COMMONWEALTH'S ATTORNEYS' SERVICES COUNCIL
Training Virginia's Prosecutors for the 21st Century

Court of Appeals Update For Law Enforcement

2020-2021
Commonwealth's Attorneys' Services Council

This Presentation is Only an *OVERVIEW*

- For a complete summary of all cases, including the facts and holdings, please see the "2020-2021 Master List" (approx. 160 pages).
- That document has cases broken down by topic and court, with citations when available at time of print.

PART ONE: Criminal Procedure

Constitutional Law and Virginia Procedure

5th Amendment: *Miranda*

Interviews & Interrogations

Invocation + Waiver:
Thomas v. Com., Dec. 1, 2020 (Pub.)

- Defendant and co-defendant shot and killed victim during a robbery.
- Defendant invoked right to remain silent, but later asked why his co-defendant would likely "catch a break," as the officers said.
- Court: Officers telling the suspect about the charges filed against him and their corresponding penalties would not reasonably call for an incriminating response, and therefore was not "interrogation."
- Officers' statements regarding the minor co-defendant were neither coercive nor deceitful.

Data Act

Restrictions on Law Enforcement Data Collection

Neal v. Fairfax County Police
299 Va. 253 (2020)

- Fairfax County Police Department uses automated license plate readers ("ALPRs").
- Officers may only search the ALPR database by license plate number, although the police also have regular access to DMV's database.
- Plaintiff filed a request for an injunction to prohibit using ALPRs in "passive" mode, collecting and storing license plate data in their database.
- He argued that ALPRs violate the Va. Government Data Collection and Dissemination Practices Act, §§ 2.2-3800 to -3809, 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.

Court: ALPRs do NOT violate Data Act

- Court found that the ALPR system does not constitute an "information system" within the intendment of the Data Act.
- "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."

Fourth Amendment
Search and Seizure

"Community Caretaker" Entry into the Home: *Caniglia v. Strom,* May 18, 2021

- Police performed a "wellness check" on Plaintiff after his wife reported that he might be suicidal.
- After arranging for plaintiff to be taken for a psychiatric evaluation, officers entered his home and confiscated his two handguns, including one he asked his wife to shoot him with.
- Plaintiff sued officers for violation of the Fourth Amendment

"Community Caretaker" Exception

- In *Cady v. Dombrowski,* U.S. Supreme Court had held 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.
- District Court & First Circuit dismissed this lawsuit, arguing officers acted within the "community caretaking exception" to the warrant requirement.

Court: Reversed, Lawsuit Reinstated

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

Question: What about "Welfare Checks"?

- Several Justices wrote separate opinions to discuss what police may do if friends or neighbors report that someone inside a home may be sick or injured.
- Chief Justice Roberts expressed view that 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 Kavanaugh argued 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.

Question: "If the police entered a home without a warrant to see if an occupant needed help, would that violate the Fourth Amendment?"

- Is it "Exigent Circumstances" if someone has been missing for several days? Is it "exigent" even after hours or days have passed?
- Court discussed this issue in their opinions and at oral argument but did not answer it in this case, leaving it unresolved.
- Justice Alito argued that 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.

Suspended License: *Kansas v. Glover*, 590 U.S. ___ (2020)

- Defendant drove on a suspended license.
- Officer ran defendant's license plate and learned that it returned to defendant, who was revoked.
- Officer assumed the registered owner was driving and stopped the car in a traffic stop.
- Court: As long as an officer lacks information *negating* the inference that the owner is the driver of the vehicle, the stop is reasonable.

But: Cannot *Assume* No Permit - *U.S. v. Feliciana*: 4th Cir., Sept. 11, 2020

- Defendant drove a delivery truck on the GW Parkway, which requires special permits for commercial vehicles.
- Basis for the traffic stop was simply that the officer saw a vehicle requiring a permit on the Parkway, and assumed defendant had none.
- SUPPRESSED. Officer had no reason to believe that the defendant was operating his truck without a permit.
  - Court did not reach issue of FMCSA stops

Arrest Warrant as Search Warrant: *U.S. v. Brinkley,* 4th Cir., Nov. 13, 2020

- Defendant had arrest warrant for possession of a firearm by felon, with no address listed.
- Officers had no firsthand information about where the defendant resided.
- Officers learned of two possible addresses where the defendant may have been residing but selected only one of them to investigate.
- Officers entered the apartment, found the defendant, and arrested him.
- Officers also saw other evidence in plain view.

Evidence Suppressed

- Court found that the officers failed to establish ***probable cause*** that the defendant would be present in the home when they entered.
- 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."

What About "Address on Warrant"?

- Court: "when police know a suspect lives somewhere, generic indicia of presence may suggest that he is there"
- However, "when police are uncertain about where he lives, the same signs suggest only that someone is there — not necessarily the suspect."
- Note: Under *Steagald,* 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***.

Computer Search Warrants
U.S. v. Cobb, 970 F.3d 319 (2020)

- Officers obtained a warrant to examine a computer, seeking "Any material associated with the homicide…"
- Defendant argued warrant was overbroad
- Affirmed: Court held 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.

Court Explains Particularity Requirement

- Court: "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."

Search Incident to Arrest: *U.S. v. Davis*: May 7, 2021 (4th Cir.)

- Police pursued defendant after high-speed chase into a swamp.
- Defendant surrendered, exited the swamp, dropped the backpack he carried to the ground, and laid prone on the ground.
- Police handcuffed him with his hands behind his back and lying on his stomach.
- Next, an officer searched his nearby backpack and found contraband

Court: Evidence Suppressed

- Court: 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."
- Under *Gant*, an item is not within a person's immediate control if it is unreasonable to believe that they can access it.
- Court agreed that officers could have searched the bag if the defendant were in handcuffs but "unsecured," or if the officers were outnumbered, or if there were other safety issues.

U.S. v. Curry – Active Shooter 965 F.3d 313 (2020)

- Officers specially patrol area that had 6 shootings in previous weeks, including 2 homicides
- Officers respond to 911 calls for shooting in progress.
- Officers hear 4-5 gunshots while responding.
- Officers arrive within 35 seconds of hearing the shots .

Encounter with Defendant

- Seconds before stopping, the officers observed a man running away that they believed to be "favoring one of his arms," as if shot.
- Using their flashlights, officers "fanned out and began approaching different individuals," "illuminating the individuals…, their waistbands and hands, looking for any handguns or firearms."
- Officers stopped the first men encountered leaving the scene, including the defendant.

Defendant's Reaction

- While other individuals complied with the officers' directives to lift their shirts and submit to a visual inspection of their waistbands for concealed firearms, defendant refused to fully comply.
- When officers tried to pat him down, he struggled with them.
- After officers put defendant on the ground and handcuffed him, they recovered a silver revolver from him.

District Court Ruling

- The district court granted the defendant's motion to suppress
- Court: the surrounding "exigencies" of the situation could not excuse the prerequisite of *individualized reasonable suspicion.*
  - Question: What was the authority to stop the defendant and hold him at gunpoint?

4th Circuit 3-Judge Panel Ruling: Suppression Reversed

- Court: The limited stop and search that was narrowly circumscribed by the exigencies present was reasonable under the Fourth Amendment.
- The U.S. Supreme Court in *Edmond* had suggested that roadway searches without reasonable suspicion could be justified by the important governmental interests presented by "an imminent terrorist attack" or "a dangerous criminal who is likely to flee by way of a particular route," unlike impermissible roadblocks whose primary purpose is general crime control

4th Circuit Full *En-Banc* Court: Suppression Reinstated

- "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."

No "Special Needs" Exception In This Case

- Court: 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.
- 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.

Contrast: *U.S. v. Mitchell,* 963 F.3d 385 (2020)

- Officers received a report of a large fight, an assault, and a person with a gun at a bar.
- Officer quickly arrived on the scene, where bystander gave detailed description of defendant, including that was walking away eastbound on a nearby street with a gun.
- Officers stopped defendant (a felon) who matched that description & found a firearm on his person.
- Court: 911 call and bystander's tip together provided reasonable suspicion to believe that the departing man with the gun related to the illegal activity and justified an investigatory stop.

Guns & Pat-Downs *Com. v. Johnson*: April 28, 2020

- Officers approached defendant to speak to him & noticed that defendant had an "L-shaped" bulge in his waistband.
- Officer lifted defendant's shirt, revealing the firearm.
- Officer seized the firearm, detained defendant, and learned that the defendant was a convicted felon.
- Court: When there is no other reason for a stop, "we do not presume that an individual carrying a concealed firearm must be in violation of the law in doing so."

ECO's & Police Liability: *Barrett v. PAE,* 975 F.3d 416 (2020)

- Plaintiff believed that she was being stalked and harassed by Southeast Asian men, whom she believed were reporting back to a Dubai-based network on their cell phones and had "breached" her office to monitor her there.
- Plaintiff's employer contacted the police for assistance.
- Plaintiff told police there was no legal means to deal with her "stalkers"
- 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.

Lawsuit

- Police sought an emergency custody order ("ECO") for an involuntary mental health evaluation.
- Virginia DHS determined that there was probable cause to believe that the plaintiff was suffering from PTSD and possibly a delusional disorder, and that she posed a genuine danger to herself and others.
- Magistrate issued a TDO.
- Plaintiff filed a complaint under 42 U.S.C. § 1983 against the police and other for unlawful seizure under the Fourth Amendment

Court: Proper to Dismiss Lawsuit

- Court: Because the undisputed evidence established that the police had probable cause to detain the plaintiff, Court agreed that qualified immunity barred her § 1983 claim under the first prong of the "qualified immunity" test, and summary judgment was properly awarded.
- 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.

Court's Language

- Court: "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."

PART TWO:
Crimes and Offenses

Substantive Criminal Law

Contributing:
Spell v. Com., Dec. 15, 2020 (Pub.)

- Defendant drove while intoxicated on Lorazepam with her children in car.
- Child called 911 out of terror, watching her mother sleepy, weaving, and rear-end another car when driving out of a parking lot.
- Court: Reversed. Evidence did not 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. 911 call did not count.

Concealed Weapon:
Myers v. Com: May 13, 2021 (Va. S.Ct.)

- Defendant carried concealed handgun in a zipped backpack in his car.
- Court: Defendant was entitled to the protection of 18.2-308(C)(8)'s exception for carrying a concealed weapon because the handgun was secured in a container within his personal, private vehicle.
- Court: "secured" includes a fully latched rigid container as well as a fully-zipped soft container, such as one made of cloth, canvas, or leather.
  - Court also held that defendant bears the burden of production at trial to raise this defense.

Defrauding an Innkeeper: *Caldwell & Smith*

- *Caldwell*: § 18.2-188(b)(2) ***requires*** proof that the defendant had the intent to cheat or defraud the hotel restaurant at the time she gained possession of the food. Reversed conviction when defendant met 2 hotel guests and ate the "complimentary" breakfast. (840 S.E.2d 343 (2020)).
- *Smith*: § 18.2-188 does ***NOT require*** proof that the defendant had the intent to defraud when she first checked in at the hotel. (Ct. App. (Pub.) December 1, 2020).

Eluding: Venue *Francis v. Comm*: November 17, 2020 (Unpub.)

- Defendant led police on a multi-jurisdictional, high-speed chase that began in Chesterfield and continued into Dinwiddie County
- Court: Conviction in both jurisdictions affirmed.
- Court: In this case, defendant's evading and eluding in Chesterfield and Dinwiddie counties each were separate and distinct acts

Not Every Multi-Jurisdictional Eluding Will Result in Multiple Felonies

- Court: "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."
- In this case, Court noted that there were multiple victims in different jurisdictions.
- 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.

Homicide: Self-Defense v. Heat of Passion

- *Dandridge v. Commonwealth*: January 12, 2021 (pub.)
- Court: It would be an unusual scenario in which the evidence supports a self-defense instruction but not a voluntary manslaughter instruction.
- Approval of a self-defense instruction supported conclusion that there was evidence that the killing was not done with malice, and the voluntary manslaughter instruction was thereby required.
- Jury's rejection of the defendant's self-defense theory did not preclude its consideration of a voluntary manslaughter theory.

Obstruction

Venue: *Tanner*, 72 Va. App. 86, 841 S.E.2d 377 (2020)

- Venue was proper in Charles City County, the jurisdiction of court toward which defendant directed his efforts to obstruct justice under § 18.2-460(C).
- "knowingly attempting . . . to obstruct or impede the administration of justice in any court," occurs where the the judicial process was affected.
- ALSO: Felony obstruction statute includes attempted crimes under § 18.2-460(C), referring to "the violation of or conspiracy to violate any [incorporated] violent felony offense."
  - See also *Gordon v. Commonwealth*: Nov. 17, 2020 (Unpub.)

Resisting Arrest:
Peters v. Com., 72 Va. App. 378, 846 S.E.2d 23 (2020)

- Although simple refusal to place his hands behind his back was not sufficient, alone, under § 18.2-460(E), here the officer had immediate physical ability to place the defendant under arrest and affirmed conviction.
- Footnote: Court concludes officer also communicated to the defendant that he was under arrest, thus also satisfying that element of the statute, even though officer did not explicitly say "arrest,"
- Officer is not required to actually say the word "arrest" to communicate to an individual that he is under arrest.

Protective Orders

"Bodily Injury" under 16.1-253.2
McGowan v. Com., Nov. 24, 2020 (Pub.)

- 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."
- Commonwealth not required to prove that victim suffered "any observable wounds, cuts, or breaking of the skin."
- Court relied on the fact that victim screamed when defendant bit her, evidencing pain and hurt, and that she allowed a police officer to document the location of that hurt within hours of the offense.

"Contact"
Green v. Com., 72 Va. App. 193, 843 S.E.2d 389 (2020)

- Victim obtained preliminary protective order that ordered defendant to "have no contact of any kind" with victim.
- Defendant posted a message to Twitter stating: "Someone tell my BM she was a bird for me."
- Victim saw the message.
- At trial, victim explained that "BM" was an abbreviation for "baby mama," meaning her.

Court: Conviction Affirmed For Violating Protective Order.

- Court: Neither the plain language of the statute nor the plain meaning of the word "contact" limits a "contact" to a direct one.
- Court: Defendant intentionally directed the communication to victim by using the public forum available through Twitter. Defendant's message itself reflected defendant's intent to contact victim through others.
- Defendant's indirect contact was all that was required to convict.

Vehicular Manslaughter

"Reckless" and Manslaughter: *Cady v. Com.* 72 Va. App. 393, 846 S.E.2d 30 (2020)

- Defendant struck and killed a motorcyclist while driving at noon on a clear day on a straight roadway.
- Defendant claimed he did not see the motorcycle and made no statements tending to show inattentiveness, intoxication, or fatigue.
- 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 about defendant's cell phone moments before the crash.

Reckless Driving: Model Jury Instruction No. 45.100

- Elements:
  - That the defendant was driving a vehicle on a highway; and
  - That he was driving in a manner so as to endanger the life, limb or property of any person

Involuntary Manslaughter Model Jury Instruction No. 33.610

- The gist of involuntary manslaughter is criminal negligence. It must be shown that the negligence of the defendant was gross or culpable negligence. Gross or culpable negligence is that which indicates a callous disregard of human life and of the probable consequences of his act. Criminal liability cannot be predicated upon every act carelessly performed merely because such carelessness results in the death of another. In order for criminal liability to result from negligence, it must necessarily be reckless or wanton and of such a character as to show disregard of the safety of others under circumstances likely to cause injury or death. Unless you believe from the evidence beyond a reasonable doubt that the defendant was guilty of negligence so culpable or gross as to indicate a callous disregard of human life and of the probable consequences of his act, you cannot find him guilty of involuntary manslaughter.

Cady Court: Conviction Reversed

- Court: under *Powers,* a conviction for reckless driving cannot be based upon "speculation and conjecture" as to what caused a crash,
- 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."
- Court argued that the defendant's failure to stop before he hit the motorcycle established simple negligence, not recklessness.

What is the difference between "Grossly Negligent", "Reckless," and "Criminally Negligent?"

Noakes: 280 Va. 338 (2010)

- "Gross negligence amounts to criminal negligence "when acts of a wanton or willful character, committed or omitted, show 'a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury, or which make it not improbable that injury will be occasioned, and the offender knows, or is charged with the knowledge of, the probable result of his [or her] acts.'"

Cady

- The reckless actor is aware of the risk and disregards it; the negligent actor is not aware of the risk but should have been aware of it."
- "To establish criminal negligence, "[i]t must be shown that a homicide was not improbable under all of the facts existing at the time, and that the knowledge of such facts should have had an influence on the conduct of the offender."

NOTE: This case is on appeal

- One issue: "The Court of Appeals erred when it applied an incorrect standard of culpability for statutory misdemeanor reckless driving by requiring proof of criminal negligence associated with felony involuntary manslaughter, particularly in light of the jury instructions which are the law of the case."
- Also, Va. Supreme Court will consider whether Ct. App. erred factually and in overruling the jury's judgment

Unauthorized Use of a Motor Vehicle: *Otey v. Com.*, 71 Va. App. 792, 839 S.E.2d 921 (2020)

- Victim gave his vehicle to the defendant to repair the brakes.
- Victim and defendant did not have any written agreement
- Defendant used victim's vehicle to tow defendant's personal vehicle dozens of miles away, out of state, severely damaged victim's vehicle, and abandoned it out of state.
- Defendant argued that, since victim did not place a specific limit on the period of his possession, his use was not unauthorized.

Unauthorized Use of a Motor Vehicle: *Otey v. Com.*, 71 Va. App. 792, 839 S.E.2d 921 (2020)

- "Regardless of whether he did tow it or was simply on the way, permission to use a vehicle for one purpose is not implied consent to take the vehicle to an unknown destination for a purpose not beneficial to the owner and unrelated to the purpose for which possession of the vehicle was given."
- Rejected defendant's argument that victim did not place express limitations on defendant's possession of the vehicle

Questions?

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