent or mental state at the time of the offense, the expert may discuss the nature of the disorders and the general effect they could have on hypothetical persons in the defendant's situation.

The Court then reasoned that, if an expert is permitted to testify on the hypothetical effect a "mental disorder" would have on a person in a defendant's circumstances, it logically follows that an expert would likewise be permitted to testify on the inverse: that is, the hypothetical effect that a lack of a particular disorder would have on a person in a defendant's situation. Thus, the Court found that the expert's testimony on the defendant's lack of pedophilia would not just be permissible under the ultimate issue rule, it would actively be encompassed by Rule 2:704(b)'s exception to the rule.

The Court cautioned that an expert may not express an opinion which merely conveys a conclusion concerning a defendant's guilt or innocence, nor may he opine that a defendant did not have the required mental state under § 18.2-374.3 at the time he is alleged to have committed the offenses. However, in this case, the Court found the expert's testimony was relevant to the defendant's entrapment defense, where one question is whether a defendant possesses the predisposition to commit the alleged offense.

Judge Malveaux dissented.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2043193.pdf

Stevens v. Commonwealth: December 1, 2020

Chesterfield: Defendant appeals his convictions for Child Sexual Assault on the admission of Expert Testimony

Facts: The defendant sexually assaulted the victim while the victim was between the ages of four and six. The victim disclosed the abuse as an adult. At trial, the Commonwealth offered a forensic interviewer from the local Child Advocacy Center as an expert witness regarding delayed disclosures of abuse and memory formation. The expert had performed over 300 forensic interviews and had a Bachelor of Science degree with a double major in criminology and sociology. She received specialized training to become a forensic interviewer, including instruction on child development, the "dynamics of

child abuse," and mock forensic interviews. She also passed a licensing examination before obtaining her certification. In addition, during her time as a forensic interviewer, the expert attended other specialized training including conferences and workshops. Finally, she testified that she had been peer-reviewed eight to ten times, a process which involves being observed while performing interviews and receiving constructive criticism. According to the expert, on a weekly basis, she "stay[ed] current in studies involving child sexual abuse" and "how and why people disclose" such abuse.

The trial court qualified her as an expert in the field of child abuse and disclosure. The expert did not interview the victim, nor did she testify specifically about her. Instead, the expert simply gave general testimony about the circumstances faced by child sexual abuse victims and the reasons why they often delay reporting the abuse. The expert indicated that she had experience with and read literature about how children "under the age of seven remember things." She also explained that memories "can get blurred the younger . . . [the children] are" and that when multiple instances of abuse occur, the child victims' "memories tend to crisscross a little bit and get confused as far as details [regarding] when something happened or how many times or things of that nature."

The defendant argued that the Commonwealth's witness was not qualified to testify as an expert. The defendant also argued that the expert's testimony about memory exceeded the scope of her expertise. The trial court overruled the objections.

Held: Affirmed. The Court held that the expert's education, training, knowledge, and experience supported the trial court's ruling that she was qualified to testify as an expert in the areas of child abuse and disclosure. The Court also agreed that the trial court acted within its discretion by allowing her testimony even though the victim was an adult at the time of trial, because the abuse and most of the delay in her reporting occurred when she was a child. The Court also found that the expert's testimony about how young children form memories of abuse was within the scope of her expertise.

The Court concluded that the expert's testimony given was appropriate for the jury's consideration. Although she did not profess to have specialized training in adult disclosures, the Court noted that she testified generally about why children sometimes do not disclose sexual abuse for many years, a matter at issue in this case.

Regarding the expert's testimony on child memory, the court agreed that the issue of memory formation and retention is inextricably linked to a child's disclosure of sexual abuse. Based on her training and experience, the Court also agreed that the expert possessed a degree of knowledge of the subject matters of memory formation and recall by children "beyond that of persons of common intelligence and ordinary experience."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1275192.pdf

Hearsay

Virginia Supreme Court

Logan v. Commonwealth: May 27, 2021

Aff'd Court of Appeals Ruling of 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 defendant argued that because the Commonwealth introduced this statement at trial to prove an element of the crime of violation of a protection order—that he had notice that he was subject to a protective order—the primary purpose of the statement was testimonial. The trial court overruled the objection, and the Court of Appeals affirmed in an *En Banc* ruling.

Held: Affirmed. The Court considered whether a return of service on a preliminary protective order is testimonial evidence and therefore subject to exclusion under the Confrontation Clause of the Sixth Amendment. The Court concluded that the primary purpose of a return of service on a protective order is administrative, in that it performs a record-keeping function, documenting that the ministerial duty of service of process was executed.

In this case, the Court examined the statement at issue, which was the return of service on the extension of a preliminary protective order, including the serving deputy's signature and the time and date of service. The Court emphasized that the relevant inquiry is the primary purpose of a statement when it is made, not at the time of trial. The Court then observed that a reasonable officer would not necessarily expect that the return of service would be used in a later criminal proceeding.

The Court rejected the defendant's argument that the return performed the same function as an affidavit and therefore was testimonial. The Court found that the fact that a statement could later be used in a future prosecution does not thereby render it testimonial or "create an out-of-court substitute for trial testimony."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1201006.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1735181.pdf

Virginia Court of Appeals
Unpublished

Snead v. Commonwealth: May 4, 2021

Lynchburg: Defendant appeals his convictions for Robbery and Burglary on Admission of Co-Conspirator Statements.

Facts: The defendant and his co-conspirator smashed their way into an apartment and robbed the victims at gunpoint. During the robbery, the other perpetrator ordered the victims to give up whatever money and valuables they had and threatened them if they did not comply. The other perpetrator also instructed the defendant to collect the wallets and other valuables from the floor. The victims identified the defendant by name and officers found the defendant's wallet and ID on the ground, outside the apartment.

At trial, the defendant objected to the victim's testimony concerning the other perpetrator's statements. The defendant argued that permitting the victim to recount the statements violated the Confrontation Clause of the Sixth Amendment.

Held: Affirmed. The Court found that the other perpetrator's statements were not testimonial and that the trial court did not violate the defendant's constitutional right to confrontation in admitting them. The Court reasoned that, viewed objectively, the circumstances surrounding the challenged statements demonstrated that the other perpetrator was engaged in a course of criminal conduct. The Court explained that the primary purpose of the statement was not to create an out-of-court substitute for trial testimony; Rather, the statements were made in furtherance of the crimes.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0027203.pdf

Snead v. Commonwealth: February 2, 2021

Halifax: Defendant appeals his convictions for Murder and Child Endangerment on permitting a child to testify and on Sixth Amendment confrontation grounds.

Facts: The defendant beat his own grandfather to death in front of his three-year old child. The child later described the murder to her foster parent, a pastor. The child also described it to her great-aunt, stating: ""my daddy and Poppa were arguing and Daddy hit Poppa in the head with a stick that hit a ball." During a forensic interview, the child told the interviewer: "Daddy hit Poppa with a stick . . . he was hit in the head, that he fell on the ground, that he died and went to heaven, that he melted."

At trial, two experts testified about the child's competency, including Ian Danielson. Based on their testimony and pretrial examination of the child, the trial court found the child to be competent and

permitted the child to testify, over the defendant's objection. The trial court found the child to be mature and "highly competent," noted she had good verbal skills, and was "impressive." It found that the child knew the difference between the truth and lies, knew it was "not okay to tell lies," and could distinguish between "make believe and real."

However, the child did not testify as the prosecution anticipated. She said that her grandfather "just got dead." She said she was not there when that happened and that she was at the store at the time. She said she did not know how he "got dead." However, she also stated that, "my daddy and Meme" told her to say that she was at the store.

Over the defendant's objection, the trial court agreed to permit the pastor, the great aunt, and the forensic interviewer to testify to the child's earlier statements under the so-called "Tender Years" exception, § 19.2-268.3(B)(1).

Held: Affirmed. The Court first refused to overturn the trial court's finding that the child was competent to testify. The Court also refused to find that her inconsistent statements made her incompetent to testify, explaining that inconsistency is not dispositive in assessing a child's mental capacity or competence.

The Court then ruled that the trial court did not deny the defendant his right to confront a witness against him. The Court pointed out that the child's earlier statements were not testimonial, observing that "few small children are speaking with future legal proceedings in mind." The Court also noted that the child did testify and was subject to cross, even though the trial court admitted her prior out-of-court statements after her live testimony had concluded.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1211192.pdf

Impeachment

Virginia Court of Appeals
Published

Nottingham v. Commonwealth: May 25, 2021

Virginia Beach: Defendant appeals his convictions for Rape, Sexual Assault, Malicious Wounding, and related offenses on Jury Instruction and Impeachment issues.

Facts: The defendant sexually assaulted a woman at gunpoint and struck her in the head with the firearm, drawing blood. Police responded and investigated. At the hospital, the SANE examiner noted many external injuries, as well as significant genital injuries, including eight distinct lacerations that the examiner immediately observed upon her examination. The victim described the pain from these injuries as ten out of ten.

At trial, the defendant attempted to introduce a videotape of the victim's statement to police and to the SANE examiner as impeachment evidence to demonstrate the difference between the victim's demeanor at trial, where she was upset and crying, and her alleged "prior inconsistent demeanor" during the interview. The defendant claimed that the victim, on video, was laughing and appeared relaxed, which reflected a "prior inconsistent demeanor" compared to her affect at trial when she "became quite emotional during her testimony." Although the court excluded the videotape, it permitted the defendant to question the officer concerning the victim's demeanor during the interview and, in closing argument, to contrast it with her demeanor on the witness stand. The officer testified that during the interview, the victim appeared "calm," did not cry, and in fact "laughed a couple of times."

At trial, the Commonwealth requested a jury instruction on *Fisher v. Commonwealth*, 228 Va. 296 (1984), that "[a] rape conviction may be sustained solely upon the testimony of the victim. There is no requirement of corroboration." The trial court granted the instruction over the defendant's objection.

Held: Affirmed. The Court first held that the court did not abuse its discretion in granting the jury instruction, as it was an accurate statement of the law. The Court repeated that an instruction that refers to specific evidence does not automatically amount to an improper emphasis, as long as the instruction does not suggest that the specific evidence compels a particular finding. Because the instruction correctly stated the law applicable to this issue and was supported by the evidence, the Court ruled that the trial court did not err in granting the instruction.

Regarding the video, the Court ruled that the court did not abuse its discretion in excluding the victim's videotaped interview and instead allowing the detective to testify about the victim's demeanor. The Court noted that the video included footage of the victim interacting with the SANE nurse and talking on her cell phone and pointed out that the defendant had made no effort to redact irrelevant or inadmissible hearsay material from the recording. The Court observed that the trial court's ruling enabled the defendant to present evidence of the victim's prior demeanor to the jury while preventing admission of other inadmissible evidence included within the full videotape.

In a footnote, the Court specifically noted that it was not addressing whether the evidence of a witness' "prior inconsistent demeanor" is inadmissible under Virginia Rule of Evidence 2:608(b)(1), which precludes introduction of "specific instances of the conduct of a witness . . . to attack or support credibility."

http://www.courts.state.va.us/opinions/opncavwp/0340201.pdf

Warnick v. Commonwealth: July 2, 2020
72 Va. App. 251, 844 S.E.2d 414
Loudoun: Defendant appeals his conviction for Murder and Robbery on Denial of Evidence of Third-Party Guilt, Admitting Evidence Explaining Prior Inconsistent Statements, Admission of a Third-Party Statement Against Penal Interest, and Delay of Trial.

Facts: In 1988, the defendant beat a man to death. The Commonwealth indicted the defendant for that offense in 2018. The defendant asked that the trial court dismiss the indictment due to the delay, but the trial court denied the motion.

At trial, defense counsel questioned a witness about a different inconsistent statement she had given. She responded, "Again, ma'am, I changed my story multiple times. I am petrified of this man. Okay? You don't know what this man has put people through. I seen [sic] this man throw people in the river, rape women." The defendant asked for a mistrial, but the trial court denied the motion. The trial court offered a curative instruction, but the defendant declined.

A third-party witness testified that she heard from a man that the defendant told the man that the defendant had killed the victim in order to obtain the victim's money and drugs. The original listener who heard the defendant make this statement died before trial. The trial court ruled that this statement, testified to by the third-party witness, was admissible as a "statement against interest" under Rule 2:804(b)(3)(B).

The defendant attempted to introduce testimony from a witness that another man confessed to killing the victim because he was paid by someone to do so. Both the alleged other killer and the person who allegedly paid for the murder died before trial. The trial court excluded that evidence.

Held: Affirmed. The Court ruled that the 28-year pre-indictment delay did not violate the defendant's Due Process rights. The Court complained that the defendant failed to satisfy his burden to show both actual prejudice and the Commonwealth's intentional delay for an improper purpose. Although the defendant mentioned thirteen relevant witnesses who died because of the delay, the Court explained that he failed to state with any specificity what information these witnesses possessed that would have been helpful to his case. Additionally, there was no evidence that the delay was intentional on the part of the Commonwealth to obtain a tactical advantage. In fact, the Court found that the record reflected that the only reason for any delay was a lack of evidence because witnesses initially refused to testify because of their fear of the defendant.

Regarding the witness' explanation for her inconsistent statements, the Court pointed out that under Rule 2:613(a)(ii), a witness must "first [be] given an opportunity to explain or deny" a prior inconsistent oral statement before extrinsic evidence of such statement can be admitted. In this case, the Court concluded that the witness' testimony was not admissible for its truth, but simply as an explanation of why her statements were inconsistent. Therefore, the Court found that the trial court did not err in admitting her statements for this purpose.

Regarding the third-party witness's statement that the defendant committed the murder, the Court agreed that the statement was inadmissible. The Court acknowledged that the defendant's own statement, confessing to the murder, fell under the "party-opponent" exception under Rule 2:803(0). However, the listener's statement to the third-party witness was an additional level of hearsay. Even though the listener apparently feared that police would think he was involved in the murder, the statement at issue did not implicate any criminal liability on the listener's part. Thus, the statement at issue, that the defendant was the person who killed the victim, only involved the defendant's penal interest and not the listener's. Nevertheless, the Court found that the error was harmless.

Regarding the defendant's proffered evidence of third-party guilt, the Court ruled that the defendant did not satisfy the standard set forth in *Ellison*. The Court concluded that the reliability

requirement was not satisfied because the only evidence the defendant presented to connect the supposed third-party to the crime besides his bare confession was his presence at a party in which about forty people were present. The Court complained that there was no evidence that the supposed third-party interacted with the victim on the night of the murder. Further, the statement itself lacked detail about the facts of the murder, such as the method, means, date, and surrounding circumstances that might suggest that it is reliable.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0616194.pdf

Prior Bad Acts

Virginia Supreme Court

Kenner v. Commonwealth: February 25, 2021
Aff'd Court of Appeals Ruling of December 3, 2019
Northampton: 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.

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. The Court of Appeals affirmed.

Held: Affirmed. Regarding the admission of child pornography, the Court ruled that the evidence was relevant to show the defendant's conduct or attitude towards the victim, motive, method, and intent. The Court agreed that the Commonwealth's evidence of the child pornography titles was relevant to show the defendant's attitude and conduct towards the victim, to prove motive or method

of committing the sexual assault and served to prove elements of the offense. The Court repeated that: "The Commonwealth cannot have its evidence barred or "sanitized" simply because the defendant takes the position that the offense did not occur and therefore intent is not genuinely in dispute.

The Virginia Supreme Court reiterated that the Commonwealth is required to prove every element of its case and is entitled to do so by presenting relevant evidence in support of the offense charged. The Court of Appeals, in its ruling, had specifically expressed concerns about its ruling in *Blaylock*, where it 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. The Virginia Supreme Court, in a footnote, essentially overruled that part of the *Blaylock* decision.

Regarding the refusal to poll the jury, the Court held that in a bifurcated trial, for purposes of determining the timeliness of a request to poll the jury, the guilt phase is a separate proceeding that ends when the jury returns its verdict of guilt or innocence. At the point during trial where the punishment phase has begun, the Court concluded that a motion to poll the jury as to its guilty verdict generally comes too late. Construing the language in Rule 3A:17, the Court explained that a request to poll the jury should occur directly after the verdict for which counsel wants the jury to be polled.

In this case, the Court specifically expressed concern that "Having heard the potential sentencing ranges for Kenner, the Commonwealth could have been prejudiced if the jury were permitted to answer a poll relating to the guilt phase."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1200027.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0934181.pdf

Miscellaneous Evidentiary Issues

Virginia Court of Appeals
Unpublished

Addison v. Commonwealth: March 16, 2021

Richmond: Defendant appeals his conviction for Murder on sufficiency of the evidence.

Facts: The defendant murdered a man at the victim's home. A nearby video camera captured the defendant's car, which had been at the victim's home and sped away just after the murder. The defendant later admitted that the car belonged to him and that he was the only person who drove it. The video did not capture the murder itself and could not in itself identify the persons shown. The defendant called a coworker minutes after the murder to say the victim was dead. Cellphone records show that while the defendant's cell phone was in the vicinity of the murder location. The defendant

stopped using his phone after the day of the murder. Soon thereafter, he parked his car being in an alley behind his stepfather's residence.

After his arrest, the defendant told police that "you reach out your hand and you get in other people's stuff, in other people's bullshit, and this is what happens." However, the defendant also told an investigator he had not been at the victim's apartment on the night of the murder.

Held: Affirmed. The Court ruled that, because the circumstantial evidence was sufficient to establish beyond a reasonable doubt that the defendant was the person who killed the victim, the trial court did not err in finding him guilty. The Court explained that the fact finder could conclude the defendant lied when he told an investigator he had not been at the apartment on the night of the murder. The Court repeated that a trial court may conclude, regarding even a non-testifying defendant, that his false statements establish that he has lied to conceal his guilt.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0020202.pdf

Carter v. Commonwealth: March 2, 2021

Spotsylvania: Defendant appeals his conviction for Petit Larceny, 3rd or subsequent offense, arguing the Court lacked the authority to convict him.

Facts: The defendant faced a charge of Petit Larceny, 3rd offense. The defendant requested that the trial court accept a plea agreement and defer his disposition under a plea agreement that provided the defendant with the opportunity to have his felony charge reduced to a misdemeanor and to serve no period of active incarceration. The trial court accepted the agreement. The defendant, however, quickly violated the terms of the plea agreement the next month by committing new offenses and later absconded for approximately three years.

After his re-arrest, the defendant argued that the trial court never had the authority to accept the plea agreement and defer the disposition in the first place. The trial court rejected his argument.

Held: Affirmed. The Court explained "Even assuming without deciding that the trial court lacked the authority to defer the disposition, Carter is not permitted to take advantage of an alleged error he so clearly invited."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1789192.pdf

MISCELLANEOUS

Attorney Discipline

Virginia Supreme Court

Baumann v. Virginia State Bar: July 30, 2020
845 S.E.2d 528
Richmond: An attorney appeals his discipline by the Virginia State Bar on Due Process grounds.

Facts: An attorney charged a "non-refundable" fee of $7,500 to review a trust, return some personal property, and resolve an accounting dispute. He reviewed the trust, facilitated the return of the property, but never resolved the accounting dispute. The clients hired a new attorney who discovered that there was no accounting issue at all and resolved the problem with a single phone call. The clients filed a Bar complaint.

The Virginia State Bar charged the attorney with misconduct. The Bar informed the attorney that private discipline was available if he agreed to resolve the matter within 21 days. The Bar explained that the matter would be placed on its public hearing docket after that time period expired, and that any subsequent discipline would be a matter of public record. The attorney contested the charge of misconduct. Although the Bar offered a private reprimand to the attorney, he refused to stipulate to certain facts. Therefore, the Bar pursued the matter at a public hearing. After finding that the attorney had violated several rules, the Bar imposed a public admonition with terms that required the attorney to return $5,000 to the client and complete an additional eight hours of continuing legal education in ethics.

The attorney appealed. Among his arguments, the attorney complained that that private discipline is only available when an attorney agrees to receive a reprimand or admonition before his or her disciplinary matter is placed on the Board's public hearing docket. The attorney noted that an attorney cannot receive private discipline if he or she elects to contest a charge of misconduct. Thus, the attorney contended that the disciplinary system violates due process because it impermissibly discourages attorneys from contesting charges of misconduct.

Held: Affirmed. The Court concluded that the challenged provisions of the disciplinary system are not unconstitutional. Regarding the attorney's due process claim, the Court agreed that, although due process rights are more limited in civil proceedings that are brought to discipline an attorney, attorneys facing disbarment are "entitled to procedural due process, which includes fair notice of the charge" of misconduct asserted against them. However, the Court found that an attorney has no constitutional due process rights to receive private discipline. The Court concluded that "the disciplinary rules at issue do not needlessly chill the exercise of any constitutional right; rather, they promote legitimate policy interests and strengthen the integrity of the legal profession."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1191723.pdf

Extraordinary Writs

Virginia Supreme Court

McClary v. Jenkins: October 22, 2020

Culpeper: Plaintiffs appeal the dismissal of their taxpayer lawsuit against a Sheriff and locality regarding the enforcement of federal immigration laws.

Facts: A Sheriff entered into an agreement with DHS, pursuant to 8 U.S.C. § 1357(g) (a "287(g) Agreement"), that authorized the department to interrogate any person they detain about the person's right to be or remain in the United States, to serve warrants for immigration violations, to administer oaths and take evidence to complete alien processing, to prepare charging documents, to issue immigration detainers, and to detain and transport arrested aliens who are subject to removal to an ICE-approved detention facility.

Local taxpayers filed a lawsuit for declaratory and injunctive relief against the Sheriff and the locality concerning the Sheriff's cooperation agreement with the federal government regarding the enforcement of federal immigration laws. The trial court granted the Sheriff's and the locality's demurrers.

Held: Affirmed. The Court held that the plaintiffs lacked standing to file this action. The Court repeated that local taxpayers have the common law right "to challenge the legality of expenditures by local governments." However, in this case, the Court complained that the plaintiff's "bare" and "vague, speculative, and conclusory" allegations that the locality appropriated funds to the Sheriff generally, and that some of those funds contributed in some nonspecific and undifferentiated amount in assisting the Sheriff in his execution of the 287(g) Agreement, were not sufficient to establish local taxpayer standing.

The Court agreed that local taxpayers have an interest in the application of their revenue and have the common law right to challenge expenditures. However, in this case, the Court noted that the plaintiffs had not identified, with sufficient specificity, any additional expenditures, costs, or appropriations by the local government that would give rise to local taxpayer standing in this instance. Thus, in the Court's view, the plaintiffs had "merely identified a policy they disagree with and stated that any expenditures related to that policy were unlawful."

In a footnote, the Court explained that it had assumed without deciding that it is possible for a taxpayer to maintain an action against a sheriff based solely upon local taxpayer standing. However, in the footnote, the Court noted that Constitutional officers are not agents of nor are they subordinate to the local government.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1191132.pdf

Innocence Petitions

Virginia Court of Appeals
Published

Johnson v. Commonwealth: December 1, 2020

Dinwiddie: Defendant seeks a Writ of Actual Innocence regarding an incorrect VCC Code on an Indictment.

Facts: The defendant robbed a bank. He pled guilty to the offense, but later attempted to withdraw his guilty plea, pointing to a discrepancy between the Virginia Crime Code (VCC) on his arrest warrant and the VCC on the indictment the grand jury returned. He argued that the indictment was invalid and that he was never arraigned on the indictment. The trial court denied his motion.

On appeal, the defendant complained about a clerical error in the conviction order, which stated that the crime of conviction was "Robbery: residence" although the indictment included the VCC for a bank robbery. The Court of Appeals rejected his argument on appeal, ruling that that the failure to include the VCC or any mistake in the VCC does not render an indictment invalid as a matter of law.

The defendant sought a writ of actual innocence on the same grounds.

Held: Writ dismissed. The Court ruled that the defendant is not eligible for the writ of actual innocence because the evidence upon which he relies was available to him before his conviction became final in the circuit court, pursuant to § 19.2-327.11(a)(iv).

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0930202.pdf

Police Use of Force & Liability

U.S. Supreme Court

Torres v. Madrid: March 25, 2021
592 U.S. ___
Certiorari to the 10th Circuit Court of Appeals: Plaintiff appeals the dismissal of her lawsuit against law enforcement on Fourth Amendment grounds.

Facts: Officers, while executing an arrest warrant, approached the plaintiff and attempted to speak with her. The plaintiff escaped into her car and drove away at a high rate of speed. The officers fired at her, striking her twice. She escaped, stole another car, and drove to a hospital 75 miles away,

only to be airlifted back to a hospital in the city where she started, where the police arrested her the next day.

After pleading no contest to eluding, assault on law enforcement, and auto theft, the plaintiff sought damages from the officers under 42 U. S. C. §1983. She claimed that the officers used excessive force against her and that the shooting constituted an unreasonable seizure under the Fourth Amendment. Affirming the District Court's grant of summary judgment to the officers, the Tenth Circuit held that "a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim." The Tenth Circuit's rejected the argument that a "mere touch" constitutes a Fourth Amendment "seizure."

Held: Reversed. In a 5-3 ruling, the Court concluded that the officers seized the plaintiff for the instant that the bullets struck her. The Court relied heavily on its ruling in *Hodari D*, but also examined English common law, referring back to a 1605 Star Chamber case involving the Countess of Rutland, where "the serjeants-at-mace announced the arrest at the time they touched the countess with the mace."

The Court cautioned that the application of the common law rule does not transform every physical contact between a government employee and a member of the public into a Fourth Amendment seizure. The Court noted that a seizure requires the use of force with intent to restrain; Accidental force will not qualify. Instead, the Court explained that the appropriate inquiry is whether the challenged conduct objectively manifests an intent to restrain. The Court wrote: "While a mere touch can be enough for a seizure, the amount of force remains pertinent in assessing the objective intent to restrain. A tap on the shoulder to get one's attention will rarely exhibit such an intent."

The Court also clarified that a seizure by force—absent submission—lasts only as long as the application of force. "The Fourth Amendment does not recognize any "continuing arrest during the period of fugitivity." Thus, for the Court, "the fleeting nature of some seizures by force undoubtedly may inform what damages a civil plaintiff may recover, and what evidence a criminal defendant may exclude from trial."

Justice Gorsuch wrote a dissent, complaining that the Court had eliminated the distinction between seizures by control and seizures by force. He contended: "A mere touch may be a battery. It may even be part of an attempted seizure. But the Fourth Amendment's text, its history, and our precedent all confirm that "seizing" something doesn't mean touching it; it means taking possession."

Full Case At:
https://www.supremecourt.gov/opinions/20pdf/19-292_21p3.pdf

Fourth Circuit Court of Appeals

Wingate v. Fulford: February 4, 2021

E.D.Va.: Plaintiff appeals the dismissal of his lawsuit, filed on Fourth Amendment grounds.

Facts: An officer stopped to assist the plaintiff, whose car was stopped on the side of the road. The plaintiff stated that his car was disabled. The officer noticed that the plaintiff was dressed in all black, that his car was running, and that he was parked in an area where there had been several larcenies from vehicles. He demanded that the plaintiff provide identification, citing Stafford County Ordinance § 17–7(c), which makes it a crime "for any person at a public place or place open to the public to refuse to identify himself . . . at the request of a uniformed law-enforcement officer . . . if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification."

The plaintiff refused to provide ID. Another officer arrived and the two officers arrested the plaintiff. The prosecutor later dropped the charge of Failure to ID. The plaintiff sued the officers for violation of his Fourth Amendment rights under 42 U.S.C. § 1983 and for False Arrest and Malicious Prosecution. The district court granted summary judgment against the plaintiff.

Held: Reversed, in part, Affirmed in part. The Court first found that the officer lacked reasonable suspicion to arrest the plaintiff, finding that the officer's initial stop was not justified at its inception. The Court also found that "Qualified Immunity" did not protect the officer from liability for his unlawful stop because a reasonable officer would be on notice that suspicion of criminal activity must arise from conduct that is more suggestive of criminal involvement than the plaintiff's conduct.

The Court then specifically held that the Stafford County ordinance is unconstitutional when applied outside the context of a valid investigatory stop. The Court repeated that "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop."

However, the Court agreed that "Qualified Immunity" did protect the officers regarding their enforcement of the Stafford County ordinance, given that it was presumed to be lawful and, until now, no federal court had prescribed the constitutional limits of § 17–7(c)'s application. The Court observed that a reasonable officer could have inferred—albeit incorrectly—that *Terry's* requirements did not apply to stop and identify statutes rooted in public safety rather than crime prevention. Thus, the Court found that the officers were also entitled to a good faith defense to the plaintiff's false arrest and malicious prosecution claims under Virginia law.

Having ruled that the officer conducted an unconstitutional investigatory stop, the Court reversed and remanded for further proceedings on that one claim.

Full Case At:
https://www.ca4.uscourts.gov/opinions/191700.P.pdf

Dean v. Jones: January 3, 2021

E.D.N.C.: An inmate appeals the dismissal of his lawsuit against guards on Eighth Amendment grounds.

Facts: The plaintiff, an inmate, claims that, after he head-butted an officer escorting him to a cell, the officer retaliated by pepper-spraying his face while he was subdued and lying on his back in

handcuffs. The plaintiff also claims that, after he head-butted an officer again, a second officer responded by pushing the plaintiff into a closet where multiple officers kicked and punched him while he lay on the ground with his hands cuffed behind him. The officers dispute his version of events.

The plaintiff sued, alleging excessive force under the Eighth Amendment, but the district court granted summary judgment to the officers. The district court concluded that, even if the plaintiff was handcuffed and prone when the officers pepper-sprayed or beat him, a reasonable jury would have to conclude that both uses of force were necessary to protect officer safety and proportionate to the threat posed by the plaintiff.

Held: Reversed. The Court found that a reasonable jury crediting the plaintiff's account could find that the officers used force to retaliate against the plaintiff and not to protect themselves.

The Court examined the facts that the plaintiff alleged under the factors that the Supreme Court set forth in *Whitley v. Albers.* The Court emphasized that an Eighth Amendment excessive force inquiry turns on motive. In this case, the issue is whether the officers used force in good faith to protect officer safety, as they contend, or whether, as the plaintiff avers, they used force maliciously to punish him for his violent assaults. The Court cautioned that officers "cross the line into an impermissible motive when they inflict pain not to protect safety or prison discipline but to punish or retaliate against an inmate for his prior conduct." The Court also repeated that the use of force on an inmate who is "restrained and compliant and posing no physical threat" raises the specter of such an impermissible motive.

The Court also rejected the officers' reliance on qualified immunity, finding that it was "clearly established" that inmates have a right to be free from pain inflicted maliciously and to cause harm, rather than in a good-faith effort to protect officer safety or prison order.

Full Case At:
https://www.ca4.uscourts.gov/opinions/187227.P.pdf

Barrett v. PAE: September 15, 2020
975 F.3d 416
E.D.Va.: Plaintiff appeals the dismissal of her lawsuit against police on Fourth Amendment and False Imprisonment grounds.

Facts: After returning from several years working as a contractor in Afghanistan, the plaintiff believed that she was being stalked and harassed by Southeast Asian men, who were reporting back to a a Dubai-based network on their cell phones, and that she had taken steps to identify her stalkers and their location in the United States. She believed that one of her stalkers had "successfully breached" her office and that another was watching her just outside her office. She took various measures to attempt to expose or stop her stalkers but complained that no one believed her.

Concerned that 10 to 15 percent of their employees could fit the description of the alleged stalkers, the plaintiff's employer contacted the police for assistance. Officer interviewed the plaintiff, who stated that she owned a firearm, that she had recently taken a firearms course to obtain her concealed weapons permit, and that she hoped she would have the courage to defend herself if

necessary. She also stated that she took her cell phone (which she believed was being tracked) with her to the handgun range so that her stalkers would know she was there. The plaintiff also stated that there was no legal means to deal with her stalkers and, although she made no direct threat to kill her stalkers, she made several references to killing such "uncivilized" Middle Eastern men, and that she hoped she would be able to defend herself if necessary.

Police sought an emergency custody order ("ECO") for an involuntary mental health evaluation. The Virginia Department of Health Services determined that there was probable cause to believe that the plaintiff was suffering from Post-Traumatic Stress Disorder ("PTSD"), and possibly a delusional disorder, and that she posed a genuine danger to herself and others. A magistrate issued a TDO.

The plaintiff filed a complaint under 42 U.S.C. § 1983 against the police and other for unlawful seizure under the Fourth Amendment. She also claimed that the police and others conspired to falsely imprison her and violate her civil rights under Virginia law. The district court dismissed the lawsuit on summary judgment on qualified immunity grounds.

Held: Affirmed. Because the undisputed evidence established that the police had probable cause to detain the plaintiff, the Court agreed that qualified immunity barred her § 1983 claim under the first prong of the "qualified immunity" test, and summary judgment was properly awarded. The Court also noted that, even if it assumed that probable cause was lacking, the defendants were entitled to qualified immunity under the second prong because "the unlawfulness of their conduct was [not] clearly established at the time" the decision was made.

The Court pointed out that the officers interviewed the plaintiff extensively and relied upon numerous statements from the plaintiff's coworkers. The Court distinguished this case from *Bailey*, where the officers had relied on a single piece of evidence and took a person into custody without any independent basis for concluding that she posed a genuine danger of harming herself and others.

The Court also rejected the plaintiff's Virginia claim for False Imprisonment, pointing out that if the plaintiff's arrest was lawful, the plaintiff cannot prevail on a claim of false imprisonment. In this case, the Court concluded that the officers had probable cause to believe that the plaintiff posed a threat to herself and others and lawfully detained her for an emergency mental health examination

Under the facts, the Court expressed concern that "a decision had to be made, and the officers made the reasonable, albeit difficult, judgment call that Plaintiff posed a danger to herself and others and should be transported to the hospital for a mental health evaluation…. Officers should not be faulted for taking action against what they reasonably perceived to be a genuine danger to the Plaintiff and others at the time."

Full Case At:
https://www.ca4.uscourts.gov/opinions/191394.P.pdf

Jones v. Martinsburg: June 9, 2020
961 F.3d 661
N.D.W.Va: Plaintiff appeals the dismissal of his lawsuit on Fourth Amendment grounds.

Facts: Police observed the plaintiff while he was walking in the road next to the sidewalk. An officer approached him and asked for identification, but the plaintiff, who was homeless, did not have any. He asked if the plaintiff had a weapon, to which the plaintiff responded by asking what a weapon is. When told that "weapon" includes a knife, the plaintiff admitted he had "something." Rather than follow the officer's command to put his hands on the vehicle, the plaintiff continued to ask what he had done wrong. An officer used a taser on the plaintiff, but the plaintiff fled on foot, cornering himself in a stoop. Officers then put the plaintiff on the ground, kicking him repeatedly and placing him in a "choke hold."

During the struggle, the defendant stabbed an officer with a knife. The officer whom the defendant stabbed called out to the other four officers to retreat, and the officers retreated. They commanded the plaintiff to drop the knife and then, after he refused to drop the knife, the officers shot him repeatedly. The plaintiff died. The officers searched the plaintiff and found a small fixed-blade knife, tucked into his right sleeve.

The plaintiff's estate sued the officers and their city on Fourth Amendment grounds. The city had a use of force policy under which incidents of physical force must be necessary, objectively reasonable, and proportionate. The plaintiff argued that, under *Monell,* the five officers simultaneously violated this policy, and therefore the City's training must have been deficient.

The district court dismissed the case with prejudice, and the plaintiff appealed.

Held: Affirmed in part, reversed in part, and remanded. The Court first ruled that the district court erred by holding that the officers are protected by qualified immunity. The Court noted that, at the time of this incident, it was clearly established that law enforcement may not constitutionally use force against a secured, incapacitated person—let alone use deadly force against that person.

Describing the defendant's initial flight from the officer, the Court wrote: "What we see is a scared man who is confused about what he did wrong, and an officer that does nothing to alleviate that man's fears." Regarding the shooting itself, the Court wrote: "viewing the evidence in the light most favorable to the Estate, Jones was not even wielding the knife when the officers shot him; it was pinned under the right side of his body, which was on the ground, and tucked into his sleeve."

The Court agreed with the district court, though, in dismissing the *Monell* claim against the city. The court repeated that, for a municipality to be liable under § 1983 for failing to properly train police, the failure to train must amount to deliberate indifference to the rights of persons with whom the police come into contact." The Court noted that the plaintiff had not shown deliberate indifference to the need for better or different training on the use of force. *Monell's* deliberate indifference standard requires that a municipality either knew or should have known about the deficiency, so it could remedy that deficiency. In this case, the Court pointed out that the City apparently understood that it needed a use-of-force policy to avoid the risk of likely constitutional violations, and it had one.

The Court concluded by writing: "Wayne Jones was killed just over one year before the Ferguson, Missouri shooting of Michael Brown would once again draw national scrutiny to police shootings of black people in the United States. Seven years later, we are asked to decide whether it was clearly established that five officers could not shoot a man 22 times as he lay motionless on the ground. Although we recognize that our police officers are often asked to make split- second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this

opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop. To award qualified immunity at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept."

Full Case At:
https://www.ca4.uscourts.gov/opinions/182142.P.pdf

Prosecutor Liability

Fourth Circuit Court of Appeals

Annappareddy v. Pascale, et. al.: April 26, 2021

Baltimore: Prosecutor appeals refusal to dismiss a lawsuit against her on Prosecutorial Immunity grounds.

Facts: The plaintiff had been a defendant in Federal Court, where the government prosecuted him for Medicaid fraud. A district court ultimately dismissed the charges against him, finding that the government had used flawed analyses of the pharmacies' inventory and billing practices to convict him at trial, and then destroyed relevant evidence while a motion for retrial was pending.

The plaintiff then filed a wide-ranging complaint in federal court, seeking compensatory and punitive damages from multiple defendants. The plaintiff claimed that state and federal investigators and prosecutors, working together, violated his rights under Maryland state law. In particular, he sued a prosecutor in charge of the criminal case, an Assistant Attorney General who had prosecuted the case as a Special Assistant U.S. Attorney, for intentional infliction of emotional distress, violations of his state constitutional right to due process, and civil conspiracy. The plaintiff claimed that the prosecutor participated in the fabrication of evidence that was used at trial to convict him. He also claimed that, in concert with other defendants, the prosecutor destroyed three boxes of exculpatory documents.

The district court allowed the state law claims to proceed against the prosecutor, rejecting her argument that absolute prosecutorial immunity shielded her from allegations that she had fabricated inculpatory evidence and destroyed exculpatory evidence.

Held: Reversed. The Court concluded that absolute prosecutorial immunity bars the claims against the prosecutor and that the state-law charges against her must be dismissed.

Regarding the claim that the prosecutor "fabricated" evidence, the Court noted that the alleged evidence fabrication was undertaken in her "advocative" capacity, in preparation for the trial that was about to begin, and not as an "investigator" seeking probable cause for an arrest or indictment. Thus, because she was acting in her role as advocate when she allegedly fabricated evidence for use at trial, she was shielded by absolute prosecutorial immunity.

Regarding the claim that the prosecutor destroyed evidence, that Court also held that this claim goes to actions taken in an "advocative" capacity and is therefore barred by absolute prosecutorial immunity. The Court repeated that, under *Imbler,* prosecutors are shielded by absolute immunity from claims that they deliberately withheld materially exculpatory evidence at any point in a criminal proceeding. The Court reasoned that, in deciding whether to preserve the evidence or allow its destruction, the primary consideration is whether the prosecutor needs the evidence to prosecute – a decision that "goes to the heart of the advocate's role 'in initiating a prosecution and in presenting the State's case.'"

The Court rejected the plaintiff's argument that, although the failure to disclose exculpatory evidence is advocative in nature and thus protected by absolute immunity, the destruction of exculpatory evidence is not. The Court also rejected the plaintiff's analogy to *Yarris*, a 2006 3rd Circuit case, noting that, unlike in *Yarris,* the destroyed materials were properly disclosed prior to trial, though neither the government nor the defense made use of them. The Court also pointed out that, unlike *Yarris,* the plaintiff here did not allege that at the time of the destruction, the defendants already had made some independent decision not to disclose the documents in the future.

Full Case At:
https://www.ca4.uscourts.gov/opinions/192285.P.pdf

Removal Petitions

Virginia Supreme Court

Townes v. Virginia Board of Elections: June 18, 2020
843 S.E.2d 737
Hopewell: Defendants appeal their removal pursuant to a Removal Petition.

Facts: The Virginia State Board of Elections ("VSBE") filed a petition to remove the defendants from their city's board of elections. The Petition alleged numerous VFOIA violations, alleging that the defendants "repeatedly failed to follow [VFOIA] open meeting requirements." The petition also complained that ballot proofs did not display candidate names in a uniform manner and when selecting a new General Registrar, there was "no vote in open session . . . which is required under [VFOIA]." Information about these violations were also contained in 138 pages of exhibits attached to the petition.

Pursuant to § 24.2-237, the Commonwealth Attorney initially represented the Commonwealth. The Commonwealth sought the assistance of the Attorney General's office, who litigated the case for the Commonwealth.

Prior to trial, the Commonwealth moved in limine to exclude the training provided by the VSBE and the "policies and procedures developed or implemented by" VSBE "regarding supervision and training of local election officials in response to a governmental audit completed by the Joint Legislative Audit and Review Commission" ("JLARC Report"). The defendants argued that the VSBE "didn't train them on how to carry out their job, but they're being removed for failing to meet" their duties. The trial

court excluded that evidence. The trial court also granted the Commonwealth's motion in limine to exclude evidence of the board members' party affiliation.

At trial, the Commonwealth introduced evidence including: more than three meetings that did not comply with VFOIA; evidence of meeting agendas that were not made available for public inspection; and evidence of meeting minutes not being created or posted on Hopewell's website. The defendants contended that introducing evidence regarding the meeting agendas and minutes exceeded the allegations in the petition, but the trial court overruled their objection.

The Commonwealth argued that the burden of proof at trial was "preponderance of the evidence." The defendants argued that the burden was "clear and convincing evidence." The trial court agreed with the Commonwealth and instructed the jury using "preponderance of the evidence."

The jury found that both defendants "either neglected or misused [their] office or [were] incompetent in the performance of [their] duties" and "that the neglect of duty, misuse of office, or incompetence in the performance of duties . . . did have a material adverse effect upon the conduct of the office of the Hopewell Electoral Board." Pursuant to the jury's verdict, the circuit court ordered the defendants' removal from the City Electoral Board.

Held: Reversed. The Court ruled that the trial court erred by setting the burden of proof as a preponderance of the evidence. Because removal proceedings are quasi-criminal in nature due to the high penalty they impose on a removed official, the Court explained that, under *Malbon*, the correct burden of proof is clear and convincing evidence.

The Court ruled, however, that the trial court did not abuse its discretion by permitting the presentation of evidence showing the lack of meeting agendas and minutes in addition to the meetings which were held without proper notice. The Court found that the allegations in the petition "clearly inform[ed]" the defendants that the VSBE intended to introduce at least three occasions, if not more, on which the defendants failed to properly notice meetings in compliance with VFOIA.

The Court also ruled that the trial court erred by excluding any reference to VSBE's alleged failure to adequately train the defendants, because evidence of their training, or lack thereof, was relevant to their defense. Regarding the JLARC report, the Court noted that JLARC made recommendations concerning VSBE's training for and supervision of Virginia's local electoral boards. In their report, JLARC outlined the circumstances under which the defendants were working and whether VSBE provided them with proper training. Consequently, the Court found that the JLARC Report was relevant to the jury's determination whether the defendants acted reasonably under the circumstances.

The Court agreed, however, that evidence of the board members' political party affiliation was highly prejudicial and was not probative of any claim or defense since political party affiliation had no bearing on whether the defendants violated their oaths of office.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1190834.pdf

State of Emergency

U.S. Supreme Court

Roman Catholic Diocese of Brooklyn v. Cuomo: November 26, 2020

New York: Plaintiffs seek an injunction against COVID-related restrictions on First Amendment grounds.

Facts: In response to the COVID-19 pandemic, New York imposed severe restrictions on attendance at religious services in areas classified as "red" or "orange" zones. In red zones, no more than 10 persons may attend each religious service, and in orange zones, attendance is capped at 25. The plaintiffs, the Roman Catholic Diocese of Brooklyn and Agudath Israel of America, sought an injunction, contending that these restrictions violate the Free Exercise Clause of the First Amendment.

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. In an orange zone, attendance at houses of worship is limited to 25 persons, but again, non-essential businesses may also decide for themselves how many persons to admit. The list of "essential" businesses includes acupuncture facilities, camp grounds, garages, hardware stores, acupuncturists, liquor stores, bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents.

The District Court and the Second Circuit Court of Appeals refused to issue a preliminary injunction.

Held: Reversed, Temporary Injunction Granted. In a 5-4 ruling, the Court ordered that New York is enjoined from enforcing its 10- and 25-person occupancy limits on the plaintiffs pending disposition of the lawsuit. In a *per curiam* opinion, the Court concluded that the plaintiffs had shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest.

The Court found that the challenged restrictions violate "the minimum requirement of neutrality" to religion because they single out houses of worship for especially harsh treatment. Because the challenged restrictions are not "neutral" and of "general applicability," the Court explained that they must satisfy "strict scrutiny," and this means that they must be narrowly tailored to serve a compelling state interest. The Court acknowledged that stemming the spread of COVID–19 is unquestionably a compelling interest, but found that the religious rules were not "narrowly tailored."

The Court wrote: "Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten."

Justice Gorsuch and Justice Kavanaugh both wrote concurring opinions. Chief Justice Roberts and Justices Breyer and Sotomayor wrote dissenting opinions. Justice Kagan joined Justice Breyer's dissent.

Full Case At:
https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf