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2022 - 2023 VIRGINIA LAW ENFORCEMENT APPELLATE UPDATE

MASTER LIST

Cases from the Courts of Appeals
Summary of Cases by Topic
June 2022 – May 2023
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(Citations Listed Where Available at Time of Print)

CRIMINAL PROCEDURE

Bail

Virginia Court of Appeals
Published

Jeffrey v. Commonwealth: March 14, 2023

Roanoke: Defendant appeals his denial of an appeal bond.

Facts: The defendant defrauded the government of tens of thousands of dollars in CARES act money and embezzled over $200,000 from entities that one of his businesses managed. The defendant was convicted of two felony counts of obtaining money by false pretenses after a jury trial, along with felony embezzlement. The trial court sentenced the defendant to eight years' imprisonment, suspending all but two years and six months. The defendant then requested an appeal bond. The trial court denied the defendant's bail request, noting that he no longer enjoyed the presumption of innocence, that he had three felony convictions, that his actions were egregious, and that his likelihood of success on appeal were "in the court's estimation, zero."

Held: Affirmed. The Court found that the trial court appropriately considered the evidence before it and did not abuse its discretion when it denied the defendant's request for bail.

The Court ruled a trial court may properly consider that the likelihood of success on appeal. The Court explained that the likelihood of success on appeal helps measure three essential questions relevant to granting bail: (1) whether a defendant will appear at further proceedings, (2) whether the defendant represents an unreasonable danger to himself and to the public, and (3) whether there is a risk of irreparable injury to the defendant. The Court pointed out that the likelihood of success is already a factor in the typical bail context.

The Court emphasized the relevance of a court's determination that an appeal is not solely for the purpose of delay but, rather, raises a legitimate legal question. The Court noted that the possibility of release on bail pending appeal protects against the risk that a defendant will be irreparably injured by imprisonment if his conviction is ultimately reversed.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1257223.pdf

Commonwealth v. Denny: June 7, 2022 (*En Banc*)
75 Va. App. 100, 873 S.E.2d 112 (2022)
Alexandria: The Commonwealth appeals the denial of a motion to Revoke Bond

Facts: The defendant is charged with Attempt Malicious Wounding, Robbery, Burglary, and other charges regarding the defendant's attack on the mother of his children. The Magistrate released the defendant on bail with a secured bond of $2,000, and the J/Dr Court required that he have no contact with the victim. Months later, on the Commonwealth's motion, however, the J/Dr Court revoked the defendant's bond due to his having contact with the victim.

The defendant appealed to circuit court. The circuit court found that the defendant violated the no-contact condition of his bond, but reinstated the defendant's bond, stating: "…I think the argument about the violent felony was made, I don't know, you said six months ago, I think the time to appeal that was then."

In an unpublished order, a panel of the Court of Appeals affirmed the denial of bond, but later the Court, on its own motion, decided to consider this matter *en banc*.

Held: Reversed. The Court concluded that the circuit court failed to consider the factors in § 19.2-120 in determining whether to revoke bail. Instead, the Court found that the circuit court only considered the alleged new conduct, rather than viewing all of the new information in light of all of the circumstances in total, when making its determination whether to revoke bail. The Court pointed out that one of the factors that a court must consider is "the nature and circumstances of the offense," under § 19.2-120(B)(i).

Regarding the defendant's previous release on bond, the Court pointed out in a footnote that nothing in § 19.2-132 provides that a court must give deference to a prior judicial officer's decision to grant bail.

Judge Chaney filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0239502.pdf

Virginia Court of Appeals
Unpublished

Cave v. Commonwealth: October 18, 2022

Spotsylvania: Defendant appeals the denial of his request for Bond pending Appeal.

Facts: After having been convicted of driving under the influence three times and having his operator's license revoked, the defendant again drove while intoxicated and collided into the rear of a truck as it stopped at an intersection. The defendant was so intoxicated that he was "tripping all over himself and slurring his words," discarded his ignition key after the accident and refused to cooperate with an officer's investigation.

The trial court convicted the defendant of DUI after a previous conviction for Felony DUI, Driving Revoked, Subsequent Offense, and Refusal, Subsequent Offense. The defendant sought bail on appeal, arguing that he posed no danger to the community, and he "would likely" finish serving his sentence on

the underlying convictions before his appeal of those convictions concluded. The trial court denied the defendant bail.

Held: Affirmed. The Court ruled that the record amply supports the trial court's conclusion that the defendant should not be admitted to bail pending appeal because he would pose a danger to the community if released. The Court agreed that the defendant's demonstrated persistence in driving under the influence despite significant court intervention supports a finding that his release would pose a danger to himself and the public. Although the defendant contended that his dangerousness would be mitigated by a "SCRAM" bracelet, the Court pointed out that such a condition would not prevent the defendant from driving while intoxicated and endangering the public.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0242222.pdf

Lester v. Commonwealth: August 16, 2022

Buchanan: Defendant appeals the denial of bond on Child Sexual Assault.

Facts: The defendant faces multiple charges of child sexual assault on a 13-year-old victim between 1987 and 1989, and between 1992 and 1993. The victim is his niece. The defendant is a pastor, has no prior criminal record, and has never failed to appear. He is experiencing kidney failure, is a severe diabetic, and has various health problems.

The defendant requested bond. One week prior to the hearing, a court issued a protective order on behalf of a different victim, an 11-year-old child, regarding a new allegation of sexual assault that had arisen in the last six months. The trial court denied bond.

Held: Affirmed. The Court found it reasonable to conclude that the defendant, if released pending his trial, may pose a danger to young members of the community he interacted with in his role as a local minister.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0788213.pdf

Cheripka v. Commonwealth: August 9, 2022

Fluvanna: Defendant appeals the denial of Pre-trial Bail.

Facts: The defendant is charged with multiple counts of sexual assault of his stepdaughters, who were between eight and thirteen years of age. While hospitalized in New Jersey, the defendant

confessed that he sexually abused members of his family. The offenses could result in mandatory life sentences if he is convicted. In addition, the defendant had a history of mental health instability.

Held: Affirmed. Considering all the facts and circumstances, the Court did not find that the trial court abused its discretion in finding that the defendant's release on bail would constitute an unreasonable risk of danger to the victims. Despite the repeal of the presumption against bond, the Court emphasized in a footnote that under § 19.2-120(A), the circuit court was obligated to consider whether there was "probable cause to believe that" the defendant's pre-trial release would "constitute an unreasonable danger to" his stepchildren.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1217212.pdf

Patterson v. Commonwealth: June 7, 2022

Richmond: Defendant appeals the denial of bail on his Murder charge.

Facts: The defendant stabbed a man to death during an altercation at their home while her two minor children were present, in front of an eyewitness. At the time of the incident, the defendant had an outstanding arrest warrant for previously assaulting the victim.

The defendant's criminal history includes two counts of contempt of court and two counts of petit larceny, and a 2017 felony conviction for grand larceny. There is no evidence of mental health or substance abuse, and she had significant ties to the community, including local employment and residency. The trial court denied the defendant bail.

Held: Affirmed. In a *Per Curiam* opinion, the Court held that oral argument was unnecessary because "the appeal is wholly without merit." The Court ruled that the trial court did not fail to consider the statutory factors or rely on any inappropriate considerations; rather, it considered the escalating seriousness of the charges against the same victim, as well as the balance of the factors enumerated in § 19.2-120(B).

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0093222.pdf

Eman v. Commonwealth: June 7, 2022

Alexandria: Defendant appeals his denial of Pretrial Bail.

Facts: The defendant is charged with conspiracy to participate in racketeering activity, possession with intent to distribute more than one ounce of marijuana, and one count of possession of a

firearm. The defendant was a drug courier, who transported marijuana from western states to Northern Virginia for distribution. He also participated in the organization as a distributor. Police seized more than 150 pounds of marijuana, over twenty firearms, other controlled substances, and items used in the distribution of drugs during their investigation of the organization's activities.

The Commonwealth has alleged that the drug trafficking organization was responsible for the murder of a man. The defendant had been in communication with one of the other defendants allegedly involved in the murder. In addition, he sent and received text messages hours after the murder that discussed throwing something away. Following the murder, the defendant was arrested while at another defendant's home where police found approximately a pound of marijuana.

Police found a firearm in the apartment the defendant shared with his brother, along with considerable other evidence of drug distribution. Police also found a photograph on the defendant's cell phone of him pointing a gun at the camera.

The trial court denied the defendant's request for bail.

Held: Affirmed. The Court agreed that the trial court had probable cause to believe that the defendant's liberty would constitute an unreasonable danger to the public.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1102214.pdf

Collateral Estoppel

Virginia Court of Appeals
Unpublished

Jones v. Commonwealth: January 17, 2023

Henrico: Defendant appeals his conviction for Assault on Double Jeopardy and Collateral Estoppel grounds.

Facts: The defendant threatened two people with a large knife during a road-rage incident, threatening to kill the victims. The general district court found the defendant guilty of assault but acquitted the defendant of brandishing a machete in violation of § 18.2-282.1. The defendant appealed. In circuit court, the Commonwealth proffered, without objection, that the GDC made "a finding that the Commonwealth had not proven its case beyond a reasonable doubt on the length of the machete and that he didn't feel that it had met that element; that we had met that specific element and therefore, he acquitted the Defendant."

The defendant argued that the principles of double jeopardy and res judicata prevented the circuit court from convicting him of assault after he was acquitted by the general district court of brandishing a machete. The defendant also argued that the doctrine of issue preclusion in res judicata prevent prohibited the Commonwealth from presenting any evidence of his "conduct of approaching

with the knife and causing fear in another" because the "acquittal in the district court for Brandishing a Machete was a verdict in his favor on the facts, and thus an acquittal of all the elements of the offense for which he was tried." The trial court rejected those arguments.

Held: Affirmed. The Court found that assault is not a lesser-included offense of brandishing a machete under *Blockburger*, as when the elements of both offenses are viewed in the abstract, each offense requires the Commonwealth to prove an element which the other offense does not require to be proven. Consequently, the Court held the circuit court did not err in this case in finding that the defendant could be convicted of assault in his trial de novo after the general district court acquitted him of brandishing a machete. The Court also held that the doctrine of issue preclusion did not prevent the Commonwealth from introducing evidence that the defendant intentionally wielded a knife and created reasonable fear in the minds of the victims because that specific fact was not the basis of the prior acquittal.

The Court also found that, even if assault were a lesser-included offense of brandishing a machete, the defendant could still have been tried in circuit court for assault without that trial violating his double jeopardy rights because the defendant decided to appeal his assault conviction from general district court to circuit court for a trial de novo. The Court explained that, when a defendant chooses to appeal a misdemeanor conviction from general district court, a trial on the same charges in the circuit court does not violate double jeopardy principles, subject only to the limitation that conviction in district court for an offense lesser included in the one charged constitutes an acquittal of the greater offense, permitting trial de novo in the circuit court only for the lesser-included offense.

Regarding the defendant's issue-preclusion argument, the Court agreed that issue preclusion prevents the Commonwealth from relitigating issues of ultimate fact that were essential to a defendant's prior acquittal. However, the Court cautioned that issue preclusion does not prevent the Commonwealth from presenting "subsidiary facts" associated with the prior acquittal.

In this case, the Court noted that the record showed that the defendant was acquitted of brandishing a machete solely because the Commonwealth failed to prove the length of the blade. Assuming without deciding that issue preclusion prevented the Commonwealth from putting on evidence of the length of the blade, the Court still ruled that the Commonwealth was not estopped from putting on evidence of other facts related to the charge for which the defendant was acquitted. These subsidiary facts include the evidence that the defendant ran toward the victims while wielding a knife.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0354222.pdf

James v. Commonwealth: December 6, 2022

Richmond: Defendant appeals his convictions for Murder and Use of a Firearm on Admission of Video Evidence.

Facts: The defendant shot and murdered his uncle, in view of two witnesses. The defendant shot the victim repeatedly, chasing him down and shooting him as he fled. A video recording captured the defendant fleeing the scene. The defendant fled for several days, until police arrested him. Police in Chesterfield County found the murder weapon on the floorboard of a car in which the defendant had been sitting. However, a trial for felony possession of a firearm in Chesterfield County resulted in an acquittal.

At trial for murder in Richmond, the defendant objected to the admission of evidence of the firearm found on the car floorboard by the seat he occupied at the time of his arrest in Chesterfield County. Citing collateral estoppel, he contended that the Chesterfield acquittal prevented the Commonwealth from relitigating his knowing possession of the firearm in his Richmond trial and rendered the related evidence inadmissible in that trial. The prosecutor noted that the proffered order did not explain on which element or elements the jury found the evidence insufficient, and he refused to stipulate to what had occurred in that Chesterfield court. The trial court overruled the defendant's objection.

The defendant also sought to exclude a surveillance camera video purporting to show the Richmond murder. A witness testified that the video and its contents, although not entirely clear, showed "exactly what happened" when the defendant shot the victim. The trial court overruled the defendant's objection. Although the video was a bit "blurry," the trial court found that the video was of adequate quality to aid the finder of fact at trial.

Held: Affirmed.

Regarding the evidence of the firearm, the Court held that the trial court's admission of the firearm and body camera footage showing the gun and its seizure from the car floorboard at the time of the defendant's arrest was not an abuse of discretion because the defendant did not establish that collateral estoppel principles applied. The Court noted that the defendant did not offer any additional evidence to permit the trial court to determine the basis on which the Chesterfield jury acquitted him. Thus, the Court agreed that the record supported the trial court's ruling that the defendant failed to establish that the precise fact relevant to the admissibility issue in his Richmond murder trial (whether the defendant possessed the firearm found in the car at the time of his arrest in Chesterfield) was resolved by his acquittal on the Chesterfield felon-in-possession-of-a-gun charge.

Regarding the video evidence, the Court repeated that videos are generally admitted under one of two theories: "either to illustrate a witness'[s] testimony or to serve as an 'independent silent witness' of matters depicted in the video." However, when someone who witnessed the events in a video testifies that it accurately represents what took place, it is not admitted under a silent witness theory, and the testimony of its maker is not required. In those circumstances, no testimony from "anybody who downloaded the video" or "who might have carried the video from one place to another" was needed.

Regarding the video quality, the Court noted that once the threshold for proving admissibility has been met, any claimed deficiencies in the evidence are for the finder of fact to resolve in determining what weight to give that evidence.

Full Case At:

https://www.vacourts.gov/opinions/opncavwp/0896212.pdf

Competency

Fourth Circuit Court of Appeals

U.S. v. Tucker: February 24, 2023

N.C.: Defendant appeals an order of Involuntary Medication to Restore Competency.

Facts: The defendant has been in pretrial custody for more than five years. The defendant has been declared mentally incompetent to stand trial regarding two counts of attempting to persuade people he believed to be minors to produce child pornography; one count of transporting or shipping child pornography; one count of receiving child pornography; and one count of possessing a firearm while being addicted to a controlled substance.

After his 2017 arrest, defense counsel moved to have the defendant declared incompetent to stand trial and the trial court agreed. The defendant was referred for restoration of competency. In 2018, a forensic psychologist submitted a report concluding the defendant was still not competent to stand trial but there was "a substantial likelihood [he could] be restored to competency in the foreseeable future with [a] combination of" medication and individualized treatment.

A 2019 report, though, reported the defendant as only intermittently compliant with his medication regime. The report stated that his symptoms "responded well to medication treatment with antipsychotics and antidepressants in the past" and there was "substantial probability that his symptoms would be further attenuated with ongoing medication treatment." The report said the defendant was "right at the threshold of competency, and likely would have been restored had he complied with medication treatment."

In 2019, the government requested an order for involuntary medication. The defendant objected but the trial court granted the order. The defendant appealed to the Fourth Circuit. In 2021, the Fourth Circuit remanded the case for further hearing. The district court soon issued an order concluding an involuntary medication order was appropriate and granting the government "four months within which to" restore the defendant's competency. The district court found that involuntary medication is substantially likely to render the defendant competent and ordered a final extension of confinement to permit that medication to work.

The defendant appealed, arguing that the district court failed to properly consider that he has already spent more than five years in federal custody. The defendant also argued that the district court clearly erred in concluding the government's proposed treatment plan is likely to restore his competency.

Held: Affirmed. The Court evaluated the facts in light of the *Sell* factors and held that the district court committed no reversible error in entering an involuntary medication order.

The Court considered the first *Sell* factor, which asks whether "important governmental interests are at stake." The Court held that the government retains a substantial interest in prosecuting the defendant in this case, pointing out that the charges are "grave by any measure." The Court also noted that the unlikelihood of future confinement absent an involuntary medication order means "the risks that ordinarily attach to freeing without punishment one who has committed a serious crime" are not eliminated. In this case, the Court found that such risks would notably include an inability to provide "appropriate monitoring" through a period of supervised release.

The Court also concluded that the district court committed no clear error in finding an involuntary medication order would significantly further the government's interest in prosecuting the defendant. Under the second *Sell* factor, the government must show "administration of the drugs is substantially likely to render the defendant competent to stand trial" and that administration of such drugs "is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense." In this case, the Court held that the district court committed no reversible error in finding the second *Sell* requirement was satisfied.

Lastly, the Court concluded that the district court did not clearly err in finding the defendant's continued detention was reasonable. The Court reasoned that the delays associated with the defendant's appeals did not fatally undermine the district court's finding that an additional period of commitment is reasonable to give its involuntary medication order an opportunity to work.

In its conclusion, however, the Court wrote: "We emphasize, however, that "at some point the government can't keep trying and failing and trying and failing, hoping to get it right, and we trust no further extensions will be sought once the current appeal is finally resolved."

Full Case At:
https://www.ca4.uscourts.gov/opinions/204537.P.pdf

Virginia Court of Appeals
Unpublished

Cook v. Commonwealth: March 21, 2023

Henrico: Defendant appeals his conviction for Murder on Admission of Victim Photos and Denial of a Competency Evaluation.

Facts: The defendant shot and killed the victim. Later, the defendant confessed to the murder to police. Prior to trial, the defendant filed a motion in limine to exclude pictures and videos of the victim's treatment at the crime scene because he argued that their probative value was significantly outweighed by the risk of unfair prejudice. The defendant argued that the graphic nature of the images warranted their exclusion. He also argued that, because they were presented through the Commonwealth's first witness, the images "predisposed the jury to view the remaining evidence in a distorted and unfavorable way" to the defendant. The trial court overruled the objection.

Approximately one week before the scheduled jury trial, the defendant moved for a mental competency evaluation. At the hearing, the defendant's attorney proffered that "the major things" the defendant "misunderstood" were "the different verdicts that the jury could reach in his case" and the trial court's "discretion in sentencing him based on those verdicts." The defendant "knew the names of his charges and the lesser possible verdicts"; but he could not "explain the elements of those charges and how they differed from one another."

Defense counsel proffered that the defendant understood "defense counsel's role," he "had difficulty . . . explaining the roles of the judge, jury, and the prosecutor," as well as "sentencing concepts and the discretionary aspect of the sentencing guidelines." Defense counsel stated that the defendant did not understand that the trial court had the discretion to exceed "the high end of the sentencing guidelines." Defense counsel expressed doubt that the defendant "fully understood" his explanation of these concepts and suggested that the defendant had previously "downplay[ed] his inability to understand" the information provided to him and believed that the defendant's pre-trial time in jail had deteriorated his mental state.

In response to defense counsel's proffer, the trial court questioned the defendant extensively about his understanding of the trial process. The trial court found that the defendant understood the proceedings and could assist his attorney in his defense. Accordingly, it held that the defendant had failed to establish probable cause for a competency evaluation.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in denying the defendant's motion in limine and acted within its discretion in finding there to be no probable cause to order a competency evaluation.

Regarding the photos, the Court repeated that, even when the cause of death is not in dispute or has been stipulated, crime scene photographs may be admitted. In this case, the Court found that the images of the defendant immediately after the shooting accurately portrayed the scene and provided evidence of the severity, location, and scope of his wounds, all of which were probative of the defendant's state of mind when he shot the victim, and whether he acted with malice. The Court also concluded that the images assisted the fact finder in determining the victim's location relative to the location of the cartridge casings, and by extension, the defendant's location when he fired at the victim.

Regarding the defendant's request for a competency evaluation, the Court agreed that during the trial court's colloquy, the defendant demonstrated that he understood the distinctions between the possible verdicts, the role of the jury and the judge, and the potential sentencing outcomes.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0253222.pdf

Sturdivant v. Commonwealth: September 20, 2022

Williamsburg: Defendant appeals his conviction for Possession of a Firearm by Felon on Jury Instruction and Competency issues.

Facts: The defendant, who has a violent felony conviction, possessed a firearm. The day before the jury trial, defense counsel moved for competency and sanity evaluations. Counsel based the motion on a conversation he had with the Commonwealth's Attorney and the defendant's mother in which she told counsel that she believed that the defendant did not "comprehend what's going on." Defense counsel also pointed to the defendant's purported confusion at his arraignment about whether to have a jury trial or a bench trial. Defense counsel requested that the court order a competency evaluation to ensure that the defendant "understands what's going on."

The trial court reviewed its records and noted that the defendant had appeared in a separate case in 2017 and had an extensive presentence investigation during an earlier proceeding, and neither suggested any issue with competency. The trial court examined the defendant's behavior in this case and ruled that there was no "probable cause to believe that he lacks substantial capacity at this point to even proceed with an evaluation."

At trial, the defendant argued that the jury should have been instructed that they had to find that the defendant's prior felony conviction was "violent" to convict the defendant. The defendant argued that a jury must "to determine all the factual elements of the offense" in a jury trial and that whether his conviction as "violent" was a question of fact requiring jury determination. The trial court overruled the defendant's objection.

Held: Affirmed.

Regarding the competency issue, the Court ruled that the trial court did not abuse its discretion by denying the defendant's request for a competency evaluation. The Court acknowledged that courts have found that counsel's detailed proffer about a client's mental state may be sufficient to satisfy the probable cause standard. However, the Court cautioned that counsel's "general impression" of a client's incompetence or testimony about limited instances of a client's irrational behavior alone does not establish sufficient doubt. The Court also cautioned that "neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence."

In this case, the Court found that the defendant's mother's statements indicated only that the defendant may have intellectual impairments that required additional time and attention from counsel to explain unfamiliar legal concepts and procedures. The Court found that the statements did not establish that the defendant had a "mental deficiency" that would "interfere with his present capacity to participate in and understand proceedings" given adequate communication with counsel. The court wrote "Thus, they and counsel's otherwise unsubstantiated concerns, which were unconfirmed by personal observation" were insufficient to establish probable cause that the defendant lacked substantial capacity to understand the proceedings against him or to assist his attorney in his own defense.

Regarding the jury instruction issue, the Court found that the trial court properly instructed the jury and that there was proof presented at trial as to the nature of the violent felony offense. The Court quoted *Rawls* and repeated that while proof of the defendant's prior felony conviction is an essential element of the substantive offense under § 18.2-308.2(A), the nature of that prior felony conviction is not. In this case, the Court explained that the phrase "violent felony" used in § 18.2-308.2(A) is a legal term and the issue therefore presents a question of law. The Court repeated that a question of law "is not a proper question for submission to the jury."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1214211.pdf

Conflict of Interest

Virginia Supreme Court

In Re: Biberaj: December 8, 2022

Loudoun: The Commonwealth's Attorney seeks a Writ of Mandamus and Writ of Prohibition to annul the trial court's order removing the prosecutor.

Facts: A criminal defendant committed numerous charges in multiple counties, including Loudoun County. In Loudoun, the defendant was charged with a series of offenses. In August 2021, the defendant accepted a plea agreement under which he would plead guilty to several charges. The defendant signed and filed a plea agreement, and the parties also submitted a statement of facts to the trial court.

After accepting the defendant's guilty pleas and finding him guilty, the trial court questioned the prosecutor on several portions of the facts that he suggested were incomplete or misleading. The trial court stated the answers to his questions would have "some impact" on whether he accepted the plea agreement and commented that the prosecutor may have to supply those answers. Ultimately, the trial court deferred accepting the plea agreement so the parties could address his concerns at the sentencing hearing.

At the sentencing hearing, another prosecutor appeared and attempted to address the trial court's concerns regarding the facts and plea agreement. However, the trial court remained unconvinced, and he continued the matter "to further consider whether the plea [was] going to be accepted or some other action [was] going to be taken."

After the hearing, the trial court entered an order without notice to the prosecutor's office. The order characterized portions of the facts and the prosecutors' defense of the plea agreement as misleading and inaccurate and stated that the trial court could "only conclude" the Commonwealth either negotiated the plea agreement without a "full review of the facts" and "due diligence" or was intentionally misleading the court and the public to "sell" the plea agreement for "some reason that has yet to be explained."

The trial court determined that the statement of facts and prosecutors' response to his concerns demonstrated that the Commonwealth's Attorney's office could not prosecute the defendant "with the detail and attention required of a criminal prosecutor and consistent with professional standards and obligations of a prosecutor." The trial court, citing its "inherent authority," removed and disqualified the entire Commonwealth's Attorney's office "from further prosecution as counsel of record" in the case. The trial court rejected the plea agreement, recused itself from further proceedings in the case, and appointed the Commonwealth's Attorney for Fauquier County to proceed with prosecuting the case.

The Commonwealth sought a writ of mandamus and prohibition to annul the trial court's order that disqualified the Loudoun County Commonwealth's Attorney's Office from representing the Commonwealth in the prosecution.

Held: Granted in part and dismissed in part; order of disqualification is annulled. The Court granted the Commonwealth's Attorney a writ of Mandamus directing the Loudoun County Circuit Court to annul the disqualification order to the extent it removes the Commonwealth's Attorney's office from representing the Commonwealth in this prosecution and appointed the Commonwealth's Attorney for Fauquier County.

The Court first agreed that Prohibition does not lie to contest the disqualification order. The Court explained that Prohibition is an extraordinary remedy that issues from a superior court to an inferior one to prevent the latter from acting on matters over which it lacks jurisdiction. Here, the Court found that the trial court has jurisdiction to adjudicate criminal proceedings such as this one and, in some circumstances, to regulate which attorneys may appear in those proceedings on the Commonwealth's behalf. Accordingly, the Court found that Prohibition cannot test the trial court's conclusion that such circumstances justified the disqualification of the Commonwealth's Attorney's office.

Turning to Mandamus, the Court also agreed with the trial court that the petition should be dismissed as to him because he has recused himself from presiding over the defendant's prosecution and cannot take further action.

Nevertheless, as against the Loudoun County Circuit Court, the Court ruled that the Commonwealth's Attorney is entitled to a writ of Mandamus because the trial court disqualified the office without affording her or her subordinates adequate notice or opportunity to be heard. First, the Court found that Mandamus is available to resolve whether the trial court failed to provide the Commonwealth with sufficient process before he divested her of her constitutional authority to prosecute this case. Additionally, the Court found that the Commonwealth was entitled to notice and an opportunity to respond before the trial court publicly relieved her of that authority.

The Court noted that, although the trial court made statements that he believed the statement of facts was misleading or incomplete, it never notified anyone in the Commonwealth's office that he was contemplating finding that anyone in that office had committed professional misconduct or was unfit to continue prosecuting the defendant's case. Further, the trial court never provided notice that it might discipline the Commonwealths' Attorney or her subordinates, whether by disqualification or otherwise, based on such findings.

In a footnote, the Court wrote: "In reaching this conclusion, we offer no opinion on any other issue relevant to the disqualification" of the Commonwealth's Attorney and her office.

Full Case At:
https://virginiagov.box.com/s/jfhrl8foptfonm8svetxrm4m3m0pagoe
(*Note: this opinion is not yet available online; the link above is to CASC's internal copy*)

Virginia Court of Appeals

Published

Harris v. Commonwealth: September 27, 2022
75 Va. App. 534, 878 S.E.2d 33 (2022)
Fauquier: Defendant appeals his conviction for Failure to Register as a Sex Offender and his Probation Revocation, alleging Prosecutor Conflict of Interest.

Facts: While on probation for larceny and forgery, the defendant violated probation. After the violation hearing, his attorney took a position as an Assistant Commonwealth's Attorney in the same jurisdiction. As part of her transition, the attorney compiled a list of cases for the office that might create a conflict of interest and included the defendant's revocation case on that list.

The defendant then failed to register as a sex offender. After the parties reached a plea agreement, the defendant violated probation. The defendant made a motion to appoint a special prosecutor for both the failure to register as a sex offender charge and the new revocation proceeding. He argued that the Commonwealth had not effectively screened his former attorney from the rest of the office, alleging that the office had not even realized there was a conflict until defense counsel emailed them.

During a hearing, the trial court took evidence by proffer from the CA's office. The proffer revealed that the Commonwealth had contacted the Virginia State Bar Ethics Counsel upon hiring the defendant's former attorney and created a general screening procedure for when she may have a conflict. Under that unwritten policy, any case files involving someone she had represented were marked with a notation about the conflict, and such cases were not assigned to her. Any prosecutor working on the matter understood that they were not to speak to her. The affidavits confirmed that, in this case, the defendant's case files were marked with "Conflict" regarding that attorney and that the defendant's former attorney had not been involved with either his probation violation or the new failure to register charge.

The trial court denied the defendant's motion for a special prosecutor.

Held: Affirmed. The Court explained that, when a former defense attorney begins working as a prosecutor, the Office of the Commonwealth's Attorney must implement screening procedures to protect the due process rights of any of the former clients of that attorney, should those clients later face additional criminal proceedings. In this case, the Court found that the trial court did not err in concluding from all the circumstances that an effective screen was in place and that therefore the defendant's due process rights were not violated.

The Court explained that a trial court has the power to disqualify a Commonwealth's attorney from proceeding with a particular criminal prosecution if the trial court determines that the Commonwealth's attorney has an interest pertinent to a defendant's case that may conflict with the Commonwealth's attorney's official duties. The Court elaborated that this power is not freestanding, but is instead grounded in a criminal defendant's constitutional protection against prosecutors who are partial to interests beyond their official duties. The Court cautioned that a trial court's authority to intervene and vindicate a defendant's constitutional right to impartial prosecution stands as an

exception to the general rule that at common law, a prosecuting attorney is the representative of the public in whom is lodged a discretion, which is not to be controlled by the courts.

The Court then explained that when a former defense attorney becomes a prosecutor, it does not *per se* disqualify the entire office from handling the prosecution of someone the defense attorney previously represented in a related matter. In rejecting per se disqualification, the Court instead repeated that there is a "more flexible, case-by-case approach" to determine whether, under the circumstances, prosecution would violate a defendant's due process rights. The initial burden falls on the defendant to establish that a member of the prosecutor's office previously "counseled him on a matter related to the pending criminal case." If established, the presumption arises that the employees of a Commonwealth's Attorney's office share confidences with respect to matters handled by the office. The burden then falls on the Commonwealth to rebut this presumption by proving that the defendant's former lawyer has been effectively screened from contact with the Commonwealth's attorneys working on the defendant's case.

The Court held that that a screening mechanism can never be effective unless, at a minimum:

(1) the disqualified lawyer acknowledged the obligation not to communicate with the lawyers working on the matter and

(2) those other lawyers knew about the screen and that they could not discuss the matter with the disqualified lawyer.

To evaluate the success of a particular screen, the Court stipulated that a trial court should consider whether a formal screening policy exists, when screening procedures were implemented, how comprehensive the procedures were, and whether affected files were marked or segregated under the policy. "Larger offices and high-profile or unusually complex prosecutions may necessarily require more comprehensive mechanisms to ensure effective screening. But, of course, the best-laid plans often go awry. A court must always evaluate testimonial or documentary evidence about whether the procedures and policies were actually followed in a given case." The Court cautioned that a mere proffer of the existence of a "Chinese wall" was insufficient.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1372214.pdf
and
https://www.vacourts.gov/opinions/opncavwp/1174214.pdf

Virginia Court of Appeals
Unpublished

Rogers v. Commonwealth: July 19, 2022

Lancaster: Defendant appeals his convictions for Abduction and Possession of Ammunition by Felon on grounds including Fourth Amendment, Refusal to Disqualify the Prosecutor, and Admission of Prior Bad Acts at Sentencing.

Facts: The defendant, a felon, abducted and held his estranged wife until she was able to escape. The victim later informed police there was ammunition in the home. The victim had lived in the marital home since marrying the defendant. Although the victim and lived with her mother after the defendant behaved violently towards their child, the victim continued to go back and forth to the house to get her belongings. Police obtained a search warrant and visited the home. The victim let them in and police located the ammunition.

The defendant moved to suppress the evidence, claiming that the search warrant affidavit for the ammunition was defective. The affidavit detailed the officer's conversation with the victim in which she told him that there was ammunition in the residence and that it had "always been" there. The defendant claimed that the affidavit was defective because it did not say where in the house the ammunition was located or whether the ammunition belonged to the defendant. He also argued that the affidavit omitted that the defendant had already been arrested on other charges and that the victim, who was pressing charges against him, was the person who told the police about the ammunition.

Prior to trial, the defendant moved to disqualify the Commonwealth's Attorney. The defendant offered evidence from a witness who testified that the prosecutor told her that the defendant was one of four county residents who belonged in jail. She said that the prosecutor asked about the defendant's medical history because he wanted him incarcerated long enough to "die in prison." According to the witness, the prosecutor urged her to press additional charges against the defendant and to testify at the sentencing hearing. He told her to consider that the defendant would "attack [the prosecutor] and his family" if the defendant were "let go."

In response, the prosecutor admitted that he "did identify people . . . walking the streets of Lancaster County" whom he "thought were dangerous." He wanted to prosecute the defendant, he stated, because he was convinced that the defendant was dangerous and violent. The prosecutor testified that he did not know the defendant personally and bore no animus towards him. He said there was "no personal interest here. There is only an interest in locking up violent people, protect[ing] the public. That is it." The trial court denied the defendant's motion to disqualify the prosecutor.

At sentencing, the Commonwealth provided testimony by two other victims who described other numerous acts of violence by the defendant, other than those in this case. The defendant objected, but the trial court overruled the objection. The trial court also admitted, over the defendant's objection, previous civil protective orders entered against the defendant.

Held: Affirmed.

Regarding the search warrant, the Court noted that the defendant had identified no legal authority that the search warrant affidavit—which was regular on its face—had to contain the details he enumerated. The Court also found that the search was a valid search as a consensual search. The Court repeated that a person who has "joint access or control for most purposes" may also consent. Under that standard, the Court concluded that the victim had authority to consent to the search.

Regarding the defendant's motion to disqualify the prosecutor, the Court found that the alleged remarks did not reflect a conflict of interest. The Court ruled that the defendant had failed to prove that the prosecutor had any "direct personal interest" in the outcome arising from "animosity, a financial interest, kinship, or close friendship." The Court also ruled that the prosecutor was well within his authority to bring the abduction charge, even though it had been nolle pros'd earlier. The Court wrote:

"Yes, Spencer was highly motivated to charge and convict Rogers. But Rogers failed to prove that Spencer instituted charges against him because Rogers had chosen to exercise a legal right."

Regarding the defendant's prior bad acts, the Court repeated that evidence of unadjudicated criminal conduct is admissible at sentencing if it bears indicia of reliability. The Court rejected the defendant's argument that 19.2-295(1) imposes a limitation that prior bad acts may only be admitting during the rebuttal phase of a sentencing after a bench trial.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0713212.pdf

Continuances

Virginia Court of Appeals
Unpublished

Jackson v. Commonwealth: April 25, 2023

Amelia: Defendant appeals his conviction for Distribution, Second Offense on Jury Instruction, Juror Selection and Misconduct issues, Admission of a Prior Conviction, and denial of a Continuance at Sentencing.

Facts: The defendant distributed cocaine after having previous convictions for that offense. During voir dire, a juror stated that she knew the defendant because she "know[s] a lot of people in Amelia County." She said she "never spent time with" the defendant and further explained, "I know his wife more than I know him. I don't spend time with her either, but I know her." Despite this, she maintained that her knowledge of the defendant would not impact her ability to judge the case fairly and impartially. No one moved to strike the juror and she sat on the panel at trial.

At trial, the Commonwealth introduced the defendant's prior conviction and sentencing order from the same jurisdiction involving a defendant with the same name and birth date as the defendant. The defendant objected, arguing that the Commonwealth did not establish that the defendant was the person named in the order, but the trial court overruled the objection.

At trial, a cooperating witness testified for the Commonwealth. The defendant requested a jury instruction based on U.S. v. Luck, but the trial court denied it. The instruction would have stated: "The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant."

At sentencing, the defendant informed the court that he was not ready to proceed with sentencing as scheduled because he still wished to file a motion to set aside the verdict; in addition, believing the trial court would grant the motion for transcripts, he had informed three of his sentencing witnesses that they did not need to appear for the hearing. The trial court denied the continuance.

After trial, the defendant filed a motion to set aside the verdict, asserting that several years earlier, the same juror who had denied knowing the defendant had a conversation with the defendant's wife, in which the juror made comments about the defendant's previous infidelity to his wife. After the trial, the wife alleged that the juror approached her stating, "I'm so sorry." The defendant argued that the juror misrepresented her impartiality under oath during voir dire because she minimized the extent to which she knew the defendant and how that prior knowledge affected her opinion of him. He asserted that the conversation with the wife, despite being nearly a decade old at the time of trial, demonstrated that the juror "held a poor opinion" of the defendant's character and thus secretly harbored bias towards him. The trial court denied the motion and refused to hold an evidentiary hearing regarding the allegation.

Held: Affirmed.

Regarding the prior conviction, the Court repeated that the Identity of names carries with it a presumption of identity of person, the strength of which will vary according to the circumstances. The Court ruled that the trial court did not err in admitting the prior conviction order and allowing the jury to determine if the defendant was the same person named in the order.

Regarding the rejected jury instruction, the Court found that under Lovitt, "the law of this Commonwealth does not require a fact finder to give different consideration to the testimony of a government informant than to the testimony of other witnesses."

Regarding the juror, the Court pointed out that the juror affirmed during voir dire that she could make an impartial decision based on the evidence at trial. The Court also noted that, when she acknowledged during voir dire that she knew the defendant, the defendant did not question her about any specifics of that relationship or what opinion she held of the defendant. The Court ruled that the trial court reasonably determined that the defendant had not presented credible allegations of bias that undermined the prior determination of impartiality reached by the court at the conclusion of the voir dire process.

Regarding the defendant's request to continue sentencing, the Court ruled that the defendant failed to demonstrate prejudice from the denial of the continuance. The Court agreed that the defendant released his sentencing witnesses at his own peril based on a mere assumption that the court would grant the continuance.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0437222.pdf

Parker v. Commonwealth: December 13, 2022

Augusta: Defendant appeals her conviction for Assault and Battery on Law Enforcement on Denial of a Continuance and Jury Instruction issues.

Facts: Officers responded to a complaint of domestic assault. The defendant and the other party gave conflicting accounts of the altercation. Officers concluded that the defendant was the primary

aggressor and arrested her. The defendant kicked a police officer who was arresting her. The grand jury indicted the defendant for "unlawfully and feloniously assault[ing]" the officer.

At trial, the Commonwealth moved to amend the indictment to allege that the defendant "did feloniously assault and batter" the officer (from mere assault). The trial court granted the motion over the defendant's objection, noting that § 19.2-231 authorizes a trial court to permit amendment of an indictment at any time before the jury returns a verdict. The defendant then moved for a continuance, contending that the amendment was a surprise. The trial court denied the motion, concluding that the amendment did not constitute a surprise within the meaning of § 19.2-231.

At the conclusion of the trial, the defendant proffered four jury instructions pertaining whether the officers had probable cause to arrest the defendant for committing assault and battery and whether the defendant was permitted to use reasonable force to resist the arrest. The trial court decided not to give the proffered instructions because it determined as a matter of law that the officers had probable cause to arrest the defendant, rendering the instructions irrelevant.

Held: Affirmed.

Regarding the denial of a continuance, the Court noted that the defendant did not show that the amendment operated as a surprise or that she was prejudiced by the denial of a continuance. The Court also complained that the defendant failed to show any prejudice from the trial court's denial of a continuance.

Regarding the jury instructions, the Court first repeated that the lawfulness of an arrest presents a mixed question of law and fact. However, where the facts are undisputed, the Court explained that only a question of law remains. The Court emphasized that it is "fundamental" that questions of law should be decided by the court rather than submitted to the jury. In this case, the Court found that the trial court correctly found as a matter of law that the officer had probable cause and statutory authorization to arrest the defendant for assault and battery of a family or household member.

The Court noted that § 19.2-81.3(A) authorizes a law enforcement officer to "arrest without a warrant" for an alleged assault and battery against a family or household member "regardless of whether such violation was committed in his presence." The Court reviewed the factors in § 19.2-81.3(B) and the facts of this case. Based on the undisputed facts, the Court found that the trial court was entitled to rule as a matter of law that the officer reasonably believed that the defendant committed assault and battery and was the predominant physical aggressor. Therefore, the trial court did not err by refusing the four proposed jury instructions.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0377223.pdf

Gary v. Commonwealth: October 4, 2022

Henrico: Defendant appeals his convictions for Murder and Use of a Firearm on Denial of a Continuance and Motion to Withdraw his Plea.

Facts: The defendant confronted a man and shot him in the head, killing the victim. On the morning of trial, the defendant sought a continuance, stating that he needed it to secure the testimony of two unidentified defense witnesses. Defense counsel explained that the defendant had provided him with the names of the two witnesses for the first time that morning. Emphasizing that the case had been on the docket for months and a pre-trial order governing witnesses had been entered, the trial court denied the continuance motion.

During jury selection, the parties reached a plea agreement. Pursuant to the agreement, the defendant entered a no-contest pleas to the reduced charge of second-degree murder and the related firearm offense.

Prior to sentencing, though, the defendant moved to withdraw his plea. He testified that, when the court denied his continuance motion, he was distressed due to the absence of witnesses necessary to his defense. He said that he feared being convicted of first-degree murder and receiving a longer sentence than the one offered in the plea agreement. He suggested that he "numbly" answered the questions in the plea colloquy to "get the situation over with" because it was "overwhelming." The defendant further asserted that he sought to withdraw his pleas because he "didn't know it was that high," logically referring to the sentencing range for the reduced charge of second-degree murder.

The trial court denied the motion, finding that the defendant had failed to satisfy the "good faith" requirement.

Held: Affirmed. The Court held that the trial court did not err by denying the defendant's motion for a continuance on the morning of trial or his subsequent motion to withdraw his no-contest pleas.

Regarding the denied continuance, the Court applied the "two-pronged test" from *Lebudun.* That test requires the Court to ask whether the trial court abused its discretion and whether the defendant was prejudiced. The Court noted that, in a proffer of evidence, it is not sufficient for a party to proffer "merely his theory of the case" rather than the substance of the excluded evidence. In this case, the Court complained that, at the time the defendant sought his last-minute continuance, he did not proffer to the trial court the nature of the testimony that the alleged missing witnesses would provide, whether their presence could be secured at a subsequent proceeding, or even their names.

Regarding the motion to withdraw the plea, the Court agreed that the evidence supports the finding that the defendant did not act in good faith in making and seeking to withdraw his pleas. The Court noted that the defendant never clearly explained why he decided only the night before trial that he wanted to call the owner of the truck (presumably his cousin) and its unnamed additional user as witnesses to provide an alternative theory regarding the source of the primer residue.

The Court repeated that, when a defendant seeks to withdraw his plea merely because he is "fearful of his possible sentence," the motion to withdraw is not made in good faith. "Fear of the sentence simply did not provide a good faith basis for seeking to withdraw the pleas." The Court also noted that the timing and sequence of the relevant events provides additional evidence supporting the trial court's finding of a lack of good faith. The Court noted that "Allowing the appellant to withdraw the pleas under these circumstances would permit him to obtain indirectly what he had been unable to obtain directly—a continuance of his trial."

Full Case At:

https://www.vacourts.gov/opinions/opncavwp/1045212.pdf

Court Records & Sealing

Virginia Supreme Court

Daily Press v. Commonwealth: October 21, 2022
And
Newport News v. Daily Press: October 21, 2022
878 S.E.2d 390 (2022)
Newport News: Newspapers appeal the Sealing of Court Records and a Closed Court Hearing in a criminal case.

Facts: In 2019, a Newport News police officer shot and killed a man while attempting arrest him for a false report to 911. The court released the officer on pretrial bail shortly after his arrest. Contending that the officer posed a danger to the community, the Commonwealth requested a subpoena duces tecum to obtain various documents for a bail hearing, including any prior investigations of the officer's conduct as a police officer and any city emails regarding the alleged offense. Over the city's objection, the trial court issued the requested subpoena and ordered that the subpoenaed documents be filed with the clerk of court pursuant to Rule 3A:12(b)(2), which required the initial filing to be sealed until further order of the court.

After reviewing the subpoenaed documents, the Commonwealth filed a motion to revoke bail, arguing that the sealed documents established probable cause to believe that the officer's pretrial liberty would pose a danger to the community. The Commonwealth also filed a motion to preclude the officer from arguing certain defenses and attached various sealed documents as exhibits to the motion. At the beginning of the bail-revocation hearing, the Commonwealth moved to close the hearing and thereby preclude the public — including a reporter — from being in the courtroom.

In support of its request to close the hearing and seal the documents, the Commonwealth contended that the sealed documents had the potential of prejudicing the defendant. Second, the Commonwealth noted that police internal affairs files are generally considered to be confidential. The trial court agreed to seal the records and to seal the hearing to prevent trial from being impermissibly tainted by unfairly prejudicial pretrial publicity and to permit the Commonwealth to "fully articulate the reasons as to why what is in the sealed bond revocation motion constitutes probable cause" to revoke the officer's bail. The court granted the Commonwealth's request to close the bail-revocation hearing, which reconvened a few days later. Two newspaper publishers and a reporter filed an appeal challenging these first two rulings.

The trial court's third ruling, challenged on appeal by the City of Newport News, found that the City lacked standing to oppose any public access to sealed documents that the City had previously produced in response to a subpoena. The city had argued that the sealed documents the newspapers sought to access included reports concerning the officer created by the Internal Affairs Division of the Newport News Police Department.

Held: Reversed as to all three rulings.

Regarding the closed bail hearing, the Court found that pretrial bail hearings are included within the scope of the open-courts doctrine. Thus, the Court held that "the public has a First Amendment right of access to pretrial proceedings setting and modifying bail," as well as to any "documents on which the bail decisions are based." The Court wrote: "Except in the rarest of circumstances, this decision must be made in open court so that the public — including victims of the defendant's charged crimes and any potential victims of his future crimes — would know how and why, not simply what, the court has ruled on the issue."

The Court agreed that the degree to which pretrial publicity might prejudice the defendant's right to an unbiased jury is one of the few reasons that could justify the closure of a pretrial hearing in a criminal case. However, the Court cautioned, the mere possibility of prejudice is never enough, as that could be hypothesized as a potential risk in every criminal case. Instead, the Court explained, courts must ask not merely whether there is a "reasonable likelihood" of prejudice but rather whether a "substantial probability" of prejudice exists. That means that the risk of prejudice must be so palpable and the need to combat it so necessary that a trial court could not confidently rely on the *voir dire* process to ameliorate the risk.

In this case, the Court contended that the opportunity to conduct *voir dire* constituted a reasonable alternative to the trial court's decision to bar the public from the bail-revocation hearing, and that the trial court could have also considered "sequestration of jurors" or a "change of venue" to provide additional safeguards. Thus, the Court ruled that barring the public from the bail-revocation hearing was "ill-fitted for the potential harm and was not a "narrowly tailored" measure."

Regarding the City's motion to intervene to prevent the release of the documents, the Court explained that non-parties are permitted to make a special appearance in criminal cases to assert their claimed right of access to the court proceedings and records. The Court agreed that a non-party may assert a right-of-access claim during a pending criminal case given the court's "inherent authority to control its records, and this inherent authority includes the power to unseal a record previously ordered sealed." Thus, the "entity or individual subpoenaed" has a right under Rule 3A:12(b)(3)(iv) to make an appearance in the case seeking, among other things, a court order "prohibiting or limiting disclosure" of the documents.

In this case, the Court ruled that, just as the press has a right to intervene in an ongoing criminal case to assert a right to access court records, a non-party whose records were subpoenaed has a right to contest any attempt to unseal these records. The Court ruled that the trial court erred, therefore, in holding that the City had no standing in this case.

The Court cautioned that a document that bears no relation to the adjudicative process does not become subject to the open courts doctrine just because a litigant files it with a court. For example, a litigant's attempt to abuse the judicial process — by filing documents for the sanctionable purpose of public dissemination of irrelevant, scandalous information — cannot create judicial records entitled to the constitutional presumption of public access. The Court explained that "the open-courts doctrine, all courts agree, should not be employed in a manner that inadvertently encourages the whims of malicious litigants. The public has a right to know what their courts are doing or have already done, but

they do not have a constitutional right to know the contents of documents which play no role in the adjudicative process."

In this case, however, the Court found that the documents related to the bail hearing and the Commonwealth's motion to exclude defenses, whether the motion was successful or not, it and its supporting exhibits were arguably relevant to a core issue before the court. The Court ruled, therefore, that the Commonwealth's motions and supporting exhibits fell within the general scope of the open-courts doctrine.

Lastly, the Court addressed the argument that the text of Rule 3A:12(b)(2) sealed the records by operation of law. The Commonwealth had argued that the language: "Until such time as the subpoenaed materials are admitted into evidence they must remain under seal unless the court orders that some or all of such materials be unsealed" sealed the records by operation of law. However, the Court found that this proviso does not expressly state or reasonably imply that a court has no discretion to unseal documents that are not admitted into evidence.

On remand, the Court directed the trial court to permit the Commonwealth, the officer, the city, and the newspapers an opportunity to present arguments on whether the sealed documents should be unsealed and to file briefs in support of their positions. The Court then directed that the trial court determine if all, some, or none of the disputed documents should be unsealed, and if any are unsealed, what redactions, if any, should be made.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1210787.pdf

Discovery & Brady

Fourth Circuit Court of Appeals

Bowman v. Stirling: August 16, 2022
45 F.4th 740 (2022)
S.C.: Defendant appeals his conviction for Capital Murder on *Brady* Discovery grounds.

Facts: The defendant shot and killed a woman, buried, and then burned her body. At trial, at least four witnesses testified that they saw the defendant carrying a gun consistent with the murder weapon on the day of the murder, and others testified to seeing the defendant with a pistol of some type both before and after the murder. Two other witnesses testified that the defendant told them that he killed the woman. One witness—whose testimony was not affected by any alleged *Brady* evidence—further testified that, less than twelve hours after the murder, the defendant led him directly to where the body was hidden, retrieved her body from the woods within "a minute, two minutes," put it in the trunk of her car, and then set both the victim and the car ablaze.

Several witnesses confirmed that the defendant was driving the victim's car the night of the murder, required passengers to wear gloves in the car, and was trying to sell the victim's car the night of the murder. Forensic evidence found the defendant's DNA on a vaginal swab from the victim. The

victim's wristwatch was in the defendant's pants pocket. The defendant's own sisters admitted that they helped the defendant get rid of the gun in the river, and police retrieved the gun. Forensic analysis matched the gun to the bullets fired at the crime scene.

The jury convicted the defendant and sentenced him to death. Later, the defendant argued that the state's failure to produce several pieces of evidence violated his due process rights because he could have used that evidence to impeach prosecution witnesses.

Regarding the first witness, who had been the defendant's co-defendant, the defendant complained that the state failed to disclose a competency report from a psychologist. In the report, the co-defendant reported smoking large quantities of cannabis—up to six cigarettes a day, causing at least two seizures. The co-defendant also reported hearing "a voice and a little beeping noise," but the psychologist concluded that his "description of this hallucination is atypical for mental illness." The defendant argued that he could have used this report to challenge the witness' memory and sanity before the jury.

Regarding the second witness, the defendant complained that the state had failed to disclose the fact that the witness had pending charges in the same jurisdiction at the time that he testified. The defendant also made other arguments regarding other pieces of undisclosed evidence.

The trial court denied the defendant's post-trial motions to set aside the verdict.

Held: Affirmed. The Court found that the defendant had not carried his burden to prove a reasonable probability that, had he received the undisclosed evidence, the jury would not have convicted him of murder or recommended a sentence of death.

The Court repeated that a *Brady* violation requires the defendant to prove three elements:

(1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;

(2) That evidence must have been suppressed by the State, either willfully or inadvertently; and

(3) That evidence must be "material either to guilt or to punishment."

Regarding the co-defendant's report, the Court concluded that the report's additional impeachment value would be slight.

Regarding the second witness' pending charges, the Court agreed that, even without any evidence of an agreement between the witness and the State regarding those charges, a jury could infer that the witness was motivated to curry favor with the prosecution so that the charges against him would be dropped or otherwise beneficially resolved. However, in this case, the Court noted that there was no evidence that the State had treated the witness favorably at the time of trial or offered to do so, nor was the witness the State's central witness against the defendant. The undisclosed evidence of the pending charges was undoubtedly valuable for impeachment, but its importance "did not rise anywhere close to the level of the suppressed evidence in *Giglio, Boone, or Ruetter*."

Full Case At:
https://www.ca4.uscourts.gov/opinions/2012.P.pdf

Virginia Court of Appeals

Published

Harvey v. Commonwealth: January 24, 2023

Richmond: Defendant appeals his convictions for Sexual Assault, Malicious Wounding, Burglary, and Unlawful Filming on Refusal to Strike a Juror, Fourth Amendment, Discovery of Jail Calls, and Admission of Prior Bad Acts.

Facts: In March 2018, the defendant pushed a woman to the ground and attempted to sexually assault her, while carrying a cellphone. Then, over a couple of days in May 2018, the defendant followed three college students back to their residences, where he broke into their apartments and sexually assaulted them while they were unconscious, filming the incidents on his phone. In the third case, which is the case charged in this incident, the victim woke up during the assault. The defendant struck her, breaking a bone in her face and knocking her out.

In September 2018, police investigated the defendant for assaults on other women where he lifted their clothes to photograph them. The defendant voluntarily surrendered his phone to police, who days later obtained a search warrant for the phone and an SD card in that phone, seeking data for six days during the September time frame only. In October, police obtained a second search warrant to include evidence from May 2018. That warrant revealed videos that the defendant had taken of his sexual assaults in May.

DNA evidence linked the defendant to the two initial assaults. DNA evidence also linked the defendant to two crimes in 2015, including another burglary incident where the defendant entered an apartment and filmed a woman in the shower. The victim in this case identified the defendant at trial. The defendant also had two previous convictions for unlawful filming at the time of this trial. Police arrested the defendant, and he was held without bond.

In December 2019, the defendant moved to suppress the evidence from the second search warrant. In January 2020, the trial court granted that motion. Two weeks later, police obtained a third search warrant. The defendant again moved to suppress the evidence from that warrant, which the trial court granted again.

In July 2020, one day after the trial court suppressed the third warrant, police obtained a fourth search warrant. At that point, law enforcement had possessed the phone for almost two years. Unlike the second and third warrants, the fourth one included limitations on the time periods for which data was sought, covering one month in 2015 and six months in 2018, two periods during which several crimes had occurred that the defendant was suspected of committing. The affidavit was also much more detailed than the second and third warrants because it added information obtained in a separate search of the SD card from the defendant's phone.

The fourth search warrant also limited the examination of the phone itself to applications that could hold video or photographic data. Finally, the warrant restricted the search to files created between dates that were book-ended by the crimes of 2015 and those of 2018. The defendant moved to suppress the fourth search warrant, but the trial court denied the motion.

Prior to trial for this offense, the Commonwealth sought a ruling permitting it to introduce evidence of the offenses against the two other victims from earlier in May 2018. The defendant

objected, arguing that the evidence was overly prejudicial and insufficiently related, as the defendant could simply have downloaded the video of the assault against this victim from the Internet. The trial court admitted the evidence over the defendant's objection, ruling that the acts themselves were "idiosyncratic enough" in terms of temporal and geographic proximity, the assault and how it "was done," and the fact that the acts were filmed. The trial court, however, agreed to instruct the jurors that they could consider evidence that the defendant committed a crime other than the one for which he was on trial only as evidence of his intent, identity, and "the unique nature of the method of committing the crime charged in connection with the crime for which he [was] on trial and for no other purpose."

At trial, during voir dire, the prosecutor asked the jurors whether they would be able to watch a video showing the rape of the unconscious victim. One juror said that she had a friend who was raped while unconscious. She initially stated that she would "be fine" considering the rape charge fairly "without a video" but that "with a video" and considering the defendant's purported defense of consent, she was "not sure she could do that fairly." In response to further questioning, the juror responded that she could evaluate evidence in addition to the video but would probably be "swayed" by the video. The juror also volunteered what she knew about the law of unconsciousness and consent.

The trial court then clarified that, after receiving the court's instructions on the law of consent, the juror would be free to consider all the evidence and would need merely to "be open to consider" the defense. The juror replied that she "would try to" and "thought" she could do so. The trial court again instructed her that she would have to wait for the evidence and that the voir dire was just to "know" if she "could apply the law that the court would give her" After that further explanation by the court, the prosecutor again asked the juror whether she could consider evidence that the alleged victim consented and evidence that she did not consent. Both times the juror responded, "Yes," and "Absolutely." Following additional questioning, defense counsel objected to the seating of that juror. The trial court denied the motion to strike her for cause.

On the second day of trial, the Commonwealth introduced a jail phone call from two years before. On the call, the defendant asked a woman if she heard that there were "fractured faces involved." The defendant stated, "I don't know how I'm supposed to live with myself after that. I didn't realize there was that much damage done." The Commonwealth had told the defendant about the provided the call as discovery on the day before trial. The defendant asked the trial court to exclude the recording due to the alleged discovery violation. The trial court denied the motion and admitted the recording.

[*Great job to Josh Boyles and Sarah Heller, who tried this case for the Commonwealth – EJC*].

Held: Affirmed.

The Court first ruled that the trial court's denial of the defendant's motion to strike the juror was not error. The Court examined the record and was satisfied that the trial court was able to assess whether the juror was impermissibly biased or would be able to apply the law in the instructions after the presentation of all the evidence. To the extent the juror gave responses that were unclear, the Court noted that the trial court clarified them and confirmed that the juror could sit impartially. The Court found that the record revealed that the juror did not demonstrate a fixed bias and that the trial court's questioning and instruction constituted appropriate clarification, not improper rehabilitation.

The Court then affirmed the denial of the defendant's motion to suppress the fourth search warrant. The Court began by holding that the trial court did not err by concluding that the particularity requirement of the Fourth Amendment was satisfied. The Court found that the challenged search warrant satisfied the constitutional particularity requirement because it listed the specific crimes about which the evidence was sought and the specific places on the defendant's cell phone where the officers were authorized to look for that evidence.

The Court then concluded that, under the Fourth Amendment, there was proof of a constitutionally sufficient nexus between the phone and the crimes under investigation. The Court rejected the defendant's argument that evidence of a nexus between his cell phone and the nine crimes of which police suspected him was lacking because there was evidence in only one case that the assailant used a phone to record the potential crime, the 2015 incident in which a woman saw a cell phone that was possibly recording sticking through her shower curtain.

The Court examined the nine groups of offenses from 2015 and 2018, noting that video evidence was strongly suspected to be involved in 5 of those cases. Along with the defendant's two previous convictions for unlawful filming and the two videos discovered by law enforcement in the first search warrant, the Court found that the evidence provided "more than enough evidence" to support the trial court's finding that an adequate nexus existed for probable cause to search the defendant's phone for videos and photographs created during the two listed time frames.

The Court then turned to the defendant's argument that the search of his cell phone was unreasonable under the Fourth Amendment based on the length of time it took the Commonwealth to obtain a valid search warrant. The Court acknowledged that this was an issue of first impression in the Commonwealth. The Court repeated that a seizure that is lawful at its inception can nevertheless violate the Fourth Amendment if its manner of execution unreasonably infringes possessory interests protected by that amendment. The Court explained that assessing the reasonableness of the duration of the retention of the item seized includes factors such as (1) the significance of the interference with the person's possessory interest; (2) the duration of the delay; (3) the presence or absence of consent to the seizure; and (4) the government's legitimate interest in holding the property as evidence.

Regarding the defendant's interest in the phone, the Court noted that the defendant was incarcerated and could not lawfully possess the phone, and therefore the seizure did not deprive the defendant of any direct interest in possessing the phone. The Court also noted that defense counsel received a disk containing all the data on the phone during discovery. Lastly, the defendant did not request his phone back for almost two years. Consequently, the Court found that the degree of interference with his possessory interest before the police obtained a valid warrant related to the charges at issue was minimal.

The Court agreed that personal property without independent evidentiary value may not be kept indefinitely. Here, however, the Court noted that the Commonwealth repeatedly sought subsequent warrants to permit it to search the defendant's phone for evidence of specific additional crimes that he was suspected of committing, and it had a strong interest in retaining the property while doing so in as prompt a manner as possible. Lastly, the Court found that the officers involved therefore acted diligently, if imperfectly, to obtain a valid warrant permitting the search that is the subject of this appeal.

Regarding the jail phone call, the Court noted that defense counsel had at least a full business day to evaluate it before trial and did not request a continuance. The Court found that the defendant did not establish prejudice on appeal, and the trial court therefore did not abuse its discretion by admitting the recording of the phone call.

Lastly, the Court addressed the defendant's argument that the evidence of the two other offenses in May 2018 was inadmissible regarding this offense. The Court noted that the defendant took all three videos with a single phone and that the contents of the videos and the ways in which the two sets of crimes were committed involve distinct similarities. The Court explained that the defendant's theory that he downloaded the videos from the Internet did not render the evidence of the crimes against the two other victims inadmissible to prove identity in part through modus operandi.

In this case, the Court noted that both the burglary and aggravated sexual battery charges included the element of intent to commit rape or some other act of sexual abuse. The Court repeated that the prosecution is required to prove every element of its case and is entitled to do so by presenting relevant evidence in support of the offenses charged. The Court wrote that: "A defendant cannot prevent the prosecution from doing so simply because he takes the position that the offense did not occur or that someone else committed it and therefore intent is not genuinely in dispute."

Consequently, the Court ruled that other-crimes evidence was relevant to prove identity (both independently and through modus operandi) and intent. The Court found that the probative value of the evidence on the combination of elements for which it was offered—identity and intent—outweighed the obvious yet incidental prejudice. Considering the record as a whole, the Court concluded that the trial court did not abuse its discretion by admitting the video and related evidence of the defendant's rape in the earlier part of May 2018. The Court also noted that the trial court limited the impact of the other-crimes evidence through a cautionary instruction directing the jury to consider the evidence for the limited purposes of his intent, identity, and modus operandi.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0723212.pdf

Virginia Court of Appeals
Unpublished

Tyler v. Commonwealth: February 21, 2023

Chesterfield: Defendant appeals his conviction for Possession with Intent to Distribute, challenging an Expert Disclosure.

Facts: The defendant possessed heroin with the intent to distribute, along with a firearm and drug packaging. At trial, an officer, an expert in drug distribution, opined that the amount of heroin was inconsistent with personal use. He based this opinion on the quantity of heroin, the packaging, and other paraphernalia. The officer explained the paraphernalia found were commonly used to distribute heroin and observed that there was a "high correlation" between firearms and drug trafficking.

The defendant objected to the expert testimony, arguing that it exceeded the scope of the Commonwealth's pre-trial expert designation which stated simply: "The Commonwealth expects [the expert] to testify that the amount of drugs seized is inconsistent with personal use." The trial court overruled the objection. On cross-examination, the officer admitted he had not reviewed the body camera footage or police report before the Commonwealth filed its expert designation but had only known about the quantity of drugs before trial and otherwise was basing his opinion on the evidence introduced at trial.

Held: Affirmed.

The Court first observed that, under Rule 3A:11(b)(4)(A) and the court's discovery order, the Commonwealth needed to disclose not only the expected expert testimony (that "the amount of drugs is inconsistent with personal use") but also the "bases and reasons" for this opinion. The Court first rejected the Commonwealth's argument that the testimony contained "additional bases and reasons "further explaining" the expert's opinions. The Court observed that, "for additional bases and reasons to qualify under Rule 3A:11(b)(4)(B), a party must first have disclosed at least some basis or reason under Rule 3A:11(b)(4)(A)."

Instead, the Court agreed with the Commonwealth's argument that the defendant was not prejudiced by the failure to disclose under Rule 3A:11(b)(4)(A). The Court repeated that a trial court does not err in admitting evidence "when a discovery violation does not prejudice the substantial rights of a defendant." The Court complained that the defendant failed to point to any prejudice he experienced from the failure to include this information in the pretrial expert disclosure, nor did he identify any prejudice for the trial court. For example, the Court noted that, if he was "surprised by the content or otherwise unprepared to deal with it, he could have requested a continuance."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0219222.pdf

English v. Commonwealth: November 1, 2022

Roanoke: Defendant appeals his conviction for Rape and Sexual Assault of a Child Under 13, 2nd Offense, on Evidentiary Issues.

Facts: The defendant sexually began sexually assaulting a child soon after her fifth birthday. The defendant was in a relationship with the victim's mother and acted as a caretaker for the victim and her siblings. The victim testified that the defendant was a "father figure" to her. The victim was fourteen years old at the time she reported the abuse. At the time, the defendant had moved out because he was having a child with another woman. The other woman testified that she had been in an "on and off" relationship with the defendant for fifteen years, and at the time of the trial he was her boyfriend.

A SANE nurse, Melissa Harper, examined the victim, who disclosed that the defendant sexually assaulted her daily since sixth or seventh grade. The exam revealed the victim suffered from genital warts. The defendant was diagnosed and treated for genital warts in 2013 and in 2014, during which he

was sexually abusing the victim. At trial, a doctor testified that genital warts are "typically" transmitted through sexual contact.

The Commonwealth indicted the defendant for various offenses, alleging a three-year date range from shortly after the victim's tenth birthday. The defendant asked for a bill of particulars to state the dates, locations, and times of all offenses for which he was being charged. The defendant also objected to the requirement that he provide a notice of alibi based on the three-year date range in the indictment. The trial court denied the motion.

Prior to trial, filed a motion in limine seeking to exclude evidence of his prior adjudication of delinquency for the forcible sodomy of an eight-year-old when he was fifteen years old. The trial court denied that motion but gave three limiting instructions regarding the purpose for which the defendant's prior conviction could be considered; the jury was instructed not to consider it as evidence of guilt.

Prior to trial, the defendant sought to exclude evidence regarding his genital warts due to the number of years between the diagnoses and the lack of evidence conclusively establishing that the victim contracted the condition from him. The trial court denied his motion and permitted the Commonwealth to introduce that evidence at trial.

Prior to trial, the Commonwealth's moved to admit evidence of the defendant's prior sexual conduct with the victim prior to the indictment. The defendant sought to exclude evidence of his sexual acts with the victim such as "alleged play fighting, humping, and oral sex." He contended that, because these acts were not the basis of criminal charges, they were not admissible. The trial court ruled that it was relevant under Rule 2:404 (B) to establish the absence of a mistake or an accident.

At trial, the defendant also argued that the Commonwealth failed to establish that he and the victim were not married.

Held: Affirmed.

Regarding the defendant's argument that the Commonwealth failed to prove he and the victim were not married, the Court noted that it was reasonable for the jury to infer that the victim would not have been able to marry the defendant without parental consent. The Court examined the evidence about the defendant's romantic relationships with the victim's mother and the other woman and concluded that a juror could reasonably infer that the defendant was not married to the victim at the time of the offenses.

Regarding admission of the defendant's prior adjudication of delinquency, the Court repeated that, in a proceeding against a defendant under a recidivist statute, evidence of the prior offense is admissible, even when it goes only toward a sentencing enhancement. The Court then explained that a potential prejudice arising from the introduction of a defendant's prior convictions during the guilt phase can be solved by an appropriate limiting instruction to the jury.

Regarding the evidence of the defendant's genital warts, the Court agreed that the evidence was admissible to establish that the defendant began having sexual intercourse with the victim in the same time frame in which he had outbreaks of genital warts.

Regarding the evidence of the defendant's prior sexual acts with the victim, the Court noted that the Commonwealth was required to establish that he acted with "lascivious intent." Thus, the Court explained, the defendant's other sexual misconduct was relevant to establishing that he acted with lascivious intent and that his acts were accomplished knowingly and intentionally. The Court concluded

that the duration and escalation of the defendant's sexual contact with the victim before the indictment provided the jury with some evidence of the defendant's state of mind and intent when he committed the offenses after the move.

Regarding the defendant's request for a bill of particulars, the Court repeated that it is improper for a defendant to use a bill of particulars to expand the scope of discovery in a criminal case. The Court noted that under *Clinebell,* an extended period during which alleged sexual crimes occurred against a minor were sufficient to inform the defendant of the time of the offenses. In this case, the Court ruled that the time frames in the indictments and bill of particulars were sufficient to apprise the defendant of "the nature and character of the offenses."

The Court also noted that the defendant never offered any type of alibi defense. The Court ruled that the trial court did not abuse its discretion when it did not require the Commonwealth to provide more specific information about the date, time, and location of the offenses or by overruling the defendant's objection that the lack of more specific dates prevented him from providing an adequate notice of alibi defense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1065213.pdf

Cole v. Commonwealth: September 27, 2022

Hopewell: Defendant appeals his conviction for Possession of a Firearm by Felon on Due Process Notice and *Brady* discovery grounds.

Facts: The defendant, a convicted felon, stole several items, including a firearm, while at the victim's house. At witness had seen the defendant at the home earlier and noted that he had a "small black and gray" gun with him. Later, after the victim discovered and reported the theft, the defendant returned the firearm, apologized for stealing her firearm, and requested that she "drop the charges." The victim asked for the other stolen items to be returned. At first, the defendant claimed that he thew them away, but later he relented and returned the other items. When he was at the victim's home, he opened his backpack, and the victim saw a sawed-off shotgun inside it.

The Commonwealth charged the defendant with possession of a firearm by a felon. During the prosecutor's opening statement at trial, he mentioned that the defendant brought a firearm with him to the victim's house when he first went and again when he returned, that time with a sawed-off shotgun in his backpack. The defendant objected to the admission of testimony about any guns other than the one stolen because he had received no information about either of them before trial. He objected on Due Process Notice and *Brady* grounds. He also contended that the witness' testimony that he brought a gun with him when he first came to the house and the victim's testimony that she saw a sawed-off shotgun in his backpack were prior inconsistent statements. He argued that they were inconsistent because neither witness provided that evidence during her testimony in general district court or her police interview, suggesting that the statements could have served as impeachment of those witnesses.

The trial court overruled the objection.

Held: Affirmed. The Court held that the notice that the defendant received of the charge against him satisfied due process. In addition, the Court held that nondisclosure of the challenged testimony before trial did not violate the defendant's rights pursuant to *Brady*.

Regarding the defendant's Notice claim, the Court noted that the indictment set forth the charge against the defendant and followed the language of § 18.2-308.2. It also alleged that the crime occurred in Hopewell on or about October 1, 2020. Therefore, the Court concluded that the indictment "named the accused, described the offense charged, and identified the location" and a date of the alleged crime in compliance with § 19.2-220. The Court also found that the indictment was sufficient to adequately apprise the defendant of "the nature and character" of the charge against him.

In this case, the Court explained that the Commonwealth was not required to give the defendant notice of the witness' statement that he initially brought a firearm with him or of the victim's statement that she saw a sawed-off shotgun in his backpack. Consequently, the Court ruled that the admission of the challenged testimony did not deprive the defendant of his due process right to be apprised before trial of the basis of the charge against him, which was sufficiently set forth in the indictment.

Assuming without deciding that the challenged testimony was impeachment evidence, the Court noted that it was disclosed to the defendant during trial. The Court repeated that "*Brady* is not violated, as a matter of law, when impeachment evidence is made 'available to a defendant during trial if the defendant has sufficient time to make use of it at trial." In this case, the Court noted that counsel did not request a continuance or even a recess. The Court rejected the defendant's hypothesis that, had he known of this testimony before trial, he might have been able to identify witnesses to contradict the witnesses, finding that he did not demonstrate that the evidence was material within the meaning of *Brady*.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1204212.pdf

Ellis v. Commonwealth: September 20, 2022

Fauquier: Defendant appeals his conviction for Murder, Robbery, and Use of a Firearm on *Brady* Discovery and sufficiency grounds.

Facts: The defendant shot and killed the victim while attempting to rob the victim. The defendant and two other men planned to rob the victim, drove to the victim's house, and when they arrived, the defendant took a gun with him when he exited the car. The defendant pointed a gun at the victim and told the victim to give him drugs or money. The defendant then shot the victim. When he returned, he told a witness that "if he hadn't have fought back [I] wouldn't have had to pop him."

Post-trial, the defendant asked the trial court to overturn the verdict on the grounds that certain interviews possibly existed and were not disclosed to him. These interviews include interviews between a witness and a detective; the Commonwealth and the victim's mother; and the Commonwealth and the

victim's father. He argued that the interviews could have been used to impeach/cross-examine these witnesses. The defendant admitted, though, that he was unsure whether such interviews existed.

Held: Affirmed.

Regarding the *Brady* claim, the Court held that there was no *Brady* violation. The Court noted that the defendant did not show how these interviews would be favorable to him or shown how this evidence would have changed the result of the trial. Thus, the Court concluded that the defendant did not prove the third requirement for a *Brady* violation: Materiality, that is, that there was a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.

The Court pointed out that the interviews were not "known to the government," as the defendant admitted that he was unsure whether these interviews even exist. The Court explained that "*Brady* is not a rule of discovery, and the Commonwealth has no obligation to turn over interviews of which it has no knowledge. Additionally, the general definition of a *Brady* violation does not require the Commonwealth to have all physical evidence collected and analyzed for potentially exculpatory DNA evidence, nor does appellant cite any authority for such a requirement."

Regarding sufficiency, the Court also concluded that the evidence was sufficient to convict the defendant of first-degree murder, conspiracy to commit robbery, and use or display of a firearm in committing a felony.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1390204.pdf

Harrell v. Commonwealth: August 2, 2022

Chesapeake: Defendant appeals his conviction for Driving on a Revoked License on Refusal to Dismiss due to Discovery Issues.

Facts: The defendant drove on a revoked license after having two previous convictions for that offense. In September 2019, officers attempted to stop him, but he fled. Officers captured him soon thereafter. At the end of August 2020, the defendant requested body camera footage from the incident. The Commonwealth requested the video from the police at the beginning of October. Two months later, the police responded that there was no body camera for either officer because "it has been 13 months and hadn't been properly preserved, so it deleted automatically from the system."

The defendant moved to dismiss the charges based on the destruction of the video evidence, but the trial court denied the motion.

Held: Affirmed.

The Court explained that, under *Gagelonia*, *Trombetta* and *Youngblood,* a defendant seeking a new trial on the basis of missing evidence formerly in the Commonwealth's possession must show that

(1) the evidence possessed an apparent exculpatory value,

(2) the defendant could not obtain comparable evidence from other sources, and

(3) the Commonwealth, in failing to preserve the evidence, acted in bad faith.

In this case, the Court found that the defendant raised no more than the possibility that the footage would have exculpated him. Thus, the defendant failed to show that the video had "apparent exculpatory value" at the time of destruction.

The Court also noted that the destruction appeared to be due to a routine police procedure. Because of the lack of evidence in the record to scrutinize adherence to police policy, the Court was not willing to analyze whether there was a deviation in police policy let alone whether such deviation constitutes bad faith. Instead, the Court—consistent with *Gagelonia*— found that the evidence was not apparently exculpatory and there was lack of bad faith.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0884211.pdf

Forness v. Commonwealth: June 28, 2022

Arlington: The defendant appeals his conviction for DUI, 2nd Offense, on admission of Field Sobriety Tests, a Prior Conviction, the Certificate of Analysis, and denial of a Jury Instruction.

Facts: The defendant drove a vehicle while intoxicated after having previously been convicted of that offense. Officers obtained a search warrant for the defendant's blood and sent the blood to the Department of Forensic Science, which determined that the defendant's BAC was .198.

Prior to trial, the defendant moved to dismiss the prosecution, alleging that videos from other officers on the scene had been destroyed. The defendant also moved to exclude the results of the blood test, arguing that the officers' only authority to conduct a blood draw came from Virginia's implied consent statute, not from obtaining a search warrant.

At trial, the defendant also moved to exclude evidence of his field sobriety tests, contending that evidence of a person's performance on a field sobriety test cannot serve as evidence of intoxication in determining his guilt. He also contended that the Commonwealth did not adequately establish a chain of custody for the certificate of analysis. Lastly, he argued that the Court should not allow the Commonwealth to admit his prior conviction during its case-in-chief.

The trial court rejected the defendant's proposed jury instruction, which stated: "The admission of the blood or breath test results in this case is not determinative of guilt" and that the jury must "make [its] determination from all the evidence presented."

Held: Affirmed.

Regarding the field-sobriety tests, the Court reasoned that a field sobriety test provides police officers with an opportunity to observe a driver's behavior, coordination, and movement. Therefore, the Court explained, officers may later testify about those observations as circumstantial evidence of the driver's level of physical and mental impairment, which directly translate to a driver's ability to operate

a car safely. The Court also rejected the defendant's contention that FSTs are "scientific" evidence, subject to special rules, as baseless.

The Court then rejected the defendant's argument that the Commonwealth could not admit the results of blood obtained from a search warrant. The Court found that, because the police obtained a warrant, the implied consent statute was irrelevant to this case. The Court concluded that, although § 18.2-268.2 sets out the procedure for implied consent, many of the other adjacent statutory procedures governing blood draws apply to all offenses in Title 18.2, including DUI. Thus, even when the Commonwealth secures a warrant for a blood draw, it would still, for example, need a certificate of blood withdrawal and a statutorily qualified person to perform the blood draw.

The Court also repeated that the defendant's claims regarding authentication of the certificate of blood withdrawal (required by § 18.2-268.6) and the blood sample's chain of custody only went to the weight of the evidence, not its admissibility.

The Court rejected the defendant's argument that the Commonwealth could have destroyed video evidence of his arrest. The Court concluded that nothing in the record suggested that the videos he claimed that the Commonwealth had destroyed or hidden ever existed.

The Court also agreed that the Court properly admitted the defendant's prior conviction in its case-in-chief. The Court repeated that, as "with all elements of a crime, the burden is on the Commonwealth to prove the prior [DUI] conviction beyond a reasonable doubt."

Lastly, the Court found that the defendant's proposed jury instruction would have been duplicative of the other, standard instructions in this case.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1029214.pdf

Ethics

Virginia Court of Appeals
Published

Spanos v. Commonwealth: March 7, 2023
and
Spanos v. Feinmel: March 7, 2023 (unpublished)

Louisa: Plaintiff appeals the dismissal of his Request to Disbar Two Prosecutors.

Facts: The plaintiff filed a legal ethics complaint against two prosecutors in the circuit court for a neighboring county. The plaintiff sought "to revoke the Defendant's license(s) [to] practice law in the Commonwealth of Virginia, or discipline the Defendant[] consistent with the laws of the Commonwealth of Virginia," citing Code § 54.1-3915. The circuit court sustained the prosecutors' demurrer and dismissed the complaint, ruling that the court lacked jurisdiction to hear the complaint or to grant the relief sought.

Held: Affirmed. The Court ruled that it lacked subject-matter jurisdiction in this case.

The Court found that the Commonwealth's statutory scheme does not grant a local circuit court the power to disbar attorneys. In addition, the Court concluded that the Rules also do not provide any authority or jurisdiction for a circuit court to entertain a disciplinary action filed by a citizen for the purpose of revoking an attorney's license.

The Court noted that, prior to, 2017, § 54.1-3935 permitted "any person" to file a verified complaint in the Supreme Court or a circuit court alleging that an "attorney has been convicted of a misdemeanor involving moral turpitude or a felony or has violated the Virginia Code of Professional Responsibility." However, as of 2017, § 54.1-3935 no longer provides for the filing of a complaint by anyone other than the Bar or an "attorney who is the subject of a disciplinary proceeding."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0139222.pdf
and
https://www.vacourts.gov/opinions/opncavwp/0140222.pdf

Expungement

Virginia Supreme Court

Williams v. Commonwealth: April 20, 2023

Arlington: Petitioner appeals the denial of her Expungement petition.

Facts: The petitioner was arrested on the felony charge of accessory after the fact of a homicide under § 18.2-19 and a grand jury indicted her on that charge. Several months later, the Commonwealth amended the indictment, striking out the accessory after the fact charge and substituting in obstruction of justice in violation of § 18.2-460. The petitioner pleaded guilty to the amended charge. The circuit court found her guilty and sentenced her.

The petitioner later filed a petition for expungement under Code § 19.2-392.2. The circuit court denied the motion pursuant to *Necaise*.

Held: Reversed and Remanded. The Court remanded the case to the trial court to review the matter under the Court's recommended method of analysis.

The Court examined the meaning of the term "otherwise dismissed" as used in § 19.2-392.2(A)(2). The Court repeated its finding in *Dressner* that, when a charge is not a lesser included offense, the inquiry turns on whether the charge is a "completely separate and unrelated charge."

In determining whether a charge qualifies for expungement on the basis that it was "otherwise dismissed," the Court directed that a court should examine whether the charge for which the petitioner was convicted is a lesser included offense of the original charge. If it is, the petitioner does not occupy

the status of innocent, and the original charge cannot be expunged. Similarly, the Court also repeated that if an amendment to the arrest warrant for the original charge relates only to the sentencing enhancement sought to be imposed, and not the underlying offense, it "simply cannot be said" that the amendment resulted in a completely separate and unrelated charge that would render the original charge eligible for expungement.

However, if the original charge is "completely separate and unrelated" to the charge the petitioner was convicted of, and the elements of that offense are not subsumed within the original charge, the Court repeated its ruling from *Dressner* that the petitioner is eligible to seek expungement of the original charge. The Court then explained that a determination of whether an amended charge is "completely separate from and unrelated" to the original charge is not equivalent to a mechanical application of the *Blockburger* test. Rather, the Court directed that a court should:

(1) compare the conceptual similarities and differences between the original charge and the amended charge and

(2) examine whether the two charges share a common nucleus of operative facts.

For example, the Court explained, a charge of robbery that is amended to a charge of grand larceny from the person is not "completely separate and unrelated" if both originate from the same background facts. In determining whether an original charge is "completely separate and unrelated," the Court allowed that a court may consult the underlying records of the petitioner's criminal case, or related criminal cases, including any transcripts. However, the Court cautioned that the presentation of new evidence to prove the petitioner's guilt or innocence is not permitted. Instead, the focus of an expungement proceeding is on existing court records; its purpose is not to engage in a retrial of a concluded criminal case. The Court also repeated that the burden rests with the petitioner to show that the original charge that was later amended qualifies.

Judge Mann filed a concurrence, where he wrote: "Because I urge the General Assembly to make clear that the term "otherwise dismissed" means to render a legal action out of consideration in a different way or manner than a nolle prosse or formal dismissal by the trial court, Ms. Williams would be eligible for expungement. In this case, the petitioner was saddled with a process we have made so difficult and then, by extension, the trial court was required to utilize a conceptual framework that collapses under its own weight."

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1220034.pdf

Fifth Amendment: Double Jeopardy

Virginia Court of Appeals
Unpublished

Martin v. Commonwealth: April 18, 2023

Scott: Defendant appeals his convictions for Murder and Use of a Firearm on Fifth Amendment *Miranda* grounds, Admission of Bad Acts, Denial of a Jury View, and Double Jeopardy grounds.

Facts: The defendant learned that his wife and the victim were having an extramarital affair. The defendant picked up the victim in Tennessee, transported him to Virginia, confronted him, and then killed him with a handgun. After the murder, the defendant returned to Tennessee and woke up his wife, brandishing a firearm and showing her a cell phone image of her deceased lover before saying "look what you made me do." He then confessed to the details of the murder and then told her he intended to finish his plan to kill her and himself. Next, the defendant zip-tied her hands and feet, although ultimately he did not kill her.

Police arrested the defendant, who invoked his *Miranda* rights. The defendant's parents then indicated that they wished to speak to him. A detective told the defendant's mother that he wished to speak to her son and that he gave her his contact information. The detective also testified that he might have told her that he would be able to talk to the Commonwealth's Attorney if the defendant cooperated. The defendant's father told the defendant that he should only speak to the police after he obtains a lawyer. After the defendant spoke to his mother, however, the defendant re-initiated contact with the police. Police re-read him his *Miranda* warnings and the defendant confessed, claiming that the shooting was accidental.

Prior to trial, the defendant moved to suppress his statements to police. He contended that law enforcement reinitiated interrogation after he asserted that he wished to speak to counsel when his mother became agents of the Commonwealth through their contact with the detective. Thus, any statement the detective made to the mother encourage him to speak with law enforcement constituted the Commonwealth improperly initiating contact with the defendant after he asserted his right to counsel under the Fifth Amendment. The trial court denied his motion.

At trial, the defendant admitted to killing the victim but claimed self-defense. The defendant objected to the Commonwealth admitting evidence of the defendant's kidnapping of his wife in Tennessee, but the trial court overruled his objection and admitted the evidence.

At trial, the defendant also asked the trial court to permit the jury to view the crime scene. The trial court denied the motion, instead admitting into evidence a video recording reflecting the entire length of the road including the area where the body was found and where the murder took place. The trial court also admitted relevant maps in evidence. In addition, photographs of the crime scene taken at the time of the homicide were admitted. The trial court explained that three years had passed since the event occurred creating the possibility that the scene would appear differently than it had at the time of the homicide.

Lastly, the defendant objected to instructing the jury on both Aggravated Malicious Wounding and First-Degree Murder, contending that that violated his Double Jeopardy protection. The trial court overruled his objection, and instead instructed the jury that if they convicted the defendant of first-degree murder, they were not to consider the aggravated malicious wounding charge. The verdict form also reflected the court's direction to the jury.

[*Good job to Special Prosecutors Zack Stoots and Jessica Jackson, Russell County – EJC*].

Held: Affirmed.

Regarding the *Miranda* issue, the Court ruled that the facts here do not support the defendant's contention that (1) his parents became agents of the Commonwealth or (2) that the detective unconstitutionally reinitiated an interrogation after the right to counsel was asserted. The Court applied the two-part test from *Mills* and *Sabo* to evaluate whether a private individual acted as a government agent. The first prong of that test is

(1) whether the government knew of and acquiesced in the search, and

(2) whether the search was conducted for the purpose of furthering the private party's ends.

The Court cautioned that these two criteria or factors should not be viewed as an exclusive list of relevant factors. In this case, the Court concluded that the defendant initiated contact with the detective and voluntarily provided a statement to him which was consistent with the theory he advanced at trial—that the shooting was accidental.

Regarding the defendant's other crimes, the Court applied Virginia Rule of Evidence 2:404(b). The Court ruled that the defendant's kidnapping of his wife demonstrated a common plan or scheme. The Court found that the entire exchange between the defendant and his wife was highly probative of the defendant's motive, as well as his intent and plan to kill the victim. The Court also concluded that the circumstances of the kidnapping also demonstrate that kidnapping the wife was part of a common scheme or plan and are therefore relevant connected facts. The Court noted that the relevance of this evidence was heightened by the defendant's self-defense argument. Lastly, the Court found that the evidence is also more probative than prejudicial.

Regarding the denial of the jury view, the Court did not disturb the trial court's conclusion that the maps, video, and pictures in evidence were both sufficient and better reflected the crime scene on the date of the homicide.

Lastly, regarding the defendant's double jeopardy claim, the Court found that, since the jury followed the trial court's instruction, the defendant was not subject to multiple punishments for conviction on a single offense, and there was no error. In this case, the Court agreed that aggravated malicious wounding is a lesser-included offense of first-degree murder, and therefore a conviction on both indictments would violate the double jeopardy prohibition.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0757223.pdf

Jones v. Commonwealth: January 17, 2023

Henrico: Defendant appeals his conviction for Assault on Double Jeopardy and Collateral Estoppel grounds.

Facts: The defendant threatened two people with a large knife during a road-rage incident, threatening to kill the victims. The general district court found the defendant guilty of assault but acquitted the defendant of brandishing a machete in violation of § 18.2-282.1. The defendant appealed. In circuit court, the Commonwealth proffered, without objection, that the GDC made "a finding that the Commonwealth had not proven its case beyond a reasonable doubt on the length of the machete and

that he didn't feel that it had met that element; that we had met that specific element and therefore, he acquitted the Defendant."

The defendant argued that the principles of double jeopardy and res judicata prevented the circuit court from convicting him of assault after he was acquitted by the general district court of brandishing a machete. The defendant also argued that the doctrine of issue preclusion in res judicata prevent prohibited the Commonwealth from presenting any evidence of his "conduct of approaching with the knife and causing fear in another" because the "acquittal in the district court for Brandishing a Machete was a verdict in his favor on the facts, and thus an acquittal of all the elements of the offense for which he was tried." The trial court rejected those arguments.

Held: Affirmed. The Court found that assault is not a lesser-included offense of brandishing a machete under *Blockburger*, as when the elements of both offenses are viewed in the abstract, each offense requires the Commonwealth to prove an element which the other offense does not require to be proven. Consequently, the Court held the circuit court did not err in this case in finding that the defendant could be convicted of assault in his trial de novo after the general district court acquitted him of brandishing a machete. The Court also held that the doctrine of issue preclusion did not prevent the Commonwealth from introducing evidence that the defendant intentionally wielded a knife and created reasonable fear in the minds of the victims because that specific fact was not the basis of the prior acquittal.

The Court also found that, even if assault were a lesser-included offense of brandishing a machete, the defendant could still have been tried in circuit court for assault without that trial violating his double jeopardy rights because the defendant decided to appeal his assault conviction from general district court to circuit court for a trial de novo. The Court explained that, when a defendant chooses to appeal a misdemeanor conviction from general district court, a trial on the same charges in the circuit court does not violate double jeopardy principles, subject only to the limitation that conviction in district court for an offense lesser included in the one charged constitutes an acquittal of the greater offense, permitting trial de novo in the circuit court only for the lesser-included offense.

Regarding the defendant's issue-preclusion argument, the Court agreed that issue preclusion prevents the Commonwealth from relitigating issues of ultimate fact that were essential to a defendant's prior acquittal. However, the Court cautioned that issue preclusion does not prevent the Commonwealth from presenting "subsidiary facts" associated with the prior acquittal.

In this case, the Court noted that the record showed that the defendant was acquitted of brandishing a machete solely because the Commonwealth failed to prove the length of the blade. Assuming without deciding that issue preclusion prevented the Commonwealth from putting on evidence of the length of the blade, the Court still ruled that the Commonwealth was not estopped from putting on evidence of other facts related to the charge for which the defendant was acquitted. These subsidiary facts include the evidence that the defendant ran toward the victims while wielding a knife.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0354222.pdf

Patel v. Commonwealth: July 12, 2022

Fredericksburg: Defendant appeals his convictions for Distribution of Drugs on Double Jeopardy and sufficiency grounds.

Facts: The defendant, while working as a pharmacist, unlawfully sold controlled drugs such as methadone and clonazepam to a police informant without a prescription on eight occasions. During the first few controlled purchases, the defendant asked the informant if he was "wearing a wire" and if he was cooperating with the police. Later, the defendant began to communicate only in writing during the purchases, again asking the informant if he was working with the police. When he sold the drugs, the defendant provided them in unlabeled containers, mixed in one container in violation regulations. The defendant also did not report the sales in the state PMP program, as required.

At trial, the Commonwealth attempted to play a redacted version of a video recording of the defendant's interview at the narcotics task force office. The prosecutor had redacted the recording to avoid revealing what the prosecutor considered irrelevant information about the DEA's involvement in the case. In objecting to the redacted version, defense counsel requested that the entire video be played for the court. The prosecutor responded, "I'll be more than happy to play the entire video. I was just putting that out in fairness to the Defendant." After the entire video of the interview was played for the court, the prosecutor asked the detective if he knew of any other buys by the DEA. To the prosecutor's surprise, the detective revealed that the DEA had also done a controlled purchase from the defendant.

Defense counsel moved for a mistrial. The defendant complained that this was the first time he had heard about any separate controlled drug purchases conducted by the DEA and that the revelation of this information to the jury was incurably prejudicial to the defendant's affirmative defense of entrapment. In response, the prosecutor stated that he did not know what the detective's answer would be when he asked the question. The circuit court declared a mistrial.

The defendant then moved to dismiss the indictments on Double Jeopardy grounds, contending that the Commonwealth intentionally or recklessly created a mistrial. The trial court denied the motion.

Held: Affirmed. The Court held that the trial court's factual finding that the prosecutor did not intentionally provoke a mistrial was supported by the objective facts and circumstances of this case. The Court also found that the evidence was sufficient.

Regarding the defendant's Double Jeopardy claim, the Court concluded that even if the prosecutor's question to the detective about separate DEA controlled purchases was borne of frustration and amounted to harassment, bad faith, or even gross prosecutorial misconduct, this would still be insufficient—without more—to sustain the conclusion that the prosecutor intended to cause a mistrial to subvert double jeopardy protections

The Court also noted that the trial court judge who oversaw the defendant's first trial was the same judge who decided the defendant's motion to dismiss for double jeopardy, a factor that that the Court has found significant in the past. The Court pointed to the *Bennefield* case, where it found that the same trial judge was better able to determine how the prosecution's case was progressing, and whether the prosecutor had any motivation or desire to cause a mistrial to gain a more favorable position at a

new trial. The Court also noted as significant the fact that the prosecutor argued strenuously in opposition to defense counsel's motion for a mistrial, which suggested to the Court that the prosecutor did not intend to cause a mistrial.

Regarding sufficiency, the Court found that a jury could reasonably conclude the jury could have reasonably inferred that the defendant—a licensed pharmacist who should have known the proper procedures for filling prescriptions—sold the drugs to the defendant without a valid prescription. This inference was only further supported by the defendant's suspicious behavior during the controlled drug purchases, including his insistence that he and the informant communicate through written notes, and his failure to follow other statutory and regulatory requirements by selling drugs to the informant in unlabeled pill bottles and mixing different pills together in the same bottle.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0201212.pdf

Mintee v. Commonwealth: July 12, 2022
On Remand from Va. Supreme Court Ruling of December 16, 2021
Va. Supreme Court Having Rev'd Court of Appeals Ruling of December 8, 2020
Richmond: Defendant appeals his convictions for Robbery and related offenses on Speedy Trial and Recusal 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. The Court of Appeals reversed and dismissed the case on Double Jeopardy grounds, ruling that the trial court abused its discretion when it declared a mistrial over the defendant's objection without detailing its consideration of less drastic alternatives for the record.

The Commonwealth appealed to the Virginia Supreme Court, who reversed the Court of Appeals and re-instated the case. The Court held that the defendant had waived his challenge to the manifest necessity of the mistrial, and consequently, reinstated the trial court's ruling on the motion to dismiss on double jeopardy grounds. The Court ruled that the contemporaneous objection rule required the defendant to object not only to the mistrial, but to the precise point that a manifest necessity did not exist to declare the mistrial. The Court remanded the case to the Court of Appeals for consideration of the defendant's claims regarding the trial court's denial of his motion to dismiss on statutory and constitutional speedy trial grounds and his motion to recuse.

Held: Affirmed. The Court held that the trial court did not err in concluding that the defendant's statutory and constitutional speedy trial rights were not violated or by denying the defendant's motion for the Judge to recuse himself.

Regarding statutory Speedy Trial, the Court repeated that, under *Fisher*, when the first trial ends in a mistrial, a defendant's retrial is '"but an extension of that same proceeding, based upon the same indictment and process and following a regular, continuous order' and without 'implicating a new speedy trial time frame.'" In this case, since the first trial began within the five-month statutory period, the second trial was simply "an extension of that same proceeding, based upon the same indictment and process and following a regular, continuous order" As a result, the Court ruled that the defendant's statutory speedy trial rights were not violated.

Regarding Constitutional Speedy Trial, the Court assumed, without deciding, that the delay of 364 days (twelve months) was presumptively prejudicial and analyzed the delay under the factors in *Barker v. Wingo*. The Court acknowledged that the defendant was only responsible for forty-eight days of the total delay, due to his own requests for delays. The significant delay, however, was occasioned by the trial court's physical inability to attend and preside over the rest of the trial, which, the Court found, "was not anyone's fault." The Court also concluded that the Commonwealth was not negligent; instead, "every portion of the delay attributable to the Commonwealth appears to have been incurred in the ordinary course of the administration of justice."

On the other hand, the Court found that the defendant did not adequately assert his speedy trial rights when the trial court declared the mistrial. The Court observed that the defendant "appeared to be far more worried about being convicted at any time—past, present, or future— than he did in avoiding the prejudice he might suffer from additional delays." Lastly, the Court ruled that the defendant had not adequately demonstrated prejudice. The Court wrote that his complaints were "nothing more than vague professions of anxiety and not based on specific facts in the record showing he was actually more anxious than the average defendant."

Lastly, the Court rejected the defendant's motion for the trial court to recuse itself. The Court found that the trial court's legal rulings demonstrated an appropriate application of reason and impartiality. The defendant had pointed to instances when the trial court denied his motions, required the filing of voir dire questions before trial, and limited the voir dire questions he could pose. However, the Court explained that the fact that a judge makes adverse rulings against a party does not in and of itself indicate a bias.

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

Reyes Reyes v. Commonwealth: June 21, 2022

Fairfax: Defendant appeals his convictions for Murder, Street Gang Participation, and related charges on Jury Instruction, Admission of Social Media Evidence, Denial of Hearsay Testimony, and sufficiency grounds.

Facts: The defendant and another man beat a child to death. The defendant was member of MS-13 and had a high enough rank to give orders. The other men involved in the killing, were gang-affiliated; one was a lower-ranking gang member told to bury the body. At trial, that man testified that he acquiesced because the defendant was a higher-ranking gang member, and he was fearful that the defendant could retaliate if he did not comply.

Police later spoke with a witness to the incident. When police told her that the victim was dead and that they had located his grave, the witness allegedly stated "good." The defendant sought to admit that statement at trial, as an "excited utterance," but the trial court denied the defendant's request.

At trial, the witness stated that when the defendant and the other man beat the victim to death, they called him a "rival gang member" and discussed "revenge" for a prior stabbing of another person. The defendant also told the witness she was "in the gang now" after they killed the victim. At trial, a detective provided expert testimony that one goal of MS-13 is to commit violent acts to scare the community. At trial, the defendant himself admitted that the three men armed themselves and intended to beat the victim.

At trial, the Commonwealth introduced evidence from subpoena returns of the defendant's Facebook and Instagram account. A detective testified that he discovered information related to social media accounts possibly maintained by the defendant, and based on that information, he acquired a search warrant that yielded the information in the exhibits. The detective also testified that during the defendant's interview, the defendant identified multiple photos and posts from the two social media accounts and confirmed that the accounts belonged to him and that he was the person in the photos. The defendant objected that, that because the accounts were not registered in his name, the Commonwealth did not properly authenticate the exhibits. The defendant later testified that the accounts belonged to him.

The trial court denied the following instruction from the defendant: "if you find the defendant guilty of first degree felony murder in the commission of an abduction, then you must find him not guilty of the offense of abduction."

Held: Affirmed.

Regarding the social media evidence, the Court noted that Rule 2:901 applies to social media evidence. The Court agreed that the trial court properly determined that the Commonwealth proved, by a preponderance of the evidence, that the social media accounts were authenticated and admissible.

Regarding the witness's statement "Good" regarding the dead victim, the Court noted that the statement was elicited in the context of an extensive interview which, according to her own testimony, took place weeks after the witness watched the defendant kill the victim, so information that he was dead was not a surprise to her. The Court found that the witness' statement here was not an "instinctive reaction to a horrifying event."

Regarding the jury instruction, the Court repeated that, under *Spain*, "the purpose of references to felonies in the murder statutes is gradation and not prohibition of punishment for the underlying

felonies." Therefore, multiple convictions in a single trial for murder committed during a felony and the underlying felony do not violate the constitutional protections against double jeopardy. Because the defendant's proposed instruction was an incorrect statement of law, the Court ruled that the trial court did not err in denying it.

Lastly, the Court found the evidence sufficient to convict the defendant.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0525214.pdf

Fifth Amendment: Interviews & Interrogations

Fourth Circuit Court of Appeals

U.S. v. Linville: February 24, 2023

N.C.: Defendant appeals his conviction for Possession of Child Exploitation Material on Fifth Amendment grounds.

Facts: While on supervised release for a conviction for possessing child exploitation material, the defendant submitted to polygraph testing. A standard condition of his release required the defendant to truthfully answer questions from his probation officer. After a polygraph exam, the defendant's probation officer asked the defendant if he possessed child pornography. The defendant admitted he did. Police later located over a thousand videos of children being exploited.

The defendant moved to suppress his statement to his probation officer, arguing that the condition of his supervised release that he truthfully answer questions from his probation officer placed him in a "classic penalty situation," in violation of his Fifth Amendment right to remain silent. According to the defendant, a reasonable person in his situation would have believed that, had he invoked his Fifth Amendment rights in response to probation's questions, his supervised release would have been revoked. The district court denied his motion.

Held: Affirmed.

The Court considered whether a standard condition of supervised release that requires truthful answers to all questions from probation creates a penalty situation when a probation officer asks a defendant on supervised release questions that, if answered, might incriminate him or lead to incriminating evidence. The Court ruled that the government did not expressly or implicitly assert that it would revoke the defendant's supervised release if he invoked his Fifth Amendment right to remain silent, and even if the defendant believed invoking the Fifth Amendment would have risked revocation, his belief was not reasonable.

The Court acknowledged that, under *Minnesota v. Murphy*, the Fifth Amendment privileges a defendant not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. The Court repeated

that the penalty exception applies if the government, "either expressly or by implication, asserts that invocation of the privilege would lead to" punishment, here the revocation of supervised release. In this "classic penalty situation, the failure to assert the privilege would be excused, and the [defendant's] answers would be deemed compelled and inadmissible in a criminal prosecution."

Thus, the Court explained, *Murphy* provides a two-step inquiry for courts considering "classic penalty situation" arguments in the context of supervised release conditions. First, do the conditions actually require a choice between asserting the Fifth Amendment and revocation of supervised release? Second, even if they do not, is there a reasonable basis for a defendant to believe they do? In a footnote, the Court repeated that, in order for conditions of probation to provide a sufficient "penalty" to overcome a defendant's free choice to remain silent, the threat of revocation must be "nearly certain."

In this case, the Court found that the condition to the defendant's supervised release did not actually require a choice between revocation and asserting the privilege. More specifically, the condition did not expressly state that if he exercised his Fifth Amendment right to remain silent, he risked criminal penalty. The Court pointed out that the U.S. Sentencing Guidelines application notes provide that despite "the condition . . . to 'answer truthfully' the questions asked by the probation officer, a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition."

Full Case At:
https://www.ca4.uscourts.gov/opinions/214559.P.pdf

U.S. v. Leggette: January 10, 2023

N.C: Defendant appeals his conviction for Possession of Firearm by Felon on Fifth Amendment *Miranda* grounds.

Facts: The defendant, a convicted felon, possessed a firearm while trespassing in a public park after it had closed. When officers saw the defendant and his companion's car, they investigated the trespass. A uniformed officer approached with his flashlight and asked the defendant and his companion what they were doing in the park. Two more officers arrived and gathered IDs from the defendant and his companion.

While investigating, officers found a gun abandoned in a nearby trash can, so they frisked the defendant and questioned him about the gun. After twice denying the gun was his, the defendant finally admitted he was a felon and that he owned the gun. The officers arrested the defendant.

Prior to trial, the defendant sought to suppress his incriminatory statements, arguing that his statements in the park were inadmissible because he was "in custody" under *Miranda* and so the officers needed to read him his *Miranda* rights before questioning him about the gun. The trial court denied the motion.

Held: Affirmed. The Court concluded that the defendant was not in custody for purposes of *Miranda*. The Court explained that: "*Miranda* warnings are not required every time an individual has their freedom of movement restrained by a police officer… Nor are they necessarily required every time "questioning imposes some sort of pressure on suspects to confess to their crimes… Instead, they are required only when a suspect's freedom of movement is restrained to the point where they do not feel free to terminate the encounter and the circumstances reveal 'the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.'"

In this case, the Court explained that the fact that the defendant could technically have been arrested for trespass before or during the interrogation did not make his questioning custodial. The Court noted that, while trespass was technically an arrestable offense, not every investigation of trespass ends in arrest. The Court also pointed out that the officer he never expressed to the defendant that he intended to arrest him; all he did was focus his investigation on the defendant. The Court noted that although the park was dark, it was still a public area. The Court also pointed out that the officers did not isolate or separate the defendant from his companion.

The Court also repeated that an interrogation is not more coercive simply because the officer encourages the suspect's cooperation, even if the officer promises to help the suspect if they admit criminality.

Full Case At:
https://www.ca4.uscourts.gov/opinions/214175.P.pdf

U.S. v. Ezequiel Arce: September 8, 2022
49 F.4th 382 (2022)
E.D.Va: Defendant appeals his convictions for Possession of Child Pornography on Fifth Amendment *Miranda* grounds and Sixth Amendment Confrontation grounds.

Facts: The defendant shared child exploitation material online. Police discovered the defendant's material being uploaded from an IP address and obtained a search warrant for the residence of the IP address. Executing the warrant, two officers knocked on the door where the defendant was housesitting. The defendant answered and let several officers in.

Officers never drew their guns and never physically restrained the defendant. The officers displayed a calm demeanor throughout. The officers kept the defendant under observation during the house search but told the defendant that he was free to leave. The officers asked the defendant to speak with them while sitting in a police car's front seat for less than an hour. The officers not only let the defendant go after this interaction but allowed him to turn himself in once they had a warrant for his arrest. The defendant confessed to officers during this conversation.

Rather than turning himself in, the defendant fled to the Mexican border. However, local police arrested him after responding to a trespassing call, despite the defendant attempting to use a false identity. At trial, the defendant argued that his confession was obtained in violation of his Miranda rights because he was in custody when questioned. The trial court denied his motion to suppress.

While executing the search warrant, police seized the defendant's cellphones. Later, an officer used "Cellebrite" software to extract files and data from the phone, including Internet search terms and image-and-video files on the phone. The extracted files were then fed into "Griffeye," which is a program that uses a hashing algorithm to identify unique images and match them with known child-pornography images. (A hashing algorithm generates for a given image an alphanumeric identifier, which, essentially, is unique to that image; a sort of digital fingerprint.) Griffeye then compares that image's hash value to the hash values of database images that have been identified as child pornography by law enforcement analysts.

Based on this comparison, an officer used Cellebrite to generate a report that classified certain images as child pornography. At trial, an officer explained that the Cellbrite software compared the hash values of images from the defendant's phone to a database of "known" child-pornography images that Griffeye created using input from law enforcement officers. In the Cellebrite report, one column that the officer presented reflected, based on hash value, which images or videos were "Child Abuse Material (CAM)" or "Child Exploitation Material (non-CAM)/Age Difficult."

At trial, the defendant objected to admission of the report detailing items downloaded from his phone, arguing that it violated his Sixth Amendment right to confront witnesses because the report included testimonial statements that certain images were likely child pornography. The trial court overruled the defendant's objection.

Held: Affirmed. Looking at the totality of the circumstances of his interview, the Court held that the defendant's Miranda rights were not violated because he was not in custody. The Court then held that, while the inclusion of the Cellebrite report violated his Confrontation Clause rights, the error was harmless.

Regarding the *Miranda* issue, the Court distinguished cases where defendants were arrested and handcuffed, where officers executed search warrants with a battering ram, with guns drawn, where officers woke suspects naked and led them out of their own home, and where defendants were held in custody in their own homes. The Court explained that, in this case, the fact that officers kept the defendant under observation while he was in the house during the search did "little to establish that [the defendant's] freedom of action would be reasonably perceived as curtailed to a degree associated with formal arrest." In a footnote, the Court also explained that telling a defendant that he is "not under arrest" is a factor, but not a determining factor, in determining whether a defendant is in custody.

Regarding the Cellbrite report, the Court ruled that, though most of those reports contained only non-testimonial evidence that was not implicated by the Confrontation Clause, one report included testimonial statements categorizing images as likely child pornography, and that was improper. The Court concluded that statements in the Cellebrite report identifying a given image as Child Exploitation Material or Child Abuse Material were testimonial and including those testimonial statements violated the defendant's Confrontation Clause rights.

The Court explained that, in general, when "machines generate[] data . . . through a common scientific and technological process," the operators of those machines do not make a "statement" under the Confrontation Clause when reporting the data. Thus, a Cellebrite report, consisting of files viewable in a report or on a computer, that stopped at downloading the files, would not typically implicate the Confrontation Clause. The Court found that the premise that the hash value of one of the known images

matches that of an image found in the Cellebrite download "may just be the kind of machine-generated data from a common technological process that is non-testimonial."

However, the Court clarified that characterizations of, or conclusions drawn from, the data are statements. The Court found that the premise that the images in the Griffeye database were child exploitation or abuse material derives from unknown law enforcement officers' judgments that certain images qualify, and thus that premise creates a Confrontation Clause problem. The Court explained that the premise that "a given image in the Griffeye database is child exploitation or abuse material—is classic testimonial evidence. That conclusion depends on the judgment of law enforcement that a given image is child pornography."

In this case, however, in the context of this trial, the Court found that error to be harmless. The Court found that overwhelming evidence established that the charged images were child pornography.

Full Case At:
https://www.ca4.uscourts.gov/opinions/204557.P.pdf

Virginia Court of Appeals
Unpublished

Gilbert v. Commonwealth: May 30, 2023

Martinsville: Defendant appeals his convictions for Robbery, Burglary, Use of a Firearm, and related offenses on Fifth Amendment *Miranda* grounds.

Facts: The defendant and his confederates broke into a home at gunpoint and robbed the occupants, assaulting several of them. Police learned that the defendant was on probation and arranged to meet him at the probation office. The defendant did not know that the officers would be there when he arrived to meet with his probation officer.

The office in which they met was small and contained a desk, desk chair, and two other chairs for visitors. The defendant, who was unrestrained, sat in a chair across from the desk and close to the door, which was shut but not locked. Both officers were in plain clothes but displayed their badges and visible firearms. The officers told the defendant that there were no charges pending against him, he was not under arrest, and he was free to leave. Although probation officers typically escorted visitors out of the building, no code was needed to pass through the security door when leaving. Officers told the defendant that he would be allowed to leave afterward with whomever had transported him to the probation office.

The defendant made several incriminating statements and then left. Prior to trial, the defendant moved to suppress his statements to the police, arguing that he should have been given *Miranda* warnings because he was in custody. At the suppression hearing, the defendant testified that he had been told he was free to leave but did not feel free to leave and thought talking to the police would help him. He admitted having prior experience with the police and said that he was familiar with the

probation office from his prior visits there. The trial court found that the defendant was not in custody at the time of the interview and denied the motion to suppress his statements.

Held: Affirmed. The Court agreed that the record supported the trial court's conclusion that the defendant was not in custody when the police interviewed him. The Court noted that the officers did not present themselves in a threatening manner and that the defendant was not restrained and could have left the office at any time. The Court pointed out that the defendant remained in the office with the police officers and answered their questions, never indicating that he wished the questioning to stop. The Court found it significant that, at the end of the thirty-minute interview, the defendant left the probation office voluntarily, just as he had come.

Under these facts, the Court concluded that a reasonable person in the defendant's position would have believed he was not restricted in a manner associated with formal arrest, so *Miranda* warnings were not required for his statements to be admissible.

Tags: Fifth Amendment – Miranda – Custody

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0959213.pdf

Gonzalez-Estrada v. Commonwealth: May 30, 2023

Richmond: Defendant appeals his convictions for Child Sexual Assault on Fifth Amendment *Miranda* grounds.

Facts: The defendant sexually abused his two children from the age of 5.

Police arrested and interrogated the defendant after reading him his *Miranda* rights. After the detective read aloud the statement of each *Miranda* right on the waiver form, he asked the defendant if he understood and the defendant answered, "Yes" or nodded yes. When the detective handed the defendant the Miranda waiver form, the defendant asked where he should sign the form and then immediately signed it. The defendant never asked for an attorney. During the police interrogation, the defendant never requested a Spanish interpreter and never requested that the interrogation be conducted in Spanish. The detective testified that he experienced no problems communicating with the defendant in English.

Prior to trial, the defendant moved to suppress his statements to police, contending that he was a Spanish-speaking immigrant from Guatemala with a sixth-grade education and no formal instruction in English and that he did not understand the *Miranda* warnings that the detective read to him in English. The defendant argued that the Commonwealth could not prove that he knowingly and voluntarily waived his *Miranda* rights given the defendant's limited English competence and lack of understanding of the American criminal justice system. The trial court denied the motion.

Held: Affirmed. Because the trial court's finding of a knowing and intelligent *Miranda* waiver was not plainly wrong considering the totality of the circumstances, the Court held that the trial court did not err in denying the defendant's motion to suppress his statements to the detectives.

The Court first noted that the defendant acknowledged that the defendant stated that he understood his rights and signed the waiver. The Court also pointed out that, throughout the interview, the defendant spoke in English in sentence form. As the trial court had noted, "He was not speaking in broken English, but he was putting his sentence structures together very fluently as if he had no problems at all understanding the English language." Additionally, the Court acknowledged that the witnesses also told the police that the defendant speaks both English and Spanish, providing more evidentiary support for the trial court's factual finding that the defendant comprehended and validly waived his *Miranda* rights.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0033222.pdf

Martin v. Commonwealth: April 18, 2023

Scott: Defendant appeals his convictions for Murder and Use of a Firearm on Fifth Amendment *Miranda* grounds, Admission of Bad Acts, Denial of a Jury View, and Double Jeopardy grounds.

Facts: The defendant learned that his wife and the victim were having an extramarital affair. The defendant picked up the victim in Tennessee, transported him to Virginia, confronted him, and then killed him with a handgun. After the murder, the defendant returned to Tennessee and woke up his wife, brandishing a firearm and showing her a cell phone image of her deceased lover before saying "look what you made me do." He then confessed to the details of the murder and then told her he intended to finish his plan to kill her and himself. Next, the defendant zip-tied her hands and feet, although ultimately he did not kill her.

Police arrested the defendant, who invoked his *Miranda* rights. The defendant's parents then indicated that they wished to speak to him. A detective told the defendant's mother that he wished to speak to her son and that he gave her his contact information. The detective also testified that he might have told her that he would be able to talk to the Commonwealth's Attorney if the defendant cooperated. The defendant's father told the defendant that he should only speak to the police after he obtains a lawyer. After the defendant spoke to his mother, however, the defendant re-initiated contact with the police. Police re-read him his *Miranda* warnings and the defendant confessed, claiming that the shooting was accidental.

Prior to trial, the defendant moved to suppress his statements to police. He contended that law enforcement reinitiated interrogation after he asserted that he wished to speak to counsel when his mother became agents of the Commonwealth through their contact with the detective. Thus, any statement the detective made to the mother encourage him to speak with law enforcement constituted the Commonwealth improperly initiating contact with the defendant after he asserted his right to counsel under the Fifth Amendment. The trial court denied his motion.

At trial, the defendant admitted to killing the victim but claimed self-defense. The defendant objected to the Commonwealth admitting evidence of the defendant's kidnapping of his wife in Tennessee, but the trial court overruled his objection and admitted the evidence.

At trial, the defendant also asked the trial court to permit the jury to view the crime scene. The trial court denied the motion, instead admitting into evidence a video recording reflecting the entire length of the road including the area where the body was found and where the murder took place. The trial court also admitted relevant maps in evidence. In addition, photographs of the crime scene taken at the time of the homicide were admitted. The trial court explained that three years had passed since the event occurred creating the possibility that the scene would appear differently than it had at the time of the homicide.

Lastly, the defendant objected to instructing the jury on both Aggravated Malicious Wounding and First-Degree Murder, contending that that violated his Double Jeopardy protection. The trial court overruled his objection, and instead instructed the jury that if they convicted the defendant of first-degree murder, they were not to consider the aggravated malicious wounding charge. The verdict form also reflected the court's direction to the jury.

[*Good job to Special Prosecutors Zack Stoots and Jessica Jackson, Russell County – EJC*].

Held: Affirmed.

Regarding the *Miranda* issue, the Court ruled that the facts here do not support the defendant's contention that (1) his parents became agents of the Commonwealth or (2) that the detective unconstitutionally reinitiated an interrogation after the right to counsel was asserted. The Court applied the two-part test from *Mills* and *Sabo* to evaluate whether a private individual acted as a government agent. The first prong of that test is:

(1) whether the government knew of and acquiesced in the search, and

(2) whether the search was conducted for the purpose of furthering the private party's ends.

The Court cautioned that these two criteria or factors should not be viewed as an exclusive list of relevant factors. In this case, the Court concluded that the defendant initiated contact with the detective and voluntarily provided a statement to him which was consistent with the theory he advanced at trial—that the shooting was accidental.

Regarding the defendant's other crimes, the Court applied Virginia Rule of Evidence 2:404(b). The Court ruled that the defendant's kidnapping of his wife demonstrated a common plan or scheme. The Court found that the entire exchange between the defendant and his wife was highly probative of the defendant's motive, as well as his intent and plan to kill the victim. The Court also concluded that the circumstances of the kidnapping also demonstrate that kidnapping the wife was part of a common scheme or plan and are therefore relevant connected facts. The Court noted that the relevance of this evidence was heightened by the defendant's self-defense argument. Lastly, the Court found that the evidence is also more probative than prejudicial.

Regarding the denial of the jury view, the Court did not disturb the trial court's conclusion that the maps, video, and pictures in evidence were both sufficient and better reflected the crime scene on the date of the homicide.

Lastly, regarding the defendant's double jeopardy claim, the Court found that, since the jury followed the trial court's instruction, the defendant was not subject to multiple punishments for

conviction on a single offense, and there was no error. In this case, the Court agreed that aggravated malicious wounding is a lesser-included offense of first-degree murder, and therefore a conviction on both indictments would violate the double jeopardy prohibition.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0757223.pdf

Ortiz v. Commonwealth: March 28, 2023

Amherst: Defendant appeals his conviction for Violation of a Protective Order on Fifth Amendment *Miranda* grounds.

Facts: The defendant, in violation of a protective order, entered the victim's home and woke her in the middle of the night, becoming hostile and then threatening her when she called the police. The defendant fled the scene. An officer responded to investigate and observed a car matching the description of the defendant's vehicle in the vicinity of the victim's house. The officer activated his lights and initiated a traffic stop. The officer asked the defendant for his name and where he was coming from. The defendant told the officer that he was "coming from the area" where he and his wife used to live, but denied being anywhere around his wife and said that he was only "back there driving around."

The officer was the only officer present on the scene, and there was no evidence that he raised his voice, displayed his weapon, used physical restraints, or applied excessive force. The defendant moved to suppress his statements, arguing that he was in custody for the purposes of *Miranda* when the officer stopped him and, therefore, that the officer was required to give him *Miranda* warnings before being questioned. The trial court denied his motion.

Held: Affirmed. The Court concluded that the defendant was not in custody for purposes of *Miranda* when the statements were made. The Court found that the officer's questions were investigatory and served to confirm or dispel any suspicion of the defendant's involvement in the alleged crime. Since the defendant was not in custody for purposes of *Miranda* when the officer asked him where he was coming from, the Court held that the trial court did not err in overruling the defendant's objection to the admission of his statements.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0644223.pdf

Commonwealth v. Giampa: December 20, 2022

Fairfax: The Commonwealth appeals the suppression of evidence on Fifth Amendment grounds.

Facts: The defendant murdered his girlfriend's parents and then shot himself. A portion of his skull was removed due to the skull fragments and swelling. Doctors induced a coma for several weeks.

Prior to a police interview, the defendant had been in a coma for over two weeks after undergoing extensive neurosurgery for a traumatic brain injury. The defendant was 17 years old at the time the detectives questioned him. He had an IQ of approximately 64, read on a fifth-grade level. The defendant had an established history of major depressive disorder with either autism spectrum disorder or a rule out of autism spectrum disorder and paranoia.

At the interview, the officers advised the defendant by reading him his *Miranda* warnings. The officers then directed the defendant to read the form to himself, and then directed him to sign the form. The officers then conducted two interviews with the defendant in which he confessed to the murders.

The defendant moved to suppress his confession on Fifth Amendment grounds. Following the evidentiary hearing and argument by counsel, the trial court suppressed both statements, holding that the officers violated the defendant's Fifth Amendment rights. [*Note: The trial court rejected the defendant's claim that his statements were not made voluntarily – EJC*].

The trial court found that the defendant's statements showed "a consistency in halting, strained and materially inconsistent statements, indicating a lack of awareness or appreciation of the rights that he was waiving." Specifically, the trial court referenced the defendant's mistaken belief that he "shot and killed five people," including "the decedents' youngest son," his statement at one point during the interview that his girlfriend "shot herself," and that he "did not know his own father's name . . . until prompted" and did "not know his long-time former girlfriend's name and call[ed] her a completely different name." The trial court pointed to the defendant's statement during one interview that his "brain is half asleep" and found that he was "incomprehensible at times regarding confusion of the principle with the nurse when discussing a suicide pact. He is inaccurate beyond just going to the weight of the evidence regarding when he last saw his girlfriend."

When considering the defendant's ability to knowingly and intelligently comprehend his *Miranda* rights, the trial court gave weight to the speed at which the officers read those rights, as well as the officer's failure to confirm that the defendant understood those rights. The trial court further gave significant weight to a doctor's conclusion that the defendant "had long-standing social comprehension deficits that were exacerbated by his traumatic brain injury and call into question the appreciation of his rights that he was waiving." "[T]he cognitive confusion that was evident in the interview," the court continued, "went well beyond an accused denying certain things in a self-serving manner."

The trial court specifically explained:

> "He's then asked, "Can you read and see that stuff there?" in which there is an inaudible basic grunt on the January 17th tape, which the Court for purposes of this hearing will conclude is a yes. That still does not suffice to say that he understands those rights and he understands the rights that he is waiving. And there simply was no follow up as to whether or not he comprehended and appreciated the rights that he was waiving in this case."

Held: Affirmed, Motion Properly Granted. The Court held that the trial court did not err in holding that the Commonwealth failed to prove by a preponderance of the evidence that the defendant knowingly and intelligently waived his *Miranda* rights. The Court distinguished this case from the many

cases in which injured or cognitively impaired individuals were found to have knowingly and intelligently waived their Miranda rights, based on the trial court's extensive findings of fact in this case.

Judge Beales filed a concurring opinion.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1048224.pdf

Commonwealth v. Oliver: November 9, 2022

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

Facts: During an investigation into child sexual abuse, police invited the defendant to a police station for an interview. Detectives were dressed in plain clothes. Just prior to commencing the interview, they made it clear to the defendant that he could leave at any time, and even after closing the door, a detective stated that he could open the door at any time and "you can leave at any time." The defendant was not physically restrained at any point during the interview.

Toward the end of the interview, a detective asked the defendant if he would consent to voluntarily undergo a polygraph examination, and the defendant responded: "Can I speak to a lawyer about that?" The detective responded, "Yep, that's up to you, that's your right." The defendant was not questioned further about the polygraph examination, but he was subsequently asked if he would consent to a buccal swab for DNA analysis. The defendant consented to perform the buccal swab test and was subsequently swabbed for DNA.

Prior to trial, the defendant moved to suppress his buccal swab. The trial court granted the motion to suppress, stating that it granted the motion to suppress was because the defendant's participation in the interview became involuntary after he asked to speak to a lawyer about the polygraph test.

The Commonwealth appealed the trial court's suppression order entered on May 19, 2022. Under § 19.2-405, the Commonwealth was required to file the transcript of the May 16, 2022, suppression hearing within twenty-five days of May 19th, no later than June 13, 2022. However, the Clerk's machine-printed date stamp on the face of the suppression hearing transcript stated that the transcript was filed one day late, on June 14, 2022.

On August 8, 2022, the circuit court clerk transmitted to the Court of Appeals an addendum to the record on appeal, which included a circuit court order dated August 4, 2022, stating:

> "On the Court's initiative for clarification of the filing date of the transcript of the May 16, 2022, court hearing, it appearing that the filed date of the transcript was incorrect in showing it was filed on 2022 JUN 14 AM 12:48 and should actually be reflected as being filed on 2022 JUN 13 during regular business hours as the transcript was scanned on the 13th of June, 2022. It is hereby ORDERED that date filed in for the transcript of May 16, 2022, be corrected to reflect the transcript was filed on 2022 JUN 13."

Held: Reversed, Motion Improperly Granted. The Court ruled that, because the defendant was not in custody, there was no requirement under the Fifth Amendment to provide him with *Miranda* warnings at the start of the interview.

The Court found that the defendant's question asking if he could "speak to a lawyer" about taking a polygraph amounted to a question "about" counsel, rather than a request for counsel. Based on a totality of the circumstances analysis, the Court ruled that the nature of the interview did not reflect circumstances that would amount to a coercive interrogation. Additionally, the Court noted that the conduct of the detectives did not amount to police conduct that was deceitful, threatening, or psychologically challenging. For those reasons, the Court ruled that the motion to suppress the DNA was wrongfully granted because the interview remained voluntary throughout.

The Court also ruled that the trial court properly corrected the record during the appeal. The Court noted that, under *Belew,* for § 8.01-428(B) purposes "an appeal 'is docketed in the appellate court' when the petition for appeal is received in the appellate court." Therefore, in this case, the circuit court had authority under the statute to correct the error before the petition was filed in the Court of Appeals. The Court found that *Lamb* rather than *Belew* controlled in this case; the distinction in the case at bar, for the Court, was that the trial court order correcting the date was issued following the Court of Appeals' receipt of the petition for appeal.

Judge Chaney dissented, disagreeing with the majority's ruling on the Motion to Suppress, writing that a rational factfinder could conclude, that the defendant's non-verbal response of closing his eyes and opening his mouth was his compliance with a perceived directive, not a free and voluntary consent to the buccal swab search. Judge Chaney also contended that the correction order was void ab initio and a nullity and that the Court erred in considering the transcript.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0911221.pdf

Commonwealth v. Thornhill: October 25, 2022

Lynchburg: The Commonwealth appeals the granting of a Motion to Suppress on Fifth Amendment *Miranda* grounds.

Facts: The defendant carried drugs on his person and in his vehicle. During a traffic stop, an officer discovered some of the drugs in the car and placed the defendant in handcuffs. The officer then asked, "mind saying what that is in the front seat there in the white baggy, the baggy with the white stuff in it?" The defendant responded that it was cocaine. The officer then began to search the vehicle.

The officer was a trainee officer. While the officer completed his search, his training officer informed him that the defendant's statement made while he was in handcuffs could not be used. The training officer suggested going back and questioning him again.

After searching the vehicle, the officer read the defendant *Miranda* warnings. He then asked if the defendant "got that" and the defendant said "yeah." The officer then asked, "so you said a minute ago, what was in that the front seat in the white baggy?" The defendant admitted that the baggy

contained cocaine, the cocaine belonged to him, and that he put it on the floorboard when he saw the police.

During the questioning, the trainee officer was polite and courteous in his questioning. The officers did not use any force, threats, or intimidation. There was no suggestion that the defendant was under the influence of any substance or otherwise impaired.

Before trial, the defendant moved to suppress his statements. The trial court concluded that the defendant was in custody when questioned and that the pre-*Miranda* statements should be suppressed. Regarding the post-*Miranda* statements, the trial court found that the officers did not deliberately conduct a two-step interrogation and there was no "intent to circumvent the Constitutional and procedural safeguards." Nevertheless, based on *Missouri v. Seibert*, the trial court concluded that the post-Miranda statements were taken in violation of the Fifth Amendment and suppressed those statements as well. The Commonwealth appealed.

Held: Reversed, Motion Improperly Granted. The Court ruled that the trial court applied the wrong test to determine whether the post-*Miranda* statements were admissible. Instead, the Court post-Miranda statements were voluntarily made and should not have been suppressed. [*Great job to Nate Freier, ACA, for his work and for arguing this case before the Court of Appeals – EJC].*

The Court first reviewed the rule under *Oregon v. Elstad*, that absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. Under *Elstad,* a subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

The Court then examined the *Seibert* case from 2004, where a plurality of four justices concluded that the threshold issue in every two-step interrogation is "whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." The plurality set out a multi-factor test to assess whether the "midstream" warnings could be effective. The factors set out by the plurality were:

(1) the completeness and detail of the questions and answers in the first round of interrogation,
(2) the overlapping content of the two statements,
(3) the timing and setting of the first and the second,
(4) the continuity of police personnel, and
(5) the degree to which the interrogator's questions treated the second round as continuous with the first.

The Court emphasized, though, that *Seibert* had concluded that if the police did not deliberately conduct a two-step interrogation, then the "admissibility of post-warning statements should continue to be governed by the principles of *Elstad*."

In this case, the Court found that the trial court mistakenly determined that the plurality opinion in *Seibert* controlled. Because the trial court had concluded that the police did not use a deliberate strategy, the Court explained that admissibility of the post-warning statements was governed by *Elstad*. Because the trial court did not apply *Elstad*, therefore, the Court ruled that it did not apply the correct legal standard.

The Court repeated that there is no warrant for presuming coercive effect where a defendant's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. Thus, a subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0890223.pdf

Rodriguez v. Commonwealth: October 11, 2022

Arlington: Defendant appeals his convictions for Child Sexual Assault on Fifth Amendment grounds.

Facts: The defendant sexually assaulted his niece on several occasions. An officer stopped the defendant on the street and read him his *Miranda* warnings. She told the defendant that he was not under arrest and suggested that they could talk there on the street or go to a location in the nearby courthouse for more privacy. They began speaking on the street, but the defendant said that he preferred to go to the courthouse for privacy. The officer and the defendant walked together to the courthouse and went to an interview room, where the defendant signed a *Miranda* form and agreed to speak with the officer. During the interview, the officer repeatedly told the defendant that he was free to leave, reminded him that he was not under arrest, and thanked him for coming to the courthouse voluntarily.

The officer then accused the defendant of having raped the child victim, which resulted in the following exchange:

Defendant: I already explained to you that, I'm not going to …

Officer: You told me that, you gave me the definition of abuse.

Defendant: But one thing, I have to answer all your questions without a lawyer or …

Officer: You tell me. You are not under arrest. I told you on the street and I told you here. You are not under arrest.

Defendant: Because I don't want to, I don't want to be answering the question to you when I don't even have the answer, when I should have a lawyer, when afterwards everything I've been talking to you is going to be used against me. Do you understand me?

Officer: Exactly.

Defendant: Right. I don't understand why you have me here to ask me those questions when I don't have to answer the question if I don't have a lawyer.

Officer: Ok.

Defendant: In any case, I would need a lawyer to answer that question for you.

The officer continued to ask questions and ultimately the defendant made incriminating statements. The officer completed the interview, again told the defendant he was not under arrest, and let the defendant go.

The defendant moved to suppress his statement, arguing that he invoked his right to counsel during the interview and the police continued to question him in violation of the rule of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), that if a suspect requests counsel during custodial police interrogation, the questioning must cease until an attorney is provided for him.

Held: Reversed. The Court agreed that "the police subjected him to custodial interrogation in violation of his constitutional rights."

[Note: The parties conceded in the trial court that the defendant was in police custody at the time that the officer questioned the defendant. The Commonwealth continued to concede the same on appeal, and thus the Court did not rule on whether the defendant was, in fact, "in custody." – EJC].

The Court repeated that whether a suspect has invoked his right to counsel during a custodial interrogation is an objective inquiry and the invocation of the request for counsel must be such that "a reasonable officer in light of the circumstances" would understand the statement to be a request to have counsel present for the interrogation. In this case, the Court concluded that the defendant unequivocally and unambiguously invoked his right to counsel. The Court noted that the defendant stated that he did not understand why the detective was asking him questions when he did not have to answer without a lawyer. With this context, the Court found that the defendant's final statement, "I would need a lawyer to answer that question for you," constituted a clear invocation of his right to counsel when considered from the perspective of a reasonable police officer.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1394214.pdf

Holman v. Commonwealth: June 12, 2022

Rockbridge: Defendant appeals his convictions for First-Degree Murder, Abduction, and related offenses on Sixth Amendment Conflict of Interest and Fifth Amendment *Miranda* grounds.

Facts: The defendant killed his former girlfriend, whom he tricked into meeting him by abducting her co-worker and forcing her to lure the victim to the scene. When his girlfriend fled in a vehicle, the defendant chased her and forced her car off the road, and then shot and killed her. The defendant fled, but police located him and surrounded him. With guns drawn, they ordered him to drop a handgun the defendant was holding. The defendant asked police to shoot him, but they refused, and he dropped his gun. Police placed him in handcuffs and engaged in the following dialogue with the defendant:

Officer: You have anything else on you that's going to hurt us, buddy?

Defendant: Nope.

Officer: Alright. You got anything in your pockets that's going to poke us, stick us? Anything like that?

Defendant: The real gun is over in the other parking lot in Debbie's truck. That one's a fake.

Officer: When you say, "the real gun," what are you talking about?

Defendant: The one that I shot Christina with.

Officer: You shot Christina with that gun?

Defendant: Not that. That's a toy gun.

Officer: Where's Christina at now?

Defendant: Christina's in the car.

Officer: Christina—is she the one in the car?

Defendant: Yea.

Officer: You shot her with the gun that's in your car? Defendant: I shot her with the [unintelligible].

The officer later testified that during the events leadings up to his encounter with the defendant, he had "faced an actively developing situation with limited information and that he did not necessarily know who [the victim] was and whether her location had been discovered by the police."

The defendant moved to suppress his statements due to the lack of *Miranda* warnings, but the trial court denied the motion. During trial, the defendant asked the trial court to remove his attorney, alleging a conflict of interest. The defendant's attorney had previously represented the murder victim's sister, brother, and niece. However, those people were not co-defendants, witnesses, or otherwise involved in the case.

Held: Affirmed. The Court held that the trial court did not err by declining further inquiry into defense counsel's alleged conflict of interest, and the circuit court did not err by denying the defendant's motion to suppress the statements he made before being given a *Miranda* warning.

Regarding the *Miranda* claim, the Court found that the officer's initial questions were routine questions for police safety that were normally attendant to arrest and custody, and therefore did not constitute "interrogation" for the purposes of *Miranda*. The Court contended that the questions were not reasonably likely to elicit an incriminating response from the defendant, as the officer, who thought the handgun the defendant had been holding was real, could not have reasonably expected that the defendant would respond, "The real gun is over in the other parking lot in [the victim's] truck. That one's a fake." Finally, the defendant's response about the "real gun" was a volunteered statement, and thus is not protected under the Fifth Amendment.

The Court then concluded that the subsequent question ("When you say, 'the real gun,' what are you talking about?") fell under the public safety exception to *Miranda*. The Court noted that the officer believed that the handgun the defendant had been holding was real. Thus, the officer's sudden revelation about the "real gun" located in a vehicle in a public parking lot created an objectively reasonable need for the officer to inquire further to determine whether the real gun posed an immediate risk of danger to either the public or the police.

The Court explained that the officer's questions to the defendant about the victim were based on an objectively reasonable need to obtain more information about a woman that the officer had just learned had been shot and was potentially needing emergency medical care. For the Court, that this emergency pertained to a wounded woman, and not a discarded handgun, did not render the public safety exception to *Miranda* any less applicable, as "nothing in *Quarles* limits the application of the public safety exception to questions about the location of a missing weapon."

Regarding the alleged conflict of interest, the Court pointed out that the murder victim's sister, brother, and niece were not co-defendants at the trial, nor were they called as witnesses by the Commonwealth to testify against the defendant—circumstances that, if alleged, the Court believed could have raised an apparent conflict of interest. The Court contended that the defendant's counsel was in the best position to determine whether her prior representation of the victim's sister, brother, and niece would pose a significant risk of materially limiting her ability to represent the defendant. The attorney, in the Court's view, had the specific knowledge regarding the nature of her prior representation of the relatives, what legal responsibilities she owed to them, and whether those responsibilities could be jeopardized during the trial. The Court wrote: "We decline the invitation to impose a duty on the trial court to conduct further inquiry based on Holman's speculative allegation that, because Ms. Harris had represented Christina's relatives, Ms. Harris deliberately withheld information from Holman out of her bias in favor of Christina's family."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0830213.pdf

Chavarria Bermudez v. Commonwealth: June 28, 2022

Fairfax: Defendant appeals his conviction for Aggravated Sexual Battery on Fifth Amendment and sufficiency grounds.

Facts: The defendant sexually assaulted the victim, a child thirteen years of age, on two occasions. For over a decade, the defendant had been the victim's *de facto* father figure. The defendant had previously sexually assaulted the victim while they lived in other locations. The defendant was thirty years old and much larger than the victim. After the assaults, he warned the victim "not to tell anyone," and threatened to harm her mother if the victim did not comply.

Police set up a "phone sting" during which the defendant admitted to assaulting the victim and blamed drugs. Officers then arrested the defendant and read him his *Miranda* warnings. After explaining *Miranda* rights, the officer asked the defendant to sign the consent to speak portion of the *Miranda* form. The defendant did not do so but instead asked, "What if I don't want to talk, do I have to sign?" In answering the question, the officer said he wanted to hear the defendant's side of the story, claimed they were presented with the only opportunity for him to do so, and asked the defendant if all that "ma[d]e sense." The defendant responded, "Yes, but, no, I have to explain to a lawyer because I can't be answering things."

The officer then stated: "Yeah, like I said this is the only chance you and I get to talk. After this, we don't have that opportunity anymore. And you really don't have to sign it. I just need to make sure you understand what your rights are. Okay? So, signing it just tells me that you understand that you have this right, this right, this right, and this right. Does that make sense?" The defendant did not sign the consent to speak portion but answered questions from the officer thereafter.

The defendant moved to suppress his statement prior to trial on Fifth Amendment grounds, but the trial court denied the motion. The trial court convicted the defendant of Aggravated Sexual Battery under § 18.2-67.3(A)(4)(a).

Held: Reversed. The Court ruled that the defendant unequivocally invoked his right to counsel when he said, "Yes, but, no, I have to explain to a lawyer because I can't be answering things." The Court examined the context of the defendant's statement and concluded that the defendant clarified that, notwithstanding what the officer said to him, he wanted—in fact, needed—to speak to a lawyer in light of the rights just explained to him. At that point, the Court found, interrogation should have stopped, regardless of the fact that the defendant conversed with police after invoking the right to counsel.

The Court agreed, however, that the evidence supported the jury's conclusion that the defendant sexually battered the victim through use of intimidation, and therefore remanded the matter for re-trial.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0769214.pdf

Fourth Amendment – Search and Seizure

Fourth Circuit Court of Appeals

Torres v. Ball: April 17, 2023

N.C.: Plaintiff appeals the dismissal of his Fourth Amendment lawsuit against Police.

Facts: The plaintiff had several outstanding warrants for his arrest, including for felony breaking and entering, when police received a tip from a confidential informant that the plaintiff was driving a dark green Honda with dark-tinted windows and could be located at a particular address. The informant had previously given the officer reliable information. The plaintiff had an extensive criminal history. The officer found a photograph of the plaintiff and viewed it.

Four days after he had verified the outstanding warrants and learned the informant's tip, the officer saw a male suspect walking around a dark green Honda Accord in a driveway at the address provided by the informant. The officer stopped the plaintiff, removed him from the vehicle, and after verifying his identity, the officer arrested the plaintiff. He located drugs and a firearm in the vehicle.

Later, under a plea agreement, the defendant pled guilty to several of the charges on which he had been wanted, and the state agreed to dismiss the charges that stemmed from the traffic stop. The defendant then sued the officer, alleging that (1) he was stopped without probable cause or reasonable suspicion; (2) he was unlawfully arrested; (3) he was unlawfully searched when the officer reached into his pocket before conducting a pat down; (4) the vehicle was unlawfully searched; (5) the officer used

excessive force when seizing the plaintiff because the officer yelled commands and pointed his gun at him. The officer moved to dismiss, and the trial court dismissed the lawsuit at summary judgment.

Held: Affirmed. The Court concluded that the totality of the circumstances, including the fact that the officer knew the defendant had multiple outstanding arrest warrants and corroborated significant features of the informant's tip, support a finding of reasonable suspicion necessary to conduct the initial investigatory stop. The Court found that the reason for conducting the investigatory traffic stop -- to ascertain the identity of the driver -- was legitimate and that he had reasonable suspicion to believe that the plaintiff was the driver.

The Court likened this case to *Adams v. Williams*, a 1972 U.S. Supreme Court case, and to *Navarette* from 2014. The Court found that the corroborating aspects of the tip sufficiently established the informant's reliability, and the totality of the circumstances provided the officer with sufficient justification to conduct an investigatory stop for the purpose of determining whether the plaintiff was the vehicle's driver.

Full Case At:
https://www.ca4.uscourts.gov/opinions/216447.U.pdf

U.S. v. Peters: February 24, 2023

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

Facts: The defendant, a convicted felon, carried a firearm while walking on public housing property in a high-crime area. One day in 2019, the defendant and his companion were walking down a sidewalk when officers noticed that the companion was someone prohibited from being on the property. Officers also noted that the defendant had been arrested for trespassing in 2011 on public housing property. The officers also knew that an informant had stated a month prior that the defendant had been selling drugs from a location next to where officers saw the defendant walking. A police database listed the defendant as a gang member as of 2011, narcotics seller/user as of 2009, and probably armed as of 2009.

The officers approached the two men, accused them of trespassing, and requested that they lift their shirts to show they were unarmed. The defendant's companion complied, and the officers allowed that man to depart. The defendant did not comply, however. The officers ordered the defendant to lift his shirt over a dozen times. The defendant finally partially complied. Officers noticed the outline of a firearm. They seized the firearm and arrested the defendant.

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

Held: Reversed. The Court found that the officers lacked reasonable and articulable suspicion to justify seizing the defendant. The Court then found that person in the defendant's circumstance would at least feel obligated to lift his shirt in order to leave. The Court found it significant that the officers

permitted the defendant's companion to depart in concluding that the officers did not have reasonable suspicion to detain the defendant.

The Court examined the facts and rejected the trial court's factual findings. Instead, the Court reviewed the video and evidence and made its own factual conclusions. The Court argued that the defendant's criminal history as outlined in the police records did not justify the officers' suspicion that he was trespassing. Regarding the alerts in the police databases, the Court complained that the record was silent as to what led the officers to create the alerts, whether doing so led to further action, and whether the information had been updated since collected.

The Court also rejected the informant's tip as a basis to stop the defendant, complaining that the officer had not taken any notable steps to corroborate the confidential informant's statement. While the confidential informant had successfully collaborated with the police in the past, the Court complained that the officer did not corroborate this tip beyond referencing the police records. In a footnote, the Court noted that the confidential informant had provided information leading to arrests and convictions, but also had several prior felony convictions, a pending felony drug charge, and was "inactive with" the police at the time of the hearing. Even though the defendant was nearly in front of the building at which the informant reported he was selling drugs, the Court countered that he was not attempting to enter, leave, or linger near the building.

Judge Traxler wrote an extensive dissent, arguing: "Ignoring the factual findings of the district court and freeing itself from the strictures of deferential appellate review, the majority makes its own findings of fact and declares those facts insufficient to establish reasonable suspicion."

Full Case At:
https://www.ca4.uscourts.gov/opinions/194904.P.pdf

U.S. v. Suiero: February 3, 2023
59 F. 4th 132
E.D.Va: Defendant appeals his conviction for Possession of Child Pornography on Fourth Amendment grounds.

Facts: The defendant, who had recently been fired from his job as a security officer at a hotel, sent an email to his former coworker threatening statement her, stating: "You might think it's strange that I can talk so casually about killing you," and "Obliviously [sic] you knew that I *was* serious, but you didn't care until you found out that you'd be killed before I kill myself." The defendant sent her another email two days later, in which he said, "Oh, believe me, if it does come to that, I am going to . . . *enjoy* breaking you before I kill you." In that email, the defendant also stated that he would "make [her] death soooo much more agonizingly and excruciatingly painful" if she involved her husband.

The next day, police arrested the defendant and charged him with threatening another person with death or bodily injury in violation of § 18.2-60. He was held without bond. Police spoke to the defendant's housemates where he lived. They learned that the defendant rented a bedroom in a house where other people resided. In the defendant's private bedroom, according to witnesses, the defendant had a computer, internet access, and a ballistic vest.

An officer obtained a search warrant for the defendant's residence. In the affidavit, the defendant described his experience as a twenty-year veteran of the Department, his formal training received from the federal government in computer crime investigation, the emails to the victim, the arrest two days earlier, and the officer's information about the residence. In the "Description of Search Location," the officer listed "[t]he residence associated with" the defendant. Finally, the officer included in the affidavit a list of items to be seized, including in relevant part "[a]ny and all mobile telephones and GPS devices," "[a]ny computers/laptops," "printers," and other devices "capable of storing data."

A magistrate judge issued the initial warrant for the search of the residence that same day. The warrant was issued "in relation to" the defendant's alleged offense of threatening another person with death or bodily injury under § 18.2-60 and permitted officers to search the residence for "ballistic equipment, firearms, documents, and digital evidence (computers, mobile phones)."

Officers executed the warrant and seized items including three laptop computers and three external hard drives. After seizing these items, the officer obtained a separate "forensic warrant" to search these electronic devices for evidence related to the threats. While executing the forensic warrant, the officer observed child abuse material on one of the seized computers. He then obtained an additional warrant to search for evidence of possession of child abuse material.

The defendant moved to suppress the results of the warrant. First, he argued that the warrant identified a residence occupied by more than one person and permitted the seizure of electronic devices regardless of whether the defendant or someone else owned those devices. Next, relying on the D.C. Circuit's decision in *United States v. Griffith*, the defendant argued that the affidavit did not contain information indicating that the defendant owned a cell phone or that the other items sought would be found at the defendant's residence. Finally, the defendant argued that there was no connection between the alleged crime and certain items sought, including cell phones, GPS devices, printers, and hard drives.

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

Held: Affirmed. The Court concluded that the initial warrant was not overbroad.

The Court first repeated that when a warrant states a charged offense, such reference to the crime effectively narrows the description of the items to be seized. In this case, the Court noted that the warrant was restricted to evidence in relation to communicating threats of death or bodily injury, thereby restricting the evidence to be seized as that relating to the crime charged.

The Court then noted that the scope of the warrant was limited because it sought to search only "the residence associated with [the defendant]" and "the property associated with [the defendant]." The Court repeated that a judicial officer need not demonstrate absolute certainty that devices containing evidence of a crime will be present in a defendant's home. Instead, the Constitution requires that the judicial officer evaluate "totality of the circumstances" to determine whether there is a "substantial likelihood" that evidence of a crime will be found in the place to be searched.

The Court examined the facts in the affidavit, specifically the offenses, the fact that the defendant rented a bedroom in the residence, that he owned a computer in the bedroom, and that he was currently incarcerated. Under these facts, the Court found that it was substantially likely that the defendant's computer and any related devices would have remained exactly where one would expect them to be found, namely, in his place of residence. Thus, the Court concluded that the initial warrant

was appropriately confined in scope and established a sufficient connection between the alleged crime and the items sought.

Contrasting this case with the D.C. Circuit's ruling in *Griffith*, the Court wrote: "we do not view as overbroad the inclusion of "mobile phones" in a warrant when [the defendant's] alleged crime of sending threats via email required the use of an electronic device and, in 2014, "more than 90% of American adults . . . own[ed] a cell phone." Like the Court in *Griffith*, the Court rejected the proposition that "the ubiquity of cell phones, standing alone, can justify a sweeping search for such a device." However, the Court found that this case was materially distinguishable from the facts in *Griffith* and that the warrant was logically limited in scope and adequately protected against any "exploratory rummaging" by an executing officer.

Full Case At:
https://www.ca4.uscourts.gov/opinions/214413.P.pdf

U.S. v. Blount: January 4, 2023

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

Facts: The defendant, a convicted felon, possessed a firearm in his vehicle while parked in a parking lot. Nearby, a Target employee sought out an officer to report a loud disturbance and possible fight in the parking lot. When the officer got out of his patrol car, he could hear a very loud scream from a woman "that sounded like she was in trouble" that was sufficiently alarming that the officer immediately broke into a run and called for backup.

Arriving at the defendant's vehicle, the officer discovered the defendant and a woman arguing in a car with a crying child. The two gave contrary explanations – for example, that their child had fallen and hit his head but was now fine – that were not commensurate with the scream that the officer had heard. Later, at a motion to suppress, the officer testified that victims of domestic violence may be initially unwilling to report abuse, especially in front of their abuser.

When the officer asked the defendant to "hop out of the car," the defendant instead hesitated for several seconds, turned his body toward the officer to obstruct the officer's view, and then appeared to hand items to the woman, including a plastic bag. The officer then saw the defendant make a movement like he was tucking something underneath the passenger seat shortly before the defendant finally exited the vehicle. The officer removed the defendant from the vehicle and handcuffed him.

Inside the vehicle, however, the woman continued to defy commands to keep her hands on the steering wheel and instead repeatedly reached around the vehicle. Officers removed her as well and handcuffed her. Officers searched the car, including the bags they had seen the defendant handle, and then found a handgun in the vehicle's console.

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

Held: Affirmed.

The Court first found that the defendant was not seized when the officer told him to "hop out of the car." While the officer's order may have constituted a "show of authority," the Court pointed out that the defendant did not immediately comply with that order and thus did not immediately submit to the show of authority. Instead, it was only after that delay that the defendant submitted to the officer's order. At that point, but not before, the Court concluded that he was seized under the Fourth Amendment. The Court concluded that the facts were clearly sufficient to warrant a reasonable officer in this case to suspect that the defendant was engaged in ongoing criminal activity, thus justifying the Terry stop.

The Court then examined the pat-down. The Court repeated that, when a suspect is subject to a "forced police encounter" and the suspect is reasonably believed to possess a weapon, a danger exists, justifying a protective frisk. In this case, the Court concluded that the officer had a reasonable suspicion to justify a frisk and search of the vehicle for the presence of a weapon.

The Court also rejected the defendant's argument that the officer search of the car exceeded the permissible scope of a vehicle frisk for weapons because he searched a grocery bag "even though the bag's appearance, movements, and light weight made it obvious that it could not contain an object as heavy as a weapon" and a diaper bag and its zippered pockets "even though those pockets were too small to hold a weapon." The Court reasoned that a cautious search of the area where the defendant had been seated would reasonably include the search of both bags that were the subject of the officer's earlier observations when speaking with the occupants, as well as the console area, the door compartment, and the area underneath the passenger seat.

Full Case At:
https://www.ca4.uscourts.gov/opinions/214257.U.pdf

U.S. v. Anderson: January 4, 2023

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

Facts: The defendant engaged in a sexual relationship with a child and created exploitation images of that child. Officers later responded to a "disturbance in progress" at a motel where, according to a 911 caller, "an irate male [had been] banging on the doors and windows trying to get in." The caller stated that the female guest in that motel room wanted the defendant to leave. When the officer arrived at the motel, the defendant was in the parking lot and "was extremely upset," was yelling [and] cursing, and would not listen to commands. Because the defendant was visibly upset towards a woman, the officer guided the defendant away from the woman's motel room door and later, in response to the defendant's requests to move toward her car, ordered the defendant to stay near him instead.

The defendant then made statements about seeing the woman "at the house" and breaking her car window, which the officers perceived as threats. The officers smelled marijuana inside the woman's car. After receiving her consent to search her car, the officers found marijuana paraphernalia and learned from the woman that the defendant had sold marijuana to the woman and her family members.

Meanwhile, other officers interviewed a minor girl. The minor told the officers that she was fifteen, that she had spent the night with the defendant, that the defendant had asked her to hold and to hide a bag of his marijuana, and that the defendant sold marijuana.

Officers arrested the defendant for PWID Marijuana and seized his cellphone. A subsequent search of the phone revealed child exploitation images. The defendant moved to suppress, but the trial court denied the motion.

Held: Affirmed. The Court held that the officers had reasonable suspicion of criminal activity when they detained the defendant, and that the district court properly denied his motion to suppress.

The Court first concluded that, based on the information that the officer received before he got to the motel and the behavior he observed when he arrived, he was justified in concluding that the defendant had committed or may have been committing the crime of disorderly conduct. The Court then reasoned that, because the officers obtained particularized information that the defendant had engaged in criminal activity, namely, possession with intent to distribute marijuana and contributing to the delinquency of a minor, the prolonged detention of the defendant was lawful. Based on the totality of these circumstances, the Court hold that the officer had reasonable suspicion of criminal activity to justify the initial detention, and that the officers did not exceed the permissible scope of the stop.

Full Case At:
https://www.ca4.uscourts.gov/opinions/214576.U.pdf

U.S. v. Taylor: December 6, 2022
54 F.4th 795 (2022)
MD: Defendant seeks *Habeas* relief on her conviction for Drug Distribution on Violation of the Stored Communications Act and Fourth Amendment grounds.

Facts: The defendant distributed over 1000 kilograms of marijuana, using various shipping methods. During their investigation, officers served several "administrative" subpoenas on Sprint, the defendant's cellphone provider, pursuant to 21 U.S.C. § 876. The subpoenas sought "All customers/subscribers for the date range given, provide name and street and/or mailing address, Local and long distance telephone connection records, including incoming and outgoing calls for" the defendant's phone number.

For each of the three subpoenas, Sprint included the "repoll" data for every call in the call records, even though the Government never expressly requested repoll data from Sprint via the subpoenas. A repoll number "reflects which phone switch handled the call," and each number is associated with a specific metropolitan area or areas. For example, repoll number "27" is associated with Oklahoma City, Oklahoma and repoll number "40" is associated with Little Rock, Arkansas.

The call detail reports for the defendant's phone number showed several of the calls made and received were associated with a repoll number of "449," which corresponds to a phone switch for the Phoenix metropolitan area. Using that information, officers obtained several warrants for follow-up

information, which lead to a seizure of hundreds of pounds of marijuana, as well as large amounts of cash and drug distribution records.

After her conviction, the defendant filed a motion to set aside the verdict, claiming that her trial counsel had rendered ineffective assistance by not moving to suppress information resulting from the Search Warrant. The defendant alleged that the Search Warrant application referenced cell phone data, including historical CSLI and GPS tracking data, that was collected in violation of the Fourth Amendment.

The trial court denied the motion. The trial court noted that unlike historical CSLI, repoll data "provides only a single point of reference consisting of the major city or metropolitan area in which the phone switch used to route the call is located" and does "not include a series of time-stamped records created as a mobile phone continuously pings nearby cell towers, pinpointing the location within a relatively small area." Thus, because repoll data does "not create a record of an individual's physical movements over time," the district court concluded that it "cannot be deemed to be historical CSLI." Accordingly, because the district court determined that repoll data was not historical CSLI, it reasoned that the officers did not need a search warrant to acquire a subscriber's repoll numbers.

Held: Affirmed. The Court held that the district court did not err by concluding that a motion to suppress would not have been meritorious because the good faith exception applied. The Court ruled that, when the Government served administrative subpoenas on Sprint in 2014, it acted in good faith pursuant to the SCA, which permits the collection of certain subscriber information through a subpoena.

The Court began by noting that, to procure other information pertaining to a subscriber or customer without consent, the government must secure either a probable cause warrant or a court order per 18 U.S.C. § 2703(c)(1). However, the Court noted that the statute offers no express direction as to when the government should seek a warrant versus a § 2703(d) order. The Court then observed that it had not yet addressed whether an individual has a reasonable expectation of privacy in her repoll number data, but then found that it need not do so in this case.

Although the defendant asked the Court to look past the language of the subpoenas and find that the agents here were "on notice after Sprint's responsive production to the first subpoena . . . that Sprint includes repoll location data in response to an administrative subpoena," the Court refused to do so. Instead, the Court observed that, even if Sprint did routinely turn over such information, the defendant did not identify any legal obligation the Government had to ask Sprint to stop doing so. Rather, the Court noted, the Government's subpoenas asked for statutorily authorized materials. The Court wrote: "The Government cannot be held responsible when a subpoena recipient exceeds the bounds of a subpoena and produces more information than was requested or required."

Full Case At:
https://www.ca4.uscourts.gov/opinions/207593.P.pdf

U.S. v. Miller: November 29, 2022
54 F.4th 219 (2022)
N.D.W.Va: Defendant appeals his conviction for Possession of a Firearm on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, carried a firearm in his vehicle. An officer stopped the vehicle for a traffic violation. The officer's camera captured the interaction. During the interaction, the officer became suspicious of the vehicle's occupants because the defendant was shaking and tapping on the car door.

A backup officer arrived as the officer printed the defendant's warning ticket. The officer approached the defendant's vehicle, asked the defendant to exit the vehicle, and told her he would be leading his canine around the vehicle to sniff for illegal drugs. After the canine indicated that there were drugs in the vehicle, officers performed a full search.

The defendant moved to suppress the search. The district court held that the officer had reasonable suspicion to extend the traffic stop because the defendant was (1) slow to pull over, (2) excessively nervous, and (3) traveling on a known drug corridor. The district court gave great weight to the officer's experience in its analysis.

Held: Reversed. The Court held that the officer lacked a reasonable, articulable factual basis for extending the traffic stop to conduct the dog sniff. The Court expressed concern that the factors in this case do not "serve to eliminate a substantial portion of innocent travelers."

Rather than giving deference to the trial court's factual findings, the Court reviewed the officer's video and drew its own conclusions. First, the Court found that the defendant was not unduly slow to pull over and contended that the defendant stopped within a reasonable amount of time. Second, the Court found that the body camera footage showed that the defendant was not excessively nervous during the traffic stop and specifically concluded that the district court clearly erred by finding that the defendant was shaking during the traffic stop.

Regarding the defendant "tapping" her fingers, the Court found that tapping one's fingers may "just as likely be a sign of annoyance, impatience, or even boredom—any of which may be expected when a person is stopped by a police officer and is awaiting the results of a license check. By itself, tapping one's fingers is a very weak indicator of nervousness." Lastly, the Court wrote that traveling on a known drug corridor is not itself probative of criminal behavior and does not serve to eliminate a substantial portion of innocent travelers.

Full Case At:
https://www.ca4.uscourts.gov/opinions/214086.P.pdf

U.S. v. Runner: August 8, 2022
43 F.4th 417 (2022)
W.Va.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, carried a handgun in his vehicle. Officers received an anonymous tip that reported that a woman was "shooting up" in a "blue Volkswagen with Ohio tags" parked in a Wal-Mart parking lot. An officer responded and saw a woman exiting the passenger's side of

the defendant's car, a blue Volkswagen with Ohio tags, in what he described as a "pretty empty" parking lot. The officer spoke to the woman, who exhibited no signs of having used drugs.

Another officer, a trained drug recognition expert, arrived on the scene. He looked in the defendant's car and identified a glass stem pipe in the center console of the vehicle. He believed the pipe had a "frosted tint" to it, indicating prior use. Officers searched the car and found the defendant's handgun, ammunition, crystal methamphetamine, and paraphernalia.

Prior to trial, the Court denied the defendant's motion to suppress.

Held: Affirmed. The Court concluded that, even though a glass stem pipe may be put to innocent uses, here, viewing the evidence in the light most favorable to the government and in its totality, the plain view exception applied, and the Court ruled that the search of the vehicle was lawful.

The Court examined the "plain view" exception, which requires the government to show that:

(1) the officer was lawfully in a place from which the object could be plainly viewed;

(2) the officer had a lawful right of access to the object itself; and

(3) the object's incriminating character was immediately apparent.

The Court noted the U.S. Supreme Court had warned in *Texas v. Brown* that the phrase "immediately apparent" can be misleading, as it seems to imply that an "unduly high degree of certainty" as to the incriminatory character of evidence is necessary. In this case, the Court found that the evidence met the "low standard" required for "plain view," that the facts available warrant that items may be contraband or stolen property.

The Court cautioned that a pipe alone would not necessarily trigger the plain view exception. The Court noted that cases from the 4th Circuit upholding plain view searches based on pipes and paraphernalia have involved the presence of additional evidence or indicators that contributed to a finding of probable cause. In this case, the Court ruled that the initial corroboration of the anonymous tip, alongside the officer's drug recognition expertise, was sufficient. The Court found that the anonymous tip that initiated the officers' investigation was corroborated when they found a woman exiting a blue Volkswagen with Ohio tags, in an otherwise "pretty empty" Wal-Mart parking lot.

Full Case At:
https://www.ca4.uscourts.gov/opinions/214085.P.pdf

U.S. v. Orozco: July 25, 2022
41 F.4th 403 (2022)
N.C.: Defendant appeals his convictions for Possession of Child Exploitation Material on Fourth Amendment grounds.

Facts: The defendant was paid to drive a car with over $100,000 in drug-tainted cash hidden in a secret dashboard compartment. Officers stopped the defendant after learning that the car's registered owner had a suspended driver's license. Officers noticed that the defendant was excessively nervous, and it appeared that someone had removed the dashboard to his car. When officers asked the

defendant about his destination, the defendant, who had the GPS on his cell phone open, immediately closed the GPS application.

Officers summoned a K9 officer, and the dog alerted to the presence of narcotics odor. Officers opened the dashboard and found a secret compartment with over $111,000 in cash. The defendant admitted that he had been paid to drive the car and claimed the money did not belong to him. A dog then alerted to the presence of narcotics residue on the money.

When police found five SD cards wrapped in a $100 bill in the defendant's shoe, the cards fell on the ground. The defendant grabbed them and tried to eat them, swallowing one and destroying another. Police obtained a search warrant to search the phone and remaining SD cards, seeking evidence of drug trafficking. Officers searched the cards and immediately discovered child exploitation material. They then obtained a second search warrant and searched the remaining cards and the phone, finding more child exploitation material.

Prior to trial, the defendant moved to suppress, arguing that the warrant did not establish probable cause to search the SD cards and his phone. The trial court denied the motion.

Held: Affirmed.

The Court concluded that the totality of these circumstances was more than enough to establish a "fair probability" that the defendant was engaged in drug trafficking. The Court rejected the defendant's contention that driving another person's car with a large sum of drug-tainted cash stashed in a secret compartment is not probable cause. The Court observed that, given the large amount of money and the way it was stored—wrapped in grocery bags and stashed in a hidden compartment—innocent explanations seemed unlikely.

Regarding the SD Cards, the Court then found that when a suspect is reasonably believed to be engaged in drug trafficking, there is an adequate nexus to search the evidence the defendant attempted to destroy. The Court rejected the defendant's argument that all warrant applications must include the "magic incantation" from the affiant that, "in my training and experience, [there is a nexus between the suspected crime and evidence I want to search]."

Regarding the phone, the Court ruled that the fact that the defendant was running drug money when arrested and that he was using his cellphone for navigation at the time was enough for the magistrate judge to find probable cause ("reason to believe") that the defendant's phone would contain evidence of a drug-trafficking conspiracy. The Court also rejected the defendant's contention that a warrant application must contain the "magic incantation" that the officer's training and experience reveals that drug-trafficking data is often kept on cellphones. The Court wrote, "As we have already discussed, warrant applications are commonsense documents, not Wiccan rituals, so no magical incantations are necessary."

The Court wrote an extensive footnote discussing probable cause to search phones generally. The Court noted that "there are places so intrinsically part of a person's daily life that one would expect evidence of their crimes to be found there." The Court wrote: "Much like homes, cellphones contain aa digital record of nearly every aspect of [their owner's] lives—from the mundane to the intimate.' … The all- encompassing information on cellphones explains why unconstrained warrantless cellphone searches, like warrantless home searches, contravene the Fourth Amendment... But it is also why phones 'can provide valuable incriminating information about dangerous criminals.' … So just as it is

sometimes reasonable to believe that a suspect's home may contain evidence of their crimes, it might be reasonable to believe that his cellphone will. … At least this might be true for crimes like drug trafficking that involve coordination."

The Court concluded: "This case presents a model example of a proper investigation under the Fourth Amendment. The officers submitted a comprehensive affidavit with detailed facts showing drug trafficking. The magistrate combined those facts with commonsense inferences and determined that probable cause existed. And when the officers discovered evidence of other crimes, they immediately went back and obtained additional warrants to search and seize those files."

Full Case At:
https://www.ca4.uscourts.gov/opinions/214473.P.pdf

U.S. v. Daniels: July 25, 2022
41 F.4th 412 (2022)
N.C.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: Officers observed the defendant park a car in a hotel parking lot and enter a hotel. Officers learned that the defendant was wanted, and that the car was a rental car. When the defendant returned, officers arrested and spoke to him. He claimed that he did not know anything about the car. Officers called the rental car company, who informed them that another person, not the defendant, had rented the car. The rental car company towed the car back to their lot. At the lot, rental car staff consented to a police search of the vehicle. Officers discovered a handgun under the driver's side floor mat. DNA analysis on the handgun revealed the defendant's DNA.

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

Held: Affirmed. The Court ruled that the defendant lacked a legitimate expectation of privacy in the car because he introduced no evidence that he was in lawful possession of the car. Thus, he could not challenge the search.

The Court explained that criminal defendants have the burden of putting forward evidence to support all elements of their reasonable expectation of privacy. The Court noted that, under *Byrd*, an unauthorized driver of a rental car only has a legitimate expectation of privacy in a car when (1) they possess the rental car and (2) that possession is "lawful." Although defense counsel claimed at the suppression hearing and in his briefs that the renter had allowed him to drive the car, the Court complained that the defendant did not introduce any evidence at the suppression hearing to support that claim—not even a statement of his own to suggest that he had permission.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194812.P.pdf

U.S. v. Gist-Davis: July 18, 2022
41 F.4th 259 (2022)
N.C.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: The defendant, a convicted felon and gang member who had posted a recent incriminating statement on social media and whose residence had been the target of recent shootings, carried a gun in a "fanny pack" at his waistband while attending a local fair. Firearms were prohibited at the fair, and notice of this rule was posted at the fair entrance. Officers who were patrolling the fairgrounds were on "high alert" because a fair patron had been struck by a "gun projectile" a few days earlier.

While on patrol at the fair, an officer was monitoring the social media activity of some gang members. He noted that the defendant posted: "Oops see me at da fair yea I got it on me lil boy Fannie pack gang." Officers knew the defendant to be a member of the United Blood Nation, a violent gang whose members often carry firearms. Officers interpreted his statement as a warning to rival gang members that he would be at the fair and would have a gun in his fanny pack for potential use against them.

Officers later saw the defendant at the fair, wearing a fanny pack. They detained him, handcuffed him, and then patted him down. An officer detected the firearm in the bag and removed it.

The defendant moved to suppress, arguing that the officers (1) lacked reasonable suspicion to stop him as he was walking at a fairground, and (2) exceeded the scope of any permissible stop and frisk by placing him in handcuffs and by ultimately searching the fanny pack. The trial court denied his motion.

Held: Affirmed. The Court held that the officers were justified in stopping the defendant and in performing a limited, protective search for weapons. The Court held that based on the totality of the circumstances that (1) the officers had reasonable suspicion of criminal activity justifying the brief detention and limited, protective search, and that (2) they did not exceed the permissible scope of the *Terry* stop.

The Court agreed that the officers had a reasonable, particularized suspicion that the defendant was at the fair in possession of a firearm. The Court explained that the officers were justified in concluding that the defendant may have been armed and presently dangerous, given his membership in a violent gang whose members often carry weapons, his recent connection to drive-by shootings, and his statement on Facebook threatening gang rivals with the potential use of a weapon at the crowded public event.

The Court further held that the officers did not exceed the scope of this permissible stop and frisk. The Court noted that the officers conducted the pat-down without delay after he was placed in the handcuffs. Moreover, they recovered the gun fewer than 30 seconds after placing the handcuffs on the defendant. Because the defendant's liberty was restricted only temporarily to permit the officers to conduct the protective frisk for weapons, the Court ruled that the officers' use of handcuffs in this crowded public space was permissible as part of the brief investigatory stop and did not transform the stop into a custodial arrest.

The Court distinguished this case from the *Buster* case from earlier this year, which also involved a fanny pack. In this case, the Court noted that although the defendant was in handcuffs, he nonetheless was standing in a crowded public space, still in possession of his fanny pack, and had not been completely subdued. Thus, in contrast to the circumstances in *Buster*, the Court found that the defendant was not fully secured on the ground, and had not been separated from his bag, which the officer reasonably believed contained a firearm. Accordingly, at the time of the frisk, there still was a "realistic danger" to the officers' safety, as well as to the safety of the nearby crowd.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194887.P.pdf

U.S. v. Strong: June 9, 2022
Unpublished
S.C.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth and Fifth Amendment grounds.

Facts: Officers approached the defendant's vehicle, which was parking in a parking lot, regarding a potential noise violation. The officers noted the odor of marijuana in the vehicle and asked the occupants to step out of the car. An officer asked the defendant if he had anything "illegal" on him and the defendant responded that he had a firearm. The officer frisked the defendant, found the firearm, and learned that the defendant was a convicted felon.

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

Held: Affirmed. The Court first agreed that, upon approaching the vehicle and detecting the odor of marijuana, the officers had reason to believe that the vehicle contained illegal substances; therefore, at that point, the officers had probable cause to search the vehicle for illegal substances. The Court then noted that, to effect the search of the vehicle, the officers reasonably requested that the occupants exit the vehicle.

Regarding the officer's question to the defendant about whether he anything "illegal" on him, the Court concluded that this was a reasonable question, posed in the interest of officer safety, and that it was not outside the scope of the detention. Moreover, because the defendant was not in custody at the time of this inquiry, the Court agreed that the question was not subject to the dictates of Miranda.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194315.U.pdf

Virginia Court of Appeals
Published

Baskerville v. Commonwealth: February 21, 2023

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

Facts: Officers responded to a 911 "disorderly" call. The caller, a woman, reported having a verbal altercation with her boyfriend, who had been drinking, was often violent when he drank, and had vandalized their apartment. Officers arrived at the residence. The woman opened the door and spoke as she walked out of the unit. She did not identify herself as the 911 caller at the time (although later officers discovered that she had made the call), nor did she appear to be injured or distressed. She proceeded to enter the apartment unit immediately next door.

Just then, an older woman, the resident's aunt, emerged from the same residence that had made the 911 call. She reported that "the girl next door messed with my nephew" and they "were over there fighting or something." The aunt said that the woman had come over to her unit and locked the door. Soon thereafter, the aunt stated that the nephew kicked her door, and at that point, the aunt told the woman to call the police. The aunt also said that woman had returned to the apartment unit next door when the police arrived. As an officer walked toward the apartment unit next door, he noticed a broken window between the two apartments, which the aunt said the nephew had broken.

Officers then went to the apartment next door and knocked on the door. The woman (the same person who had called 911 originally) answered the door. She agreed to speak to police and allow them inside, but the defendant stepped in, immediately refused, and blocked the doorway, standing slightly behind the partially open door. He stated that he was a resident of the apartment and repeatedly told the officers they could not enter. Officers noticed a TV in the apartment lying face down on the floor. The woman told the officer that the defendant had "a medical condition." After a few minutes passed, the defendant agreed to come outside and speak with the police. The woman moved from outside the doorway and stood by the officers.

The defendant remained inside the apartment at the doorway and told the police to stay where they were. The officer then told the defendant to "come on," which triggered an agitated response from the defendant. The officer moved closer to the defendant and warned him not to raise his voice, as he was trying to "give [the defendant] a pass." The shouting match between the two men escalated, with each physically pointing fingers at the other. The defendant told the officer, "you can't give me a pass . . . I know where you live at, I know where your family is at," to which the officer replied, "it don't [sic] matter."

The defendant tried to close the door, but the officer kept it open with his leg and hand. Then the officer, followed by two other officers, stepped through the door, and entered the apartment. Once inside, officers interviewed the woman, who reported that the defendant had assaulted her. They arrested the defendant, learned he had an outstanding warrant, and searched him incident to arrest. They located drugs that the defendant intended to sell.

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

Held: Reversed. The Court found no basis for concluding any exigency existed. The Court therefore held that the warrantless entry by police into the defendant's home violated the Fourth Amendment.

The Court first applied the *Verez* factors to this case and held that no exigent circumstances justified the officers' warrantless entry into the defendant's home. In this case, the Court found that when the police arrived in response to the "disorderly" call, there was no ongoing disorderly conduct or any indication of any other ongoing crime. The Court noted that the woman appeared unharmed when she first opened the door to the officer's knock, and she said nothing about the earlier disturbance as she walked past him to her apartment next door. The Court concluded that the officers had no reasonable belief that contraband would be removed or destroyed; in fact, they had no belief any contraband would be found.

The Court repeated that a finding of exigency requires "a clear showing of probable cause" at the time of entry. The Court also assumed, without deciding, that the statements that the defendant made to the officer amounted to a threat and established probable cause for obstruction of justice. However, the Court then concluded that the offense was a nonviolent misdemeanor. Although the officers were investigating the reported domestic altercation, which the trial court noted could escalate quickly and become more serious, the Court countered that the officers observed only property damage and possibly vandalism, both crimes "that involve a low level of violence," in the Court's view.

The Court also agreed that the officers reasonably believed the defendant, their suspect, was in the apartment, but the Court noted that they had no reason to think he was likely to escape. The Court observed that the defendant remained in his apartment within sight of the officers during the entire encounter, and he gave no indication that he intended to flee. The Court cited *Lange v. California* to note that the police pursuit of a person charged with a misdemeanor does not categorically justify a warrantless entry into his residence.

The Court then considered whether to apply the exclusionary rule, acknowledging that "not every Fourth Amendment violation requires that the evidence be suppressed." In this case, however, the Court repeated that there was neither exigency nor any other valid reason to enter the defendant's apartment without a warrant. Under the circumstances, the Court argued that a reasonably well-trained officer would have known that warrantless entry into the defendant's apartment was illegal and unnecessary. The Court wrote that "Failing to impose the exclusionary rule here would reward "a 'sloppy study of the law… Thus, we hold that the evidence here is subject to exclusion."

Lastly, the Court rejected both the independent source doctrine and the attenuation doctrine as potential exceptions that would have permitted the evidence to survive suppression in this case. Regarding attenuation, the Court explained that "it is unclear whether police learned of the outstanding warrant before or after their discovery of the drugs… For the attenuation doctrine to apply, the police would have had to discover the warrant before they found the drugs."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0837212.pdf

Harvey v. Commonwealth: January 24, 2023

Richmond: Defendant appeals his convictions for Sexual Assault, Malicious Wounding, Burglary, and Unlawful Filming on Refusal to Strike a Juror, Fourth Amendment, Discovery of Jail Calls, and Admission of Prior Bad Acts.

Facts: In March 2018, the defendant pushed a woman to the ground and attempted to sexually assault her, while carrying a cellphone. Then, over a couple of days in May 2018, the defendant followed three college students back to their residences, where he broke into their apartments and sexually assaulted them while they were unconscious, filming the incidents on his phone. In the third case, which is the case charged in this incident, the victim woke up during the assault. The defendant struck her, breaking a bone in her face and knocking her out.

In September 2018, police investigated the defendant for assaults on other women where he lifted their clothes to photograph them. The defendant voluntarily surrendered his phone to police, who days later obtained a search warrant for the phone and an SD card in that phone, seeking data for six days during the September time frame only. In October, police obtained a second search warrant to include evidence from May 2018. That warrant revealed videos that the defendant had taken of his sexual assaults in May.

DNA evidence linked the defendant to the two initial assaults. DNA evidence also linked the defendant to two crimes in 2015, including another burglary incident where the defendant entered an apartment and filmed a woman in the shower. The victim in this case identified the defendant at trial. The defendant also had two previous convictions for unlawful filming at the time of this trial. Police arrested the defendant, and he was held without bond.

In December 2019, the defendant moved to suppress the evidence from the second search warrant. In January 2020, the trial court granted that motion. Two weeks later, police obtained a third search warrant. The defendant again moved to suppress the evidence from that warrant, which the trial court granted again.

In July 2020, one day after the trial court suppressed the third warrant, police obtained a fourth search warrant. At that point, law enforcement had possessed the phone for almost two years. Unlike the second and third warrants, the fourth one included limitations on the time periods for which data was sought, covering one month in 2015 and six months in 2018, two periods during which several crimes had occurred that the defendant was suspected of committing. The affidavit was also much more detailed than the second and third warrants because it added information obtained in a separate search of the SD card from the defendant's phone.

The fourth search warrant also limited the examination of the phone itself to applications that could hold video or photographic data. Finally, the warrant restricted the search to files created between dates that were book-ended by the crimes of 2015 and those of 2018. The defendant moved to suppress the fourth search warrant, but the trial court denied the motion.

Prior to trial for this offense, the Commonwealth sought a ruling permitting it to introduce evidence of the offenses against the two other victims from earlier in May 2018. The defendant objected, arguing that the evidence was overly prejudicial and insufficiently related, as the defendant could simply have downloaded the video of the assault against this victim from the Internet. The trial court admitted the evidence over the defendant's objection, ruling that the acts themselves were "idiosyncratic enough" in terms of temporal and geographic proximity, the assault and how it "was

done," and the fact that the acts were filmed. The trial court, however, agreed to instruct the jurors that they could consider evidence that the defendant committed a crime other than the one for which he was on trial only as evidence of his intent, identity, and "the unique nature of the method of committing the crime charged in connection with the crime for which he [was] on trial and for no other purpose."

At trial, during voir dire, the prosecutor asked the jurors whether they would be able to watch a video showing the rape of the unconscious victim. One juror said that she had a friend who was raped while unconscious. She initially stated that she would "be fine" considering the rape charge fairly "without a video" but that "with a video" and considering the defendant's purported defense of consent, she was "not sure she could do that fairly." In response to further questioning, the juror responded that she could evaluate evidence in addition to the video but would probably be "swayed" by the video. The juror also volunteered what she knew about the law of unconsciousness and consent.

The trial court then clarified that, after receiving the court's instructions on the law of consent, the juror would be free to consider all the evidence and would need merely to "be open to consider" the defense. The juror replied that she "would try to" and "thought" she could do so. The trial court again instructed her that she would have to wait for the evidence and that the voir dire was just to "know" if she "could apply the law that the court would give her" After that further explanation by the court, the prosecutor again asked the juror whether she could consider evidence that the alleged victim consented and evidence that she did not consent. Both times the juror responded, "Yes," and "Absolutely." Following additional questioning, defense counsel objected to the seating of that juror. The trial court denied the motion to strike her for cause.

On the second day of trial, the Commonwealth introduced a jail phone call from two years before. On the call, the defendant asked a woman if she heard that there were "fractured faces involved." The defendant stated, "I don't know how I'm supposed to live with myself after that. I didn't realize there was that much damage done." The Commonwealth had told the defendant about the provided the call as discovery on the day before trial. The defendant asked the trial court to exclude the recording due to the alleged discovery violation. The trial court denied the motion and admitted the recording.

[*Great job to Josh Boyles and Sarah Heller, who tried this case for the Commonwealth – EJC*].

Held: Affirmed.

The Court first ruled that the trial court's denial of the defendant's motion to strike the juror was not error. The Court examined the record and was satisfied that the trial court was able to assess whether the juror was impermissibly biased or would be able to apply the law in the instructions after the presentation of all the evidence. To the extent the juror gave responses that were unclear, the Court noted that the trial court clarified them and confirmed that the juror could sit impartially. The Court found that the record revealed that the juror did not demonstrate a fixed bias and that the trial court's questioning and instruction constituted appropriate clarification, not improper rehabilitation.

The Court then affirmed the denial of the defendant's motion to suppress the fourth search warrant. The Court began by holding that the trial court did not err by concluding that the particularity requirement of the Fourth Amendment was satisfied. The Court found that the challenged search warrant satisfied the constitutional particularity requirement because it listed the specific crimes about

which the evidence was sought and the specific places on the defendant's cell phone where the officers were authorized to look for that evidence.

The Court then concluded that, under the Fourth Amendment, there was proof of a constitutionally sufficient nexus between the phone and the crimes under investigation. The Court rejected the defendant's argument that evidence of a nexus between his cell phone and the nine crimes of which police suspected him was lacking because there was evidence in only one case that the assailant used a phone to record the potential crime, the 2015 incident in which a woman saw a cell phone that was possibly recording sticking through her shower curtain.

The Court examined the nine groups of offenses from 2015 and 2018, noting that video evidence was strongly suspected to be involved in 5 of those cases. Along with the defendant's two previous convictions for unlawful filming and the two videos discovered by law enforcement in the first search warrant, the Court found that the evidence provided "more than enough evidence" to support the trial court's finding that an adequate nexus existed for probable cause to search the defendant's phone for videos and photographs created during the two listed time frames.

The Court then turned to the defendant's argument that the search of his cell phone was unreasonable under the Fourth Amendment based on the length of time it took the Commonwealth to obtain a valid search warrant. The Court acknowledged that this was an issue of first impression in the Commonwealth. The Court repeated that a seizure that is lawful at its inception can nevertheless violate the Fourth Amendment if its manner of execution unreasonably infringes possessory interests protected by that amendment. The Court explained that assessing the reasonableness of the duration of the retention of the item seized includes factors such as (1) the significance of the interference with the person's possessory interest; (2) the duration of the delay; (3) the presence or absence of consent to the seizure; and (4) the government's legitimate interest in holding the property as evidence.

Regarding the defendant's interest in the phone, the Court noted that the defendant was incarcerated and could not lawfully possess the phone, and therefore the seizure did not deprive the defendant of any direct interest in possessing the phone. The Court also noted that defense counsel received a disk containing all the data on the phone during discovery. Lastly, the defendant did not request his phone back for almost two years. Consequently, the Court found that the degree of interference with his possessory interest before the police obtained a valid warrant related to the charges at issue was minimal.

The Court agreed that personal property without independent evidentiary value may not be kept indefinitely. Here, however, the Court noted that the Commonwealth repeatedly sought subsequent warrants to permit it to search the defendant's phone for evidence of specific additional crimes that he was suspected of committing, and it had a strong interest in retaining the property while doing so in as prompt a manner as possible. Lastly, the Court found that the officers involved therefore acted diligently, if imperfectly, to obtain a valid warrant permitting the search that is the subject of this appeal.

Regarding the jail phone call, the Court noted that defense counsel had at least a full business day to evaluate it before trial and did not request a continuance. The Court found that the defendant did not establish prejudice on appeal, and the trial court therefore did not abuse its discretion by admitting the recording of the phone call.

Lastly, the Court addressed the defendant's argument that the evidence of the two other offenses in May 2018 was inadmissible regarding this offense. The Court noted that the defendant took all three videos with a single phone and that the contents of the videos and the ways in which the two sets of crimes were committed involve distinct similarities. The Court explained that the defendant's theory that he downloaded the videos from the Internet did not render the evidence of the crimes against the two other victims inadmissible to prove identity in part through modus operandi.

In this case, the Court noted that both the burglary and aggravated sexual battery charges included the element of intent to commit rape or some other act of sexual abuse. The Court repeated that the prosecution is required to prove every element of its case and is entitled to do so by presenting relevant evidence in support of the offenses charged. The Court wrote that: "A defendant cannot prevent the prosecution from doing so simply because he takes the position that the offense did not occur or that someone else committed it and therefore intent is not genuinely in dispute."

Consequently, the Court ruled that other-crimes evidence was relevant to prove identity (both independently and through modus operandi) and intent. The Court found that the probative value of the evidence on the combination of elements for which it was offered—identity and intent—outweighed the obvious yet incidental prejudice. Considering the record as a whole, the Court concluded that the trial court did not abuse its discretion by admitting the video and related evidence of the defendant's rape in the earlier part of May 2018. The Court also noted that the trial court limited the impact of the other-crimes evidence through a cautionary instruction directing the jury to consider the evidence for the limited purposes of his intent, identity, and modus operandi.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0723212.pdf

Turner v. Commonwealth: September 20, 2022
75 Va. App. 491, 877 S.E.2d 541 (2022)
Fredericksburg: Defendant appeals his conviction for PWID, 3rd or Subsequent Offense, and related offenses on Fourth Amendment grounds.

Facts: The defendant, who had previous convictions for PWID, carried PCP for sale in his vehicle. In June of 2020, an officer observed the defendant driving around 1 am. At the time, the city had declared a state of emergency and had passed an emergency order that provided: "The City of Fredericksburg shall be under a curfew between the hours of 8 p.m. and 6 a.m. beginning June 1, 2020, and ending June 3, 2020." During the curfew, the emergency order directed that "no person shall be present on any street, road, alley, avenue, park, or other public place in the City of Fredericksburg" between the hours of 8:00 p.m. and 6:00 a.m. The curfew contained exceptions for persons traveling to and from home, work, or places of worship, as well as exceptions for individuals in certain professions and anyone seeking emergency services. The emergency order expressly made any violations punishable as Class 1 misdemeanors.

The officer stopped the defendant and learned that his privilege to operate a motor vehicle was suspended. A K-9 unit alerted on the vehicle. Officers searched the vehicle and found the defendant's drugs.

Prior to trial, the defendant moved to suppress, arguing that the officers lacked sufficient reason to believe that he had violated curfew, given that they did not know whether he fell within one of the stated exceptions. The trial court denied the motion.

Held: Affirmed. The Court held that the stop of the defendant's vehicle did not violate the Fourth Amendment. Instead, the Court ruled that the stop was clearly grounded in a particularized and objective basis for suspecting that the defendant had committed a crime.

The Court repeated that reasonable suspicion need not rule out the possibility of innocent conduct. The Court explained that imposing an obligation on law enforcement to somehow determine whether a curfew exception applies to a person seen driving during prohibited hours before a stop could even be made to briefly investigate the reason for driving during the curfew would eviscerate the city's ability to enforce the curfew in the first place.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1103212.pdf

Virginia Court of Appeals
Unpublished

Brownson v. Commonwealth: May 16, 2023

Norfolk: Defendant appeals his convictions for Concealed Weapon and Obstruction on Fourth Amendment grounds.

Facts: The defendant carried a concealed handgun while walking on a street. An officer noticed an "L-shaped" outline in the area around the defendant's pants pocket and suspected the outline was a possible firearm. Once the defendant made eye contact with the officers, he made a "U-turn" and started walking away from them. The defendant also pulled down his shirt and turned the side of his body away from the officers' view.

The officers followed the defendant. He reached an unoccupied car and entered the back seat behind the driver's side. The officers walked up to the side of the vehicle where the defendant was seated, which had the windows down. The officers asked the defendant what he was doing and then saw him reach toward the floorboard underneath the front seat. The defendant then reached for his right hip at least three times, while officers ordered the defendant "don't reach for it." The defendant continued to reach for that area and said, "It is not my gun. I'm not reaching for it." He also said the car did not belong to him.

The officers forcibly removed the defendant from the car. The defendant again insisted neither the gun nor the car belonged to him. While an officer patted the defendant down, the defendant's firearm fell onto the ground.

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

Held: Affirmed. The Court concluded that, under the totality of the circumstances, the officers had reasonable suspicion justifying the stop.

The Court first pointed to the fact that, as soon as the defendant made eye contact with the officers, he immediately made a "U-turn," started walking away from them, and entered the back seat of a parked, unoccupied car that he admitted did not belong to him. The Court then pointed at the fact that an officer noticed an "L-shaped" outline in the defendant's right pants pocket, and then pulled his shirt down and turned the right side of his body away from the officers' view after he saw them, in an apparent attempt to conceal the outline. Lastly, the Court examined the defendant's actions in the car.

In a footnote, the Court also pointed out that, because the defendant disregarded the officers' commands, he was not seized for Fourth Amendment purposes until the officers began to physically remove him from the car.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0988221.pdf

Best v. Farr: April 18, 2023
Lary v. Farr: April 18, 2023

Arlington: Plaintiffs appeal the dismissal of their Use of Force lawsuit against Police.

Facts: Plaintiffs, the driver and passenger in a car, were stopped by police after police saw a hand-to-hand transaction between the driver and another person that police believed was a drug transaction. The passenger had a warrant for her arrest at the time. Police attempted to detain the plaintiffs using a tactical unit involving multiple unmarked vehicles, manned by at least five armed, plainclothes officers. Three of the unmarked vehicles were instructed to "box in" the van while it was parked on the public street.

Officers converged on the plaintiffs and the lead unmarked vehicle began flashing blue lights. Four of the officers, armed but not in uniform, approached the van. One of the officers began tugging on the driver's window. According to the plaintiffs, no badges were displayed, nor did they tell either plaintiff that they were under arrest. However, while the officer was pulling on the driver's side window, he yelled to the driver, "show me your hands!"

The driver plaintiff tried to escape, pulling forward and striking the lead police vehicle, and then backing up and striking another unmarked police vehicle, and pushing it backwards, allowing the van to escape. One of the officers was directly in front of the van as it accelerated out and had to jump out of the way to avoid being struck. This officer, along with several of the other officers present, fired multiple gunshots at the van, striking the driver plaintiff five times and the passenger plaintiff once. The driver

plaintiff was able to drive a short distance but was unable to continue driving due to his severe gunshot wounds. After the van came to a stop, the passenger plaintiff ran from the van and hid nearby until a police dog located her and bit her when the dog found her.

Both plaintiffs sued the officers for Battery under Virginia Law, but the trial court sustained numerous demurrer motions until dismissing the lawsuit.

Held: Affirmed. The Court held that the plaintiffs failed to allege facts sufficient to state a cause of action under Virginia tort law.

The Court first agreed with the trial court that the stop was supported by reasonable articulable suspicion and was therefore lawful. The Court repeated that the absence of charges or the fact that further investigation reveals a suspect's innocence does not mean that reasonable suspicion did not exist at the time of the stop.

The Court then agreed with the trial court's conclusion that the plaintiffs knew that the officers were law enforcement when they crashed into the cars and fled. The Court noted that:

(1) the police truck flashed blue emergency lights, which are commonly associated with law enforcement,

(2) the first plainclothes officer directed the driver to "show [him] his hands," a directive also commonly associated with law enforcement,

(3) the plaintiffs were both aware that the passenger had an outstanding warrant, which would put them on notice that the police would likely be pursuing her, and

(4) neither plaintiff ever claimed that they did not know that the officers were law enforcement.

The Court concluded that the plaintiffs were not privileged to defend themselves from an assault or threatened assault because the only reasonable inference was that the plaintiffs were in fact aware that they were dealing with law enforcement officers. The Court repeated that there is no right to resist an investigative detention.

The Court then ruled that the officers' use of deadly force in response to the plaintiffs' efforts to flee was justified. The Court noted that the video showed that one of the officers was in immediate danger of being struck by the van, and explained that, just because an officer was able to deftly avoid injury does not mean that he was not in immediate danger. Regarding the dog, the Court found that no facts alleged that would allow for a reasonable inference that the officers did not use reasonable force in doing using a police dog to capture the passenger plaintiff.

Lastly, the Court found that, even if the officers unlawfully failed to identify themselves, the plaintiffs' own conduct was an intervening and superseding cause of the injuries that they suffered. The Court wrote: "Upon being lawfully stopped by the officers, and with the knowledge that he was dealing with law enforcement officers, Best made a conscious choice to attempt to evade detention. There is no right to resist an investigative detention... The video depicts Best utilizing his van to plow his way through the other police vehicles, and in doing so, he endangered one of the on- foot officers. The officers were entitled to use deadly force to respond in kind to Best's conduct, and it was reasonably foreseeable that they would in fact do so."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0952224.pdf

and
https://www.vacourts.gov/opinions/opncavwp/0949224.pdf

King v. Commonwealth: April 4, 2023

Augusta: Defendant appeals his conviction for PWID Marijuana on Fourth Amendment grounds.

Facts: In August 2020, the defendant possessed marijuana with the intent to distribute. An officer observed the defendant passed out in his car at a gas station. The officer approached and smelled the odor of marijuana. Based on that odor, the officer searched the car and located the drugs the defendant had for sale.

At the time, personal possession of marijuana had been decriminalized and was punishable only by a civil fine less than $25. The defendant argued that the officer did not have probable cause to search his car because personal possession of marijuana was only subject to a civil penalty at the time, and thus there was no evidence that a crime had been committed. He also argued that § 4.1-1302 should apply retroactively and bar the fruits of the search because it was conducted based solely on the smell of marijuana. The trial court denied the defendant's motion.

Held: Affirmed.

The Court repeated that § 4.1-1302 does not apply retroactively. In a footnote, the Court agreed that § 4.1-1302 abrogated the "plain smell" doctrine articulated in *Bunch* for searches occurring after § 4.1-1302 became effective. However, the Court ruled that § 4.1-1302 is not applicable to this case.

The Court rejected the premise that marijuana was not contraband. Despite reducing the punishment for possession of marijuana, the Court noted that the legislature declined to make possession of marijuana lawful and legitimate until July 1, 2021, when the repeal of § 18.2-250.1 became effective.

In this case, the Court noted that the officer could localize the smell of marijuana to the defendant, so it was reasonable for him to believe that the defendant possessed marijuana and that searching the defendant's car would yield marijuana. Because it was unlawful for an individual to possess marijuana at the time of the search, the Court found that the officer could have validly requested a search warrant. Thus, his warrantless automobile search was "based on facts that would justify the issuance of a warrant" and it was reasonable. In other words, the Court ruled that the search was supported by probable cause. The smell of marijuana emanating from the car gave the officer reason to believe that he had a fair probability of finding contraband when he searched the car.

In a footnote, the Court distinguished this case from the *Spencer* case. Unlike that case, in this case, the Court noted that the officer could not identify the source of the smell, except that it came from inside the car. The Court explained that circumstances suggested that the car contained contraband because, unlike in *Spencer*, the defendant did not explain the smell of marijuana and the officer could not plainly see any burning marijuana.

Full Case At:

https://www.vacourts.gov/opinions/opncavwp/0563223.pdf

Turay v. Commonwealth: March 21, 2023 (***En Banc***)
Reversed Panel Opinion of October 18, 2022

Waynesboro: Defendant appeals his convictions for Robbery, Armed Burglary, and related charges on Fourth Amendment grounds.

Facts: The defendant and his confederate, both armed felons, forced their way into a home and robbed several individuals at gun point. The defendants fled the scene on foot. Police responded quickly thereafter and issued an initial lookout ("BOLO") for "three black males wearing black sweatshirts."

Thirty minutes after the robbery, an officer detained the defendant, along with his confederate. The officer had seen the men walking on the street less than 10 blocks away, and less than a minute's drive from the crime scene. No other people were around, and the night was cold. He noted that there were only two men, not three, but that the defendant was wearing a black jacket. The confederate's clothing was not black. The trial court denied the defendant's motions to suppress.

The Court of Appeals reversed the denial regarding the confederate but affirmed regarding the defendant in this case. However, the Court of Appeals granted a re-hearing.

Held: Reversed, motion to suppress granted. The Court held that the officer's detention violated the defendant's Fourth Amendment right against unreasonable seizures because, at the time of the seizure, there was no particularized, objective basis for suspecting the defendant of criminal activity.

The Court complained that there was no evidence that the officer observed the defendant, or his confederate, do anything suspicious or evasive. The Court noted that the officer detained the men when they were "merely walking—not rushing" down the street at night in a residential neighborhood. The Court also noted that there was no evidence that they were walking away from, rather than toward, the scene of the robbery. The Court wrote: "The mere observation of two Black men walking late at night in a residential neighborhood cannot give rise to reasonable, individualized suspicion that they were involved in a robbery that occurred six to ten blocks away thirty minutes earlier."

The Court also complained that the 911 dispatch included a vague description of clothing and did not include a description of any suspect's height, weight, build, hair style, facial characteristics, age, or any other distinguishing physical features apart from the general classifications of race (Black) and gender (male). The Court also emphasized that the defendants did not match the "extremely vague BOLO description" of three armed Black males wearing black sweatshirts. The Court also pointed out that there were only two men, not three, and none seemed to be armed.

Judge Petty filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0868213.pdf
Original Court of Appeals ruling at:
https://www.vacourts.gov/opinions/opncavwp/0868213.pdf

Eckerd v. Commonwealth: March 14, 2023

Augusta: Defendant appeals his convictions for Possession of Child Pornography on Denial of a *Franks* Hearing, Jury Instruction Issues, and Juror Misconduct.

Facts: The defendant possessed child exploitation images. His girlfriend discovered the images and enlisted a friend to examine the defendant's electronic devices. The friend discovered more images and the two reported it to the police. The victim specifically described that she "caught her boyfriend … looking at animated child pornography" and that she found an image on his phone "that was borderline child pornography." An officer obtained a search warrant for the devices based on their reports. The warrant revealed multiple child exploitation images.

The defendant moved to suppress, seeking a *Franks* hearing to challenge the search warrant. The defendant alleged that the affidavit's use of the word "nude" to describe pictures of toddlers that the friend saw when he examined the defendant's external hard drive was false. The defendant argued that the word "nude" was false because the friend's written statement to the police did not include that word, and because the friend, during testimony at a preliminary hearing, described the toddlers as "clothed." The trial court denied him a *Franks* hearing.

At trial, over the defendant's objection, the trial court instructed the jury that an element of the offense of possession of child pornography (second offense) is "that this possession occurred subsequent or in addition to at least one other possession" The trial court also instructed the jury, over the defendant's objection, that "The second or subsequent possession need not occur on a separate date or time, but must involve a separate child pornography file."

At trial, the defendant contended that the jury should have been instructed about the alleged dates of the offenses in the jury's "finding instructions." The trial court refused.

After the jury rendered its guilty verdict, the trial court polled the jury twice — once for the first offense and once for the eleven second or subsequent offenses. After trial, the defendant moved to set aside the verdict. The defendant attached an internal sheriff's office email which stated:

> "[A juror] called this morning to report that he was very disturbed by a court process that he was involved in 9/30/21. He said that he felt threatened, and was threatened in the bathroom, and felt like he had to vote the way of the majority. He talked endlessly about the trial process and was upset that a 2-day trial had been turned into a one-day trial where the jury was forced to stay late in the evening. He complained that the judge only gave them one break the entire day."

The complaining juror did not name the other juror who supposedly threatened him. Despite the Sheriff's attempts to reach this juror, the juror never responded to the Sheriff's numerous efforts to contact him or ever spoke with the Sheriff regarding the alleged threat. The trial court denied the motion.

Held: Affirmed.

Regarding the *Franks* hearing, the Court held that the defendant was not entitled to a *Franks* hearing because, even without the word "nude," the statements of the witnesses demonstrated that probable cause existed to support the search warrant, and the affidavit correctly stated that the toddler that the friend saw in the image was positioned in a lewd sexual manner.

The Court repeated that if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing pursuant to *Franks* is required. In this case, the Court concluded that, given all the circumstances set forth in the affidavit, it was "reasonable to believe" that child exploitation material would be found on the defendant's devices. The Court explained that "the word "nude" was simply not necessary to the finding of probable cause, and therefore no *Franks* hearing was required."

Regarding the jury instruction on the second offense, the Court concluded that the instruction accurately defined the elements of possession of child pornography—and possession of child pornography, second or subsequent offense. In addition, the Court ruled that the jury instruction was appropriate here where twelve separate images of child pornography were found on the defendant's external hard drive.

Regarding the defendant's request to instruct the jury on the date of the offenses, the Court held that none of the jury instructions were required to contain the alleged date of the offense as listed in the indictments because in a felony case the Commonwealth may prove the commission of a crime charged on a date different from that alleged in the indictment and because time was not an element of the offenses. The Court ruled that the trial court properly instructed the jury that a violation of § 18.2-374.1:1 required proof beyond a reasonable doubt that the defendant "knowingly possessed child pornography"— and that each subsequent violation required proof that the defendant possessed a separate child pornography image. Consequently, given that time is not a material element of an offense under either § 18.2-374.1:1(A) or (B), and that the instruction properly covered the actual elements of the offenses, the Court ruled that the trial court did not err by refusing to include the dates of the charged offenses in the jury instructions.

Regarding the alleged threat by a juror, the Court held that it was not an abuse of discretion to deny the defendant's motion to set aside the jury's verdict, given that the defendant could present only minimal facts about a vague supposed threat from a juror to another juror while in a bathroom at the courthouse. The Court ruled that the trial court did not err, given that the jury verdict was clearly shown to be unanimous after being polled twice, given that the complaining juror never responded to the Sheriff's efforts to follow up with him on those vague allegations, and given that the record contained no real proffer of any details of what the juror claimed happened at the courthouse.

In a footnote, the Court pointed out that the trial court could not consider much of the defendant's claim because a juror is precluded from testifying as to any matter or statement occurring during the jury's deliberations. In addition, the Court pointed out that Virginia Rule of Evidence 2:606(b)(i) states that, during an inquiry into the validity of a verdict, "[t]he court may not receive a juror's affidavit or evidence of a juror's statement" on "any statement made or incident that occurred during the jury's deliberations." In this case, the Court found the juror's allegations in this case to be so vague that none of the exceptions to Rule 2:606(b) applied.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0218223.pdf

Jones v. Commonwealth: March 14, 2023

Lynchburg: Defendant appeals his convictions for Possession of a Firearm and related offenses on Fourth Amendment grounds.

Facts: An officer found drugs in the trash located outside of the residence where the defendant lived with three other adults. The defendant had been charged four previous times with intent to distribute a Schedule I/II narcotic. Based on surveillance, an officer sought a search warrant, averring that there was "a high likelihood" that vehicles were visiting the home and being used in the distribution and transportation of illegal narcotics.

Officers executed the search warrant at the defendant's residence. The defendant was not present when law enforcement executed the search warrant. However, during the search, the defendant turned his vehicle onto the street. Upon seeing law enforcement vehicles at the residence, the defendant shifted the vehicle into reverse, backed up, turned around, and drove away. The defendant's vehicle reached approximately fifteen to twenty yards from the outer perimeter before he turned around.

An officer recognized the defendant driving the vehicle and followed him. Approximately two miles away, the defendant pulled the vehicle into a parking lot and got out of the vehicle. There, the officer activated his lights and approached the defendant. He searched the defendant and found ammunition and drugs. Another officer searched the vehicle and recovered a firearm.

The defendant moved to suppress, but the trial court denied the motion. The trial court held that the search warrant authorized the search of the defendant and the vehicle because the defendant was "present on the scene" when he turned the vehicle onto the street where the residence was located. The trial court further held that even if the search warrant did not authorize the search, exigent circumstances justified the search.

Held: Reversed.

The Court first noted that the defendant was not "present" at the residence at any point during the execution of the search warrant. Thus, although the search warrant was valid, the Court noted that it did not authorize the search of him or his vehicle which occurred approximately two miles from the dwelling being searched.

The Court then found find that, based on the surveillance and trash pulls, probable cause existed and justified the issuance of a search warrant for the dwelling and for the defendant if he was present when the search warrant was executed.

However, the Court then held that the trial court erred in holding that, even if the search of the defendant and the vehicle was not within the scope of the search warrant, the search was justified by exigent circumstances. The Court ruled that the officers lacked probable cause to execute a warrantless search of the defendant or the vehicle. The Court complained that there was also no evidence presented

that tied the defendant, instead of one of the other three residents, to the drugs found during the trash pulls. The Court also found no probable cause to search the vehicle other than the fact that it had been parked at the residence several times and that the defendant frequently drove it.

In a footnote, the Court acknowledged that the officers could have searched the defendant without probable cause if he had been detained in the "immediate vicinity of the premises to be searched, under *Bailey v. United States*, but in this case concluded that the defendant was not in the "immediate vicinity of the premises to be searched."

[*Note that on appeal, the Commonwealth did not argue that the officers had a reasonable and articulable suspicion that a crime was being committed and were stopping the defendant pursuant to Terry – EJC*].

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0431223.pdf

Rodriguez v. Commonwealth: February 28, 2023

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

Facts: A police informant, working with officers, arranged a drug purchase from a low-level drug connection. The person who was the connection accepted several thousand dollars as a cash "front," and told the informant that he would meet his source at an apartment complex and return with drugs. Police monitored that initial transaction by wire and by watching surreptitiously.

The police followed the connection to an apartment complex parking. They observed the defendant arrive, exit his car, and greet the connection before both men entered the connection's car. At that point, the officers approached and arrested the defendant and the connection.

Officers observed a large amount of cocaine and cash in the connection's car. Officers also saw a bag of cocaine in plain view in the defendant's car. They searched both cars and seized the cocaine along with a firearm from the defendant's car. Later that day, a Magistrate issued warrants for the defendant's arrest based on an affidavit that the officers wrote in support of the arrest warrants.

The defendant moved to suppress the results of the search and the evidence in support of his arrest, but the trial court denied the motions.

Held: Affirmed. The Court held that because the detention and subsequent arrest were lawful, the trial court did not err in denying the suppression motions.

The Court first concluded that the totality of the circumstances furnished support for the suspicion that the occupants of the vehicle were engaged in criminal activity sufficient to justify approaching and briefly detaining the defendant and the connection. Once the officers reached the car and saw the cocaine and cash, though, when combined with the other information available to them, the Court found that the officers had probable cause to arrest the defendant.

The Court criticized the defendant's argument that the arrest warrant was "defective," explaining that there is no procedure by which to suppress an arrest warrant, and therefore the Court described the mode by which the defendant sought to affect his choice remedy as "dubious." The Court also noted that the affidavit included detailed information about what the officers saw and discovered during a search of both vehicles. The Court wrote: "Rather than presenting free-floating inferences, the affidavit included specific facts and empirical grounds sufficient for the magistrate to have concluded that a crime occurred, and thus, demonstrating probable cause" for the arrest.

In a footnote, the Court agreed that it was not clear when the actual arrest in this case took place but explained that the question of when the arrest took place did not bear on its analysis.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1305212.pdf

Camaan v. Commonwealth: February 28, 2023

Frederick: Defendant appeals his convictions for Drug Possession on Fourth Amendment and sufficiency grounds.

Facts: While investigating a public-indecency complaint, officers spoke with the defendant in the parking lot of a convenience store. During that encounter, an officer noticed that the defendant was hiding something under his shoe. The defendant was standing in place, noticeably keeping his left shoe planted as he shifted his weight back and forth. The officer could see a piece of aluminum foil sticking out from beneath the defendant's shoe. The officer later testified that, through his training and experience, he knew that aluminum foil is often used with a straw to smoke narcotics.

The officer told the defendant to move his foot. The defendant did so, revealing aluminum foil with burnt residue and a straw. The officers arrested the defendant and searched his person, discovering a white powder in a cellophane wrapper in his wallet and pills in a pill bottle in his pocket.

Testing of the white powder revealed that it contained two controlled substances: Fentanyl and Etizolam. The pills tested positive for two other controlled substances. The defendant admitted that he was a drug addict, that he had tried to conceal the foil underfoot, that the foil contained "a drug," and that the items found in his pockets were all his. He admitted knowing that the white powder was fentanyl but denied knowing that it also contained etizolam, a drug he'd never heard of.

The defendant was convicted of three felony counts of possessing a Schedule I or II controlled substance, including Fentanyl and Etizolam, and one misdemeanor count of possessing a Schedule IV controlled substance.

Held: Affirmed in Part, Reversed in Part. The Court affirmed the trial court's decision denying the defendant's motion to suppress the evidence but reversed the conviction for possession of a Etizolam.

The Court first agreed that the defendant was seized when the officer told him to move his foot, not because the defendant was not free to leave, but because a reasonable person in the defendant's position would not have felt free to keep his foot planted. (In a footnote, the Court explained that its

analysis evaluated whether the defendant's person was illegally seized, not whether the space under his foot was illegally searched.) Thus, to justify telling the defendant to move his foot, the officer needed reasonable, articulable suspicion that the defendant was engaged in, or was about to about to engage in, criminal activity.

In this case, the Court concluded that, although the officer did not at first see the straw or the burnt residue, the officer could form a reasonable belief that the defendant was engaged in criminal, drug-related activity and trying to hide the evidence. The Court thus concluded that the investigatory detention that occurred when the officer said "move your foot" was properly supported by reasonable suspicion.

The Court then concluded that finding burnt residue on an improvised device for smoking narcotics created probable cause to believe that the defendant was in possession of a controlled substance. The Court favorably cited cases from other jurisdictions that also have concluded that the discovery of drug residue on the defendant's person or on a narcotics pipe found in the defendant's possession provided probable cause to arrest the suspect for possession of a controlled substance. Thus, since the officer had probable cause to arrest the defendant for possession of narcotics, the subsequent search was a lawful search incident to arrest under the Fourth Amendment.

Regarding Possession of Etizolam, however, the Court found that the record lacked evidence to support a finding beyond a reasonable doubt that the defendant knew that the white powder was a mixture that contained Etizolam, as well as Fentanyl.

The Court examined the statute, previous cases, and the history of Virginia's possession statute to reach the conclusion that a conviction for possession under § 18.2-250 must be supported by proof of knowing possession. The Court likened this case to *Young* and found that the prosecution failed to exclude the reasonable hypothesis of innocence that the defendant believed that the white powder contained only one controlled substance—Fentanyl.

The Court reaffirmed the ruling in *Howard*, rejecting the argument from that case that if the Commonwealth could not prove that a defendant intended to possess more than one controlled substance in the mixture, then "both of his convictions must be reversed." The Court contended, though, that by requiring a mens rea showing for each count of possession, it was not making the first count of possession any harder to prove, only the subsequent counts. The Court pointed out in a footnote, for example, that if a defendant knowingly possessed a drug by its street name, the prosecution might present testimony that the street name is commonly understood to refer to a combination of controlled substances, such as speedball, a "mixture of cocaine and heroin."

Judge Athey dissented from the conclusion that the Commonwealth needed to prove that the defendant knew he possessed two separate controlled substances. Judge Chaney dissented from the denial of the motion to suppress.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0243224.pdf

English v. Commonwealth: February 21, 2023

Spotsylvania: Defendant appeals her conviction for Assault on Law Enforcement, arguing that she Lawfully Resisted an Unlawful Arrest

Facts: Police responded to a call from a witness, who told a 911 operator that the defendant hit someone with a bottle and that, to defend her brother, the witness had struck the defendant with a flashlight. The 911 dispatcher relayed that report to an officer and advised him of the defendant's multiple convictions for crimes of violence, as well as the defendant's height, weight, skin color, and eye color.

Seven minutes after the 911 call, an officer encountered the defendant. She was walking along a snowy road, about a tenth of a mile away from the reported crime scene. The defendant matched the suspect's description and correctly identified herself. She was not dressed appropriately for the inclement weather. The defendant had an injury to her head, consistent with the witness' report that she had hit the defendant with a flashlight to protect her brother after the defendant reportedly hit him with a bottle.

An officer detained the defendant, placed her in handcuffs, and put her in a police car. The defendant then slipped out of her handcuffs. An officer removed the defendant from the car to put them back on. The defendant became more agitated, yelling racial epithets and profanity, and threatening to fight the officer. The defendant suddenly turned and "bucked" at him, headbutting his chest and striking him with her shoulder. She then "mule kicked [his] right knee."

At trial, the officers testified that they understood that the defendant had not been arrested and was simply being detained. An officer also testified that, had the defendant not later assaulted an officer, he would have released her and not arrested her.

At trial, the defendant argued that her arrest was unlawful and argues that the common law permitted her to use reasonable force to resist. The trial court rejected that argument, concluding that the defendant had only been detained, not arrested. Applying *Commonwealth v. Hill*, 264 Va. 541 (2002), the trial court concluded that the common-law privilege to use reasonable force to resist an unlawful arrest did not apply to her detention.

Held: Affirmed. Unlike the trial court, the Court assumed, without deciding, that the defendant had been arrested. However, the Court concluded that her arrest was not unlawful because it was supported by probable cause. Thus, the Court found that she did not have the right to resist a lawful arrest.

The Court examined the facts and concluded that a reasonable officer could find from those facts "a probability or substantial chance" that the defendant had committed an assault and battery on the victim and was leaving the scene, thus allowing for the arrest under § 19.2-81(G). The Court then explained that, once probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused.

Because the officer had probable cause to arrest the defendant for the reported assault and battery on an officer, the Court ruled that it did not matter that the officers both described the defendant as having been only detained, not arrested. The Court repeated that an officer's subjective characterization of observed conduct is not relevant to an objective application of the Fourth Amendment. The Court quoted *Mason*: "So strong is this principle that, even when an officer's

testimony shows that he misjudged the legal basis for the stop, his subjective misjudgment does not undermine the objective validity of a stop that could be based on a wholly different legal basis."

In a footnote, the Court also explained that it likewise does not matter that the defendant was ultimately charged and convicted for a different crime from the one for which she could have been lawfully arrested earlier.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0470222.pdf

Williams v. Commonwealth: February 14, 2023

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

Facts: The defendant, a convicted felon, possessed multiple firearms. In November 2019, a reliable confidential informant told police that the defendant and his confederate were distributing heroin. That same month, police also confirmed that the confederate was dealing drugs containing heroin and fentanyl after conducting two controlled buys from him. In February 2020, police also discovered one of the defendant's known customers dead inside the house where the defendant packaged and sold heroin. In March 2020, police arrested the defendant for possession of a controlled substance, and the next month, police witnessed the defendant conduct two "hand to hand" drug transactions at a convenience store immediately after meeting his confederate inside the defendant's townhouse.

In mid-August, police saw the defendant leave his townhouse to meet his confederate and several vehicles gathered outside a residence in a manner "indicative of narcotics distribution." Finally, during the ten-month period the defendant was under surveillance, police confirmed that the defendant lived at the Chesterfield townhouse and his confederate exhibited a "clear pattern" of traveling to that residence, another home, and the convenience store where the defendant had previously sold drugs.

In August 2020, police applied for and obtained a search warrant for the defendant's residence. Officers executed the warrant four days later and found a handgun, a rifle, and ammunition.

The defendant moved to suppress, contending that the police illegally searched his home and seized evidence based on a stale search warrant that lacked probable cause. The trial court denied the motion, concluding that the good faith exception applied.

Held: Affirmed. The Court held that the trial court correctly concluded that the good faith exception applied.

In this case, the Court agreed that the affidavit contained detailed factual allegations that provided at least "some indicia" of probable cause to believe the defendant's residence would contain evidence of drug dealing when police executed the search warrant. The Court examined the facts and concluded that they supported the rational inference that there was—if not "a fair probability"— at

least some likelihood that the residence would contain evidence of his ongoing illicit drug distribution when police executed the search warrant.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0138222.pdf

Vazquez v. Commonwealth: February 14, 2023

Henry: Defendant appeals his convictions for Possession with Intent to Distribute on Fourth Amendment and Admission of Video Evidence grounds.

Facts: The defendant possessed methamphetamine and marijuana in his residence with the intent to distribute. Police intercepted a package of drugs at a shipping facility bound for the defendant's residence. Police obtained an anticipatory search warrant for the defendant's residence, intending to make a controlled delivery of the package. Police placed a tracker inside the package under the authority of the search warrant. The tracker was equipped with a light sensor, which alerted when the package was opened. This allowed law enforcement to time their entry into the home.

After the controlled delivery, police executed the warrant. Police found cocaine and ten pounds of marijuana in plain view. Police also found ledgers indicating sales, ten thousand dollars, and nearly four kilograms of methamphetamine hidden in a sofa.

The defendant moved to suppress the evidence from the search warrant, arguing that the use of the light tracker was unlawful, but the trial court denied the motion.

Police also recovered a cellphone during the search. It was the only such device found in the residence and only the defendant appeared to reside there. A forensic analyst examined the phone using Cellebrite. The analyst found a video showing baggies of methamphetamine, taken the same day as the search warrant. The analyst also found "selfie" photographs that the defendant had taken of himself.

Prior to trial, the defendant filed a motion in limine to exclude video evidence found on the cell phone. A police forensic analyst testified regarding his extraction of the cell phone's data. The analyst explained the software he used to extract the data and his training and experience in using the program. The analyst testified that the program, Cellebrite, examines the path of the photos or videos to determine whether they were created by the phone. He testified that Cellebrite does not add any photos or videos to the cell phone. Finally, the analyst testified that the Cellebrite program accurately processed the video and that the video remained unaltered. The trial court admitted the video over the defendant's objection.

Held: Affirmed.

Regarding the search warrant, assuming without deciding that the use of a GPS equipped with a light sensor was an illegal search, the Court ruled that the inevitable discovery doctrine applied in this situation. Regardless of whether the devices operated as anticipated, the Court reasoned that the police would have executed their valid search warrant for the home. Thus, the alert from the GPS and light

sensor affected the timing of the entry to the house but was not a necessary prerequisite for execution of the search warrant. Therefore, the Court found that it need not determine the legality of the placement of the GPS and light sensor into the package.

In this case, the Court found a reasonable probability that the evidence in question would have been discovered by lawful means because a valid search warrant existed for the residence, which specifically authorized law enforcement to enter the premises and seize drug-related items. Thus, the search warrant for the home would have been executed regardless of the light sensor's indication. The Court rejected the defendant's contention that there was a possibility that the officers would not have executed the valid search warrant they obtained. The Court wrote: "While anything is possible, the inevitable discovery doctrine does not require the proponent of the evidence to show that under any and all circumstances the evidence would have been found. It only requires the Commonwealth show a reasonable probability that the evidence would have been lawfully discovered."

Regarding the video, the Court repeated that a video may be authenticated if it is either a fair and accurate depiction of what a witness observed, or if there has been an adequate foundation laid as to the "accuracy of the process producing it," which renders the video a "silent witness." Under *Ferguson* and *Brooks*, the test to authenticate a video as a silent witness is "whether the evidence is sufficient to provide an adequate foundation assuring the accuracy of the process producing it." Similar to *Brooks*, the Court noted that the Commonwealth provided testimony to support the reliability and source of the video derived from the cell phone, including the information that the video at issue was taken on the same day as the search and seizure and that the selfie was taken the night prior to the search.

In this case, the Court ruled that the video was relevant because it tended to make a fact—namely the defendant's knowledge of the narcotics—more probable. While the Court agreed that no evidence was introduced showing that the defendant took the video, spoke in the video, or was aware of the video, the Court found that the Commonwealth introduced sufficient evidence showing that the cell phone seized was the defendant's cell phone. Specifically, the cell phone contained multiple self-taken photographs of the defendant, it was found among the defendant's possessions, and it was the only phone found in the house while the defendant was the sole occupant. Therefore, the Court ruled that the factfinder could make reasonable inferences that the cell phone was the defendant's and that the defendant had knowledge of the video contained on his cell phone.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0356223.pdf

Commonwealth v. Spencer: February 14, 2023

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

Facts: An officer in a hotel parking lot smelled the odor of marijuana, which led her to the defendant. The officer found the defendant smoking a marijuana cigarette in her car while and spoke

with her. The engine was running, and the car was parked. The defendant admitted that she was smoking marijuana and stated that she was staying at the hotel. She told the officer: "all I have is a blunt." At the time of this offense, marijuana possession was a civil offense. Officers subsequently searched the car and found cocaine.

The defendant filed a motion to suppress. The trial court suppressed the evidence recovered from that search because, at the time, marijuana possession was a civil offense. On appeal, the Commonwealth contended that, while a civil offense, marijuana remained "contraband," so its presence gave the officers probable cause to search the car without a warrant under the automobile exception.

Held: Suppression Affirmed. Assuming without deciding the nature of the offense made no difference to the validity of the search, the Court concluded that the officers did not have probable cause to search the car. The Court found that these circumstances did not create a fair probability that the car contained other contraband.

The Court rejected the Commonwealth's argument that the presence of the marijuana cigarette alone established probable cause to search for more marijuana. The Court noted that the defendant was not in a high crime area, did not try to hide the cigarette, did not make any furtive movements, did not appear to have any weapons, and was cooperative with the officer. The Court also found it significant that the officer did not see any paraphernalia or other drugs and did not detect any additional marijuana odor from the vehicle. The Court explained that "under the facts of this case, it is not clear what evidence of a DUI the officers would have probable cause to search for other than the burning cigarette in appellee's hand, which they could already seize."

While the officers suggested during their interaction that the defendant might be committing a DUI, the Court pointed out that the officer admitted in her testimony that the defendant "was acting normal" and that she saw no need to initiate a DUI investigation. For the Court, that fact suggested there was no probable cause to believe she was intoxicated.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1443221.pdf

Commonwealth v. Dotson: February 7, 2023

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

Facts: An officer responded to the defendant's vehicle for a report of someone smoking something in the area. He saw the defendant in his truck and noted that his position reminded him of a drug overdose. He attempted to awaken the defendant through an open window but was not able to. The officer looked inside the vehicle from the outside and saw apparent marijuana in the vehicle. [*Note: this case took place when Marijuana was a civil violation – EJC*]. He also saw an unlabeled, transparent pill bottle containing blue pills that the officer believed to be Xanax.

Finally, the officer was able to awaken the defendant. The officer asked the defendant about the open satchel in his lap as well as the unlabeled pill bottle, asking "what's that?" The defendant voluntarily handed the pill bottle to the officer. The pills were in an unlabeled, translucent bottle. At the suppression hearing, the officer testified that he believed that the blue pills were Xanax because he had seen pills like that before.

The defendant immediately disclaimed ownership of everything in the truck, including the pill bottle, stating that anything in the truck belonged to his girlfriend. The officer noted that the defendant was moving around and "being fidgety" so the officer ordered the defendant out of the vehicle and handcuffed him. The defendant again proclaimed that "anything in the vehicle would be his girlfriend's." The officer learned that the defendant was a convicted felon. The officer searched the vehicle and found cocaine, methamphetamine, and drug paraphernalia.

The defendant moved to suppress the results of the search. The trial court granted the defendant's motion to suppress, noting that the officer did not testify that he thought the pills were "illegal at that time." The trial court emphasized that the officer did not arrest the defendant at that point for possessing a prescription medication without a prescription. The Court stated that the officer "didn't testify to anything that would give him reasonable suspicion or probable cause to search the vehicle."

The Commonwealth filed a notice of appeal, but the notice did not include the case number for the defendant's possession of methamphetamine charge. The motion and suppression hearing pertained to four separate charges, each of which is its own case, as indicated by the case numbers assigned to the charges by the clerk of the trial court. The notice merely indicated the Commonwealth's intention to appeal two cases - possession of cocaine and possession of drug paraphernalia.

However, in the accompanying certificate of appeal, the Commonwealth listed the cases the Commonwealth intended to appeal by stating that the suppressed evidence was "substantial proof of facts material to the Commonwealth's case, to wit: illegal narcotics (cocaine and methamphetamine)."

Held: Reversed, Motion Improperly Granted. The Court held that the record contained sufficient evidence of probable cause to justify the search of the defendant's vehicle.

The Court first addressed the Commonwealth's notice of appeal, which it agreed by itself, was insufficient to satisfy the jurisdictional requirement that the notice of appeal identify the case or cases to be appealed. However, while the notice of appeal may have been deficient on its own, the Court found that the accompanying certificate made clear that the Commonwealth intended to appeal both the possession charge related to cocaine, as well as the possession charge related to methamphetamine. Because the Commonwealth did in fact file a timely notice of appeal, and because that notice of appeal, read in conjunction with the certificate, adequately identified the cases to be appealed, the Court held that, under the facts of this case, dismissal for failure to satisfy the rules governing notice of appeal is not warranted.

The Court then ruled that had the officer had probable cause to believe that the defendant was in possession of illegal substances. The Court noted that Xanax is a Schedule IV controlled substance, and the possession of Xanax without a "valid prescription or order of a practitioner while acting in the course of his professional practice" is a Class 2 misdemeanor. The Court observed that the fact that the pills were in an unmarked bottle adds to the likelihood that Dotson did not possess them lawfully,

pursuant to a valid prescription. The Court also explained that the defendant's immediate disclaimer of the pills and his repeated assertion that anything found in the truck would be his girlfriend's demonstrated his guilty knowledge that there would be illegal contraband in the truck.

In sum, the Court found that the circumstances when coupled with the defendant's "fidgety" demeanor and prior felony conviction were sufficient to demonstrate there was "a fair probability" that the defendant's truck contained further contraband or evidence of a crime. The Court rejected the trial court's reasoning, repeating that "an 'officer's subjective characterization of observed conduct is not relevant' to an objective application of the Fourth Amendment." The Court also emphasized that the fact that the officer did not immediately arrest the defendant for illegal possession of Xanax was inconsequential.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1341223.pdf

Commonwealth v. Barrett: January 31, 2023

Fauquier: The Commonwealth appeals the Granting of a Motion to Suppress on Fourth Amendment grounds.

Facts: The defendant severely neglected dozens of dogs at her dog breeding business. Officers learned of the neglect while investigating the death of a particular dog due to serious neglect. They learned from veterinarians that the defendant has been bringing neglected animals to them for "an extended period of time." Law enforcement obtained a search warrant for her property for animal cruelty.

In the affidavit, the officer explained that he had personally seen signs of severe neglect on the dog and personally seen many dogs at the defendant's property. The officer also included statements from three witnesses at the veterinary clinic about the dog's extreme neglect and their concerns about the care of the other dogs.

Police seized approximately 75 dogs were seized from the defendant's property when the warrant was executed. The Commonwealth brought a civil forfeiture case regarding the dogs, as well as a criminal case for five counts of animal cruelty. In the civil forfeiture case, the defendant moved to suppress the evidence, arguing that the search warrant affidavit was insufficient and that the resulting warrant lacked probable cause. The general district court granted the motion to suppress, and the Commonwealth appealed. The circuit court reviewed de novo and denied the motion to suppress in the civil forfeiture case. It found that the search warrant was supported by probable cause and, alternatively, that the good faith exception to the exclusionary rule applied.

Although the trial court denied the defendant's motion to suppress in the companion civil forfeiture case, it granted her motion to suppress in the criminal case, finding that the search warrant affidavit lacked probable cause and the good faith exception did not apply.

Held: Reversed, Motion to Suppress Improperly Granted. The Court ruled that the criminal complaint and search warrant affidavit provided probable cause. The Court repeated that probable cause "does not demand any showing that such a belief be more likely true than false."

In this case, the Court noted that the search warrant affidavit connected the deceased dog to the defendant, provided the time and location of the offense, and contained non-conclusory information supporting probable cause. Although the defendant had argued that no specific time frame was provided in the affidavit, the Court noted that neglect, particularly severe neglect, does not occur quickly. The Court also pointed out that the officer, in the affidavit, stated that he had personally seen that the defendant kept many dogs at her residence and personally seen the severe neglect of the original dog. Additionally, the Court ruled that the magistrate properly considered the criminal complaint together with the search warrant affidavit.

The Court concluded that, viewed together, the criminal complaint and affidavit provided time and location, a nexus between the dead dog and the defendant, and non-conclusory information supporting probable cause, giving the magistrate sufficient evidence to decide that the defendant was "fairly probably" committing animal cruelty on her property. Thus, the magistrate had probable cause to issue the search warrant for the defendant's property.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1323224.pdf

Terry v. Commonwealth: January 31, 2023

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

Facts: The defendant possessed illegal drugs while riding as a passenger in a car. An officer stopped that car for driving without a front license plate and making an illegal turn. The driver of the car stopped in a convenience store parking lot. During the stop, the officer asked the passengers for their identification. The defendant agreed to provide his identification. The officer learned that the defendant was wanted on an outstanding warrant. The defendant attempted to flee, but officers quickly arrested him. During the search incident to arrest, the officers found the defendant's drugs.

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

Held: Affirmed. The Court found that the defendant was lawfully detained as a passenger in a vehicle properly stopped for traffic infractions. During that lawful detention, the Court found that the officer properly requested the defendant's identification, which the defendant voluntarily provided. Discovering that the defendant had outstanding arrest warrants, the Court then found that the officers lawfully arrested him, discovering narcotics in their search incident to arrest. The Court rejected the defendant's claim that he was tricked into providing his identification.

The Court agreed that, during a traffic stop, a vehicle's passengers are also "seized" under the Fourth Amendment. Thus, the officer could legally detain the passengers in the vehicle for the duration of the stop. The Court repeated that officers were not required to let the passenger exit the vehicle to

go into the store. Quoting the U.S. Supreme Court's ruling in *Wilson*, the Court wrote that officers were "not constitutionally required to give the passenger an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, the officers were not permitting a dangerous person to get behind them." "It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety."

The Court then explained that, under *Thomas,* during a lawful stop, police may "obtain the registration for the vehicle and request the identities of its occupants," "seek radio dispatch confirmation of the information obtained from the vehicle occupants," detain the driver and passengers for "the duration of the stop," and "ask questions unrelated to the traffic violation." The Court rejected the argument that an officer was required to inform the defendant of his right to refuse the request for identification.

In a footnote, the Court noted that although the U.S. Supreme Court has not decided the question, all federal circuit courts to address the issue have concluded that officers may request a passenger's identification during a traffic stop and run a warrants check, even absent an independent basis for doing so. The Court acknowledged that a handful of state courts have concluded that officers are prohibited from requesting identification from passengers during a traffic stop, absent reasonable suspicion of wrongdoing or some other case-specific justification beyond general officer safety concerns. However, the Court applied Virginia's previous ruling in *Thomas*.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1365212.pdf

Commonwealth v. Hendrick: December 29, 2022

Richmond: The Commonwealth appeals the Granting of a Motion to Suppress on Fourth Amendment grounds.

Facts: The defendant possessed Heroin, Cocaine, and Fentanyl with the Intent to Distribute. Officers stopped him for a traffic infraction in a high crime area. As officers approached, they saw the defendant "[h]unched over" and "leaning towards the steering wheel, going toward the floorboard . . . and then he looked back . . . in the mirror." The officers, believing that the defendant may have been attempting to conceal a weapon, patted down the defendant.

During the pat down, the officers did not locate any weapons. Later, an officer testified that during the pat down, he checked the defendant's groin and did not feel any weapons. He also testified that if there had been a weapon, he would have felt it.

The defendant then told officers that he had just been released from jail on the offense of Possession of a Firearm by Felon. Officers then conducted a protective sweep of the vehicle. While examining the vehicle, the officers had the following conversation: "[d]ude, he was divin' in the front, so I don't know if he shoved some shit down his pants," and "[h]e definitely was in the front. He had something down his pants, I think." He also stated, "[i]f I was a betting man, he put it down his nuts."

As the officers continued the search, their dispatch confirmed that the defendant was "probably armed." A few moments later, an officer located the defendant's drugs in a baggie, stating: "[o]h, there you go. There's all the drugs right there."

The defendant moved to suppress the evidence. The trial court held that the officers lacked reasonable, articulable suspicion to conduct a protective sweep of the defendant's car. The trial court also rejected the Commonwealth's argument, based upon the attenuation doctrine, that the defendant's subsequent statement about just coming home from a gun charge provided a reasonable, articulable suspicion supporting a sweep. The trial court found that at the time the defendant made his "gun charge" statement "the officers had already moved from a sweep to a search," and held that the attenuation doctrine was not applicable.

Held: Affirmed, Motion Properly Granted. The Court held that the trial court did not err in granting the motion to suppress the evidence recovered from the car during a traffic stop.

The Court ruled that the trial court did not err in finding that the officers lacked reasonable, articulable suspicion for a protective sweep. The Court explained that, although the stop occurred late at night in a high-crime area, such circumstances are not themselves determinative of the issue of reasonable, particularized suspicion. The Court then noted that the defendant made a single movement over the steering wheel and toward the floorboard as officers approached his car, but that he had ceased his movement and was sitting upright with his hands in plain view when officers stepped up to his window. Further, he exhibited no signs of nervousness, such as shaking hands, heavy breathing, or sweating.

In a footnote, the Court explained that it was not taking a position on whether a single furtive hand gesture made outdoors in plain view of an officer may be distinguishable from a "furtive movement" made inside an automobile compartment, where officers may be less able to see what an individual is doing or may have in his hands. The Court also stated that it was taking no position on whether, as implied by the trial court, a single furtive movement of any kind, even in a high-crime area, is an insufficient basis for reasonable, articulable suspicion.

The Court then assumed, without deciding, that the defendant's "gun charge" statement was sufficient to provide officers with reasonable, articulable suspicion for a protective sweep. Even making that assumption, though, the Court concluded that the trial court did not err in granting the motion to suppress because the officers exceeded the permissible scope of such a sweep. The Court explained that officers conducting a protective sweep must limit the sweep to a search for weapons that a suspect might gain immediate control over, thus presenting a threat to officers and others.

In this case, the Court concluded that the record demonstrated that officers did not confine themselves to such a limited, permissible search for weapons; instead, they expanded their conduct to search for drugs. The Court examined the officers' statements to one another and concluded that the officers were concerned to search for and find drugs, rather than weapons. The Court also noted that once the officers located the drugs, they ceased examining the driver's compartment. Thus, the Court found that the record supported the conclusion that the officers were searching for drugs, rather than weapons. Accordingly, even assuming that the officers possessed reasonable, articulable suspicion for a protective sweep, the Court reasoned that they exceeded the permissible scope of a sweep, and thus the trial court did not err in suppressing the recovered drugs.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1054222.pdf

Drier v. Commonwealth: December 13, 2022

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

Facts: Police responded to a call for a stolen vehicle, noticed the vehicle while someone was driving it, and noticed the defendant closely following the stolen vehicle. When both the stolen vehicle and the defendant's vehicle stopped together at a convenience store, officers stopped both vehicles. The driver of the stolen vehicle told police that they were "just bringing it back," but also stated that she was armed.

An officer then asked the defendant if he was armed, to which he responded that he had a knife. During a pat down, the officer removed the knife; however, the officer continued to feel a rectangular object in one of the pockets. The defendant then admitted that he had another pocketknife in his back pocket. The officer removed the rectangular object for his safety, believing it to be another knife, to ensure that it was not another knife. The object was, in fact, a tightly wrapped bag containing a pipe, which contained methamphetamine.

The defendant moved to suppress. The trial court denied the motion. The trial court noted:

(1) the stop took place at 3:30 a.m.;

(2) it was snowing;

(3) the nature of the "high crime area";

(4) the offense being investigated involved a stolen vehicle; and

(5) the experience of both officers.

The trial court agreed that, under the totality of the circumstances, these facts alone would not be sufficient for the pat down. However, the trial court found compelling that the woman driving the stolen vehicle had indicated that she was armed prior to the defendant's pat down. Coupled with the defendant's admission that he was armed, before the pat down began, the trial court found the officer had reasonable suspicion for the pat down.

Held: Affirmed. The Court agreed with the trial court's conclusion that the officer reasonably inferred that the defendant may be armed and was justified in performing the pat down to ensure his safety.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0030221.pdf

Adams v. Commonwealth: December 13, 2022

Hanover: Defendant appeals his conviction for Drug Possession and other charges on Fourth Amendment grounds.

Facts: An officer stopped the defendant for a traffic violation. The defendant admitted that he had no driver's license but refused to give his name to the officer. The officer then conducted a "pat-down" of the defendant. During the pat down, the officer felt syringes in the defendant's pocket, which he recognized as possible contraband used to inject illegal drugs. As a result, he removed the syringes from the defendant's pocket.

The defendant then gave a false name and date of birth. Unable to find a person with that name and birthdate in the police database, the officer asked the defendant for his "actual name." The defendant responded with his correct name and the officer discovered that the defendant had a warrant for his arrest. One of the syringes later tested positive for fentanyl.

The defendant moved to suppress the evidence, contending that the officer did not have probable cause to remove the syringes. The trial court denied the motion.

Held: Affirmed. The Court concluded that, in the normal course of police procedure, the officer's line of investigation would have inevitably led to the discovery of the defendant's outstanding warrants, his arrest, and the detection of the syringes. The Court noted that the officer had a lead regarding false identity at the time of the pat down. He had probable cause to arrest the defendant once he became aware of the outstanding warrants and would have found the syringes during a search incident to arrest. Consequently, the doctrine of inevitable discovery applied, and the Court ruled that the trial court did not err in denying the motion to suppress.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0275222.pdf

Daye v. Commonwealth: November 22, 2022

Lynchburg: Defendant appeals his convictions for PWID Marijuana and Firearms offenses on Fourth Amendment grounds.

Facts: Police responded to a call for disorderly conduct at the defendant's residence. Upon arrival on the front porch of the home, an officer began knocking and kicking on the door and demanding that the door be opened. The officers saw what appeared to be a pipe in the window of the home. When the defendant opened the door and offered to show the officers where the alleged fight occurred, the officers stopped him, informed him that they smelled marijuana and saw "a bowl" in the window, and asked to come inside "and get this weed out of your house."

The officers almost immediately began to focus on the odor of marijuana rather than the original call regarding a fight. Officers told the defendant "Okay, let's put it this way. We can either detain you and put you in cuffs and sit you on these steps for five hours while we go ahead and get [a warrant]." The defendant then said: "go ahead" and sat on the steps.

Officers entered the apartment. Inside, they saw marijuana in plain view. They continued to walk through the apartment and saw a firearm in a bedroom. Officers then secured the apartment and obtained a search warrant. Executing the search warrant, the officers discovered a large quantity of marijuana and numerous handguns and ammunition.

The defendant moved to suppress the search. At the motion to suppress, the officer testified that he would have attempted to get a search warrant if the defendant had refused the officers entry. After a hearing on the motion, the trial court found that the defendant did not consent to the initial search, the officers' initial entry into the apartment was unlawful, and a protective sweep of the apartment was not justified. However, the trial court concluded that the evidence should not be suppressed, despite the unlawful entry into the home, because it "inevitably would have been discovered by lawful means."

[*Note: This case took place in 2020, prior to the General Assembly's limitations on searches based on Marijuana odor alone – EJC*].

Held: Affirmed.

The Court repeated that, to prove that evidence inevitably would have been discovered by lawful means, the Commonwealth must show:

(1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct and

(2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct.

In this case, the Court noted there were only two possible scenarios for what would have occurred had the defendant denied the officers entry into the home—that the officers either would have secured the apartment and contacted a supervisor about obtaining a warrant or would have simply attempted to get a search warrant themselves. The Court concluded that the evidence demonstrated a reasonable probability that the officer would have obtained and executed a search warrant, finding the contraband within the apartment, using only the information he obtained before the warrantless and unlawful entry.

Judge Raphael filed a dissent, in which he argued that *Murray v. U.S.* requires that courts apply a subjective standard when determining whether police inevitably would have sought and obtained a lawful warrant had they not been permitted to undertake the unlawful search. His dissent focused on the existing split of authority among jurisdictions regarding the appropriate standard that the prosecution must meet to show that the evidence ultimately would have been discovered by lawful means. For Judge Raphael, the question should have been what the particular officer or officers would have done, not what a reasonable officer under the circumstances would have done. Judge Raphael explained that he would have followed the Supreme Court of New Hampshire's precedent in this case.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0925213.pdf

Commonwealth v. Mihokovich: November 15, 2022

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

Facts: Police officers on a routine foot patrol walked through the premises of a motel and noticed the defendant, who appeared through the window of the motel room to be asleep in bed with a woman, may have overdosed on fentanyl and might need emergency medical aid. They observed the defendant's friend leave the motel room apparently under the influence. The friend admitted to the officers that he himself had recently taken fentanyl, and after the officers patted the friend down, they found syringes and fentanyl in his pocket. The friend also told the officers that he had helped carry the defendant to the motel room and put him in the bed there although he adamantly denied that the defendant had taken fentanyl himself or was overdosing.

The officers talked with the friend for approximately ten minutes before deciding to get a key to the defendant's room and enter that motel room without a search warrant. When the key finally arrived, without trying first to get any response, they swiped the room key, opened the door, and entered the room. Once in the room, they waited a few minutes before trying to rouse the defendant themselves and first relied on the woman in bed with him to see if he was breathing. The officers then summoned EMS. They did not retrieve Narcan from their own police vehicle; instead, they waited for EMS personnel to arrive and administer Narcan to the defendant to successfully revive him.

The trial court found that the emergency aid exception did not apply and granted the defendant's motion to suppress evidence found in the room. Pursuant to § 19.2-398(A)(2), the Commonwealth appealed.

Held: Affirmed, motion properly granted.

The Court repeated that the emergency exception only requires that police officers have an objectively reasonable belief under the specific facts of the situation that an individual needs immediate emergency assistance. However, the Court cautioned that the trial court can only consider what information the officers knew before they entered the hotel room—not what they learned after they entered it without a search warrant.

In this case, the Court complained that, during the initial investigation, including the additional two minutes that it took for one of the officers to go and retrieve a room key, the officers did not tap on the window or shout through the window to the defendant or the woman, yell to ask the occupants about whether they needed medical help, or knock on the wall or door to see if they could rouse the defendant or the woman to determine if they were all right. The Court also explained that, if the officers had then received no response during this time that they stood mere feet away outside the defendant's motel room, there almost certainly would have been an objective basis to enter the motel room without a search warrant under the emergency aid exception.

The Court acknowledged that a review of a trial court's grant of a motion to suppress presents a two-step analysis:

(1) whether a Fourth Amendment violation occurred and

(2) whether the application of the exclusionary rule was the appropriate remedy.

However, in this case the Court did not reach the question of the application of the exclusionary rule because the Commonwealth's had waived that argument before the trial court and on appeal.

Finally, the Court stated: "We expressly do not hold, however, that police officers must knock before entering whenever the emergency aid exception applies."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1076224.pdf

Ramsey v. Commonwealth: November 9, 2022

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

Facts: The defendant, a convicted felon, carried a firearm while driving. The defendant left a gang member's funeral in his car while following his brother's vehicle. The two stopped at a store and parked. A police officer ran the license plate of the brother's car and discovered that the brother had a warrant for his arrest. He also learned that the defendant's privilege to operate a motor vehicle was suspended. The defendant asked if he could drive the brother's car away. Officers asked him to wait while they confirmed the warrant. The defendant then asked if he could enter the brother's car to retrieve an item and the officer permitted him to do so.

During the encounter, the defendant walked away, made phone calls, and bought refreshments from the gas station market with no interference from any officer. An officer told the defendant that his license was suspended. A K9 officer then arrived and told the defendant his dog would examine the defendant's car. The defendant admitted to having consumed Marijuana earlier in the day, but an officer replied that he was "not concerned about that." The defendant then called his girlfriend on the phone, stating "I need you to come get me." The defendant then asked an officer, "why am I being stopped? I feel like y'all are detaining me with him." The officer stated that she "did not know anything about that."

At no point did officers make physical contact with the defendant or try to restrict his movement in any way after telling him the dog was going to sniff his car. The officers' language and tone of voice was conversational. There was no evidence that officers instructed the defendant to remain at the scene once the dog arrived or began its work.

The dog alerted on the vehicle and an officer detained and handcuffed the defendant, who admitted to having marijuana in his pocket. The officers searched the defendant's car and found his firearm in the back seat pocket. Later, analysis found the defendant's fingerprint on the gun.

The defendant moved to suppress the firearm and testified that once the officer informed him that his license was suspended, he no longer felt free to leave. The trial court denied the motion.

Held: Affirmed. The Court concluded that, from the totality of the circumstances, the police conduct in this case would not have caused a reasonable person to believe that he was not free to end the encounter.

The Court emphasized that, regardless of the defendant's testimony, the relevant inquiry is whether a reasonable person would have felt free to leave, not whether they would have felt free to leave using a specific transport. The Court found that the defendant's actions and his call to his girlfriend, "I need you to come get me," indicated that the defendant did feel free to end the police encounter and go about his business.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1096211.pdf

Carr v. Commonwealth: October 18, 2022
Turay v. Commonwealth: October 18, 2022
Note: Turay reversed En Banc March 21, 2023

Waynesboro: Defendants appeal their convictions for Robbery, Armed Burglary, and related charges on Fourth Amendment grounds.

Facts: The defendants, armed felons, forced their way into a home and robbed several individuals at gun point. The defendants fled the scene on foot. Police responded quickly thereafter and issued an initial lookout ("BOLO") for "three black males wearing black sweatshirts."

Thirty minutes after the robbery, an officer detained the defendants. He had seen the men walking on the street less than 10 blocks, less than six blocks away, and less than a minute's drive from the crime scene. No other people were around, and the night was cold. He noted that there were only two men, not three, but that Defendant Turay was wearing a black jacket. Defendant Carr's clothing was not black.

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

Held: Affirmed regarding Defendant Turay, reversed regarding Defendant Carr.

[*Note: The panel consisted of Justices Chaney, Callins, and Petty. Judge Chaney wrote the opinion reversing Defendant Carr's conviction, and Judge Petty wrote the opinion affirming Defendant Turay's conviction. – EJC*].

Regarding Defendant Turay, the Court noted that it was reasonable for the officer to believe that the defendants were together and that a robbery suspect may discard potentially identifying clothing or attempt to change his appearance when he flees the crime scene. In a footnote, the Court explained that the fact that the clothing worn by Defendant Turay did not exactly match the original description "is of no moment". The Court noted that the officer observed the supposedly armed suspects from his car in the dark of night; he testified on several occasions that, from his viewpoint, the two men matched the description he had received from dispatch.

However, regarding Defendant Carr, the Court held that the detention violated the defendant's Fourth Amendment right against unreasonable seizures because, at the time of the seizure, there was no particularized, objective basis for suspecting Defendant Carr of criminal activity. The Court specifically noted that, when the officer stopped the men, there were only two men, not three, neither man

appeared to be armed, and their clothing did not match the BOLO. The Court wrote: "The observation of a Black man walking late at night in cold weather in a residential neighborhood six to ten blocks from where a crime was committed thirty minutes earlier does not give rise to reasonable, individualized suspicion of criminal activity."

Judge Chaney filed a dissent in the ruling affirming Defendant Turay's conviction. In a footnote, Judge Chaney complained that "Even if Turay was wearing a garment that was describable as a "black sweatshirt," wearing such a non-distinctive garment—without more—does not support a finding of particularized reasonable suspicion of criminal activity." Judge Petty filed a dissent in the ruling that reversed Defendant Carr's conviction.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1136213.pdf
and
https://www.vacourts.gov/opinions/opncavwp/0868213.pdf

Galvante v. Commonwealth: September 27, 2022

Virginia Beach: Defendant appeals his convictions for Felony DUI and related charges on Fourth Amendment grounds.

Facts: The defendant, who had prior convictions for DUI and had his license revoked due to those convictions, again drove while intoxicated. A citizen tried to get the defendant an Uber because he should not be driving, but the defendant refused. The citizen then stopped next to a police vehicle and flashed his car lights. The citizen pointed to the defendant, who was getting in a nearby parked car and informed the officers that the man had been drinking at the bar across the street and should not be driving.

The officers pulled up next to the defendant's car but did not block his exit. The officers got out of their vehicle and indicated they wanted to talk to the defendant. The officers informed the defendant that they had received a citizen complaint that he may have had too much to drink, and immediately smelled the odor of alcohol from his person. The discovered he was DUI and arrested him.

The defendant moved to suppress on Fourth Amendment grounds, contending that the citizen's information was akin to an "anonymous tip." The trial court denied the motion.

Held: Affirmed. The Court held that the officers had reasonable suspicion to stop the defendant's vehicle to investigate him for suspected driving while intoxicated. The Court concluded that, under the totality of the circumstances, the informant's tip in the face-to-face encounter with police provided the officers with reasonable suspicion to stop and investigate the defendant for suspected driving while intoxicated.

The Court likened this case to the Supreme Court's *Navarette* ruling and noted that, although the informant was unknown to the officers, the informant presented himself to the officers in a face-to-face encounter with no assurance that the police would not use his license plate number to find him if

the information he provided proved false. The Court pointed out that the informant "cogently presented his report, based his report on his personal observation, exhibited a sense of urgency, and specifically identified the suspect and his car."

Therefore, the Court concluded, the officers could have reasonably inferred that the informant's claim that the defendant was intoxicated was based on the informant's personal observation of the defendant. The Court found that the proximity of the bar that the defendant was reportedly coming from also bolstered the credibility of the informant's tip. The fact that the informant was making a contemporaneous tip as the defendant was entering his car was another indicium of the tip's reliability, for the Court.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0866211.pdf

Barker v. Commonwealth: September 20, 2022

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

Facts: The defendant grew marijuana at his residence while in possession of numerous firearms. Police learned of the operation from an informant and confirmed the location of the marijuana via Google Earth, drove to the location to verify the tip-off, observed the marijuana plant themselves, and sampled and tested the marijuana to a positive result. Officers then obtained a search warrant for the residence. The warrant recited the facts regarding the marijuana operation. The objects of the search consisted of "[a]ll things related to the growing of Marijuana," including, but not limited to, marijuana plants and seeds, and other marijuana-related paraphernalia.

However, in the warrant, the affidavit identified § 18.2-248—which forbids manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute a controlled substance—as the suspected offense, rather than § 18.2-248.1, the related marijuana offense. Police obtained the warrant and executed it, finding the defendant's marijuana and firearms.

The defendant moved to suppress, citing the error in the warrant. The trial court denied the defendant's motion to suppress.

Held: Affirmed. The Court held that the trial court did not err in applying the good-faith exception and denying the suppression motion. The Court held that the police "had a good faith belief that the warrant was valid" under *Leon*, and an objectively reasonable belief that the warrant was supported by probable cause. The Court also held that exclusion was not appropriate based on the search warrant being defective.

The Court began by noting that, but for its reference to an incompatible section of the Code, the warrant was valid. In this case, because there was no evidence the magistrate was biased, failed to read the warrant, or otherwise engaged in behavior tantamount to abandonment of his judicial role, the Court rejected the defendant's objection to the warrant. The Court found that, when read in context

with the rest of the document, the referenced code section appeared to be a clerical error that the magistrate did not notice. The Court noted that the rest of the document described allegations that amounted to probable cause of illegal activity.

In a footnote, the Court noted that "Even if the magistrate did abandon his role, however, suppression would unlikely be the appropriate remedy… Evidence seized under a warrant should be suppressed 'only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.'"

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0514212.pdf

Amaya v. Commonwealth: September 20, 2022

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

Facts: The defendant drove while intoxicated and crashed into another vehicle. An officer arrived on the scene before rescue units and observed that the defendant's driver's door would not open, and the defendant, the only individual near the car, was lying on the ground outside the open, front passenger door. The defendant had "lots of blood in his mouth," broken and missing teeth on the left side of his face, and a large laceration on his left cheek. When the officer inspected the inside of the car, he saw a large amount of blood in the driver's area and a lesser amount on the front passenger seat.

An officer sought a search warrant for the defendant's blood samples drawn by medical staff at the hospital for chemical testing of the contents of his blood. In the warrant, the officer recited his observations and stated: "The driver was identified as Alexis Jonathan Amaya." A magistrate issued a search warrant, and subsequent forensic testing revealed that the defendant's blood had a blood alcohol content of 0.137.

The defendant moved to suppress the evidence seized under the search warrant, contending that the warrant affidavit was made with a "reckless disregard for the truth" and misled the magistrate. The defendant requested a *Franks* hearing based on his argument that the officer made a recklessly false statement in the affidavit by stating that the "driver was identified as Alexis Jonathan Amaya." He argued that the officer "may have had a suspicion that [the defendant] was the driver," but nobody saw the defendant driving, and the officer "had not identified [the defendant] as the driver."

The trial court denied the motion. Instead, the trial court found that the affidavit described "exactly what the Trooper did"— investigate the accident scene and identify the defendant as the driver.

Held: Affirmed. The Court found that, considering all the circumstances, the officer's avowal that he had identified the driver as the defendant was, at a minimum, truthful "in the sense that" it was "believed or appropriately accepted by the affiant as true."

Full Case At:

https://www.vacourts.gov/opinions/opncavwp/1123212.pdf

Richardson v. Commonwealth: September 13, 2022

Chesapeake: Defendant appeals his conviction for Possession of a Firearm on Fourth Amendment grounds.

Facts: In May of 2017, officers responded to the defendant's home regarding a domestic complaint involving a "male subject [who] had a gun and was not supposed to have one." Officers encountered the defendant at the driveway, where he had just exited his car, while his wife was seated at the front porch of the home. Officers spoke to both individuals. The wife stated that she called for help because the defendant had threatened to kill himself and "to blow his brains out" after she threatened to leave him.

Officers took the defendant into custody and noted the odor of marijuana. After they failed to find marijuana on the defendant, the officers approached and searched the defendant's car. The car was parked on the upper part of the defendant's private residential driveway directly in front of and facing the front door of their home. In the car, officers found a firearm. The defendant is a convicted felon.

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

Held: Affirmed. The Court acknowledged that, to the extent that the searched car was in an area adjacent to the defendant's home and in an area to which the activity of his home life extended, the car was in the curtilage of the home. Assuming without deciding that the officers violated the Fourth Amendment when, without a warrant, they re-approached and searched the defendant's car in his home's curtilage, the Court ruled that the trial court did not err in denying the motion to suppress the firearms found in the car.

The Court ruled that its decision on this issue is controlled by the Virginia Supreme Court's 2019 holding in *Collins v. Commonwealth*, on remand from the U.S. Supreme Court. The Court noted that the exclusion of evidence obtained pursuant to a Fourth Amendment violation is not justified when the police acted with an objectively reasonable, good faith belief that the search was lawful. Instead, the Court explained, the suppression of evidence from an unconstitutional search is warranted only when such suppression serves to deter unconstitutional searches.

In this case, the Court observed that, at the time of the search, the officers had probable cause to believe that the car contained marijuana. When this probable cause arose in May 2017, the officers had reason to believe that the warrantless search was justified under the Fourth Amendment's automobile exception. At the time of the vehicle search here, as in *Collins*, "no binding precedent had held that the automobile exception was inapplicable to a vehicle parked in a private driveway located close enough to a home to be considered within the curtilage."

The Court concluded that even if the warrantless search of the defendant's car violated the Fourth Amendment, this constitutional violation would not warrant the application of the exclusionary rule. Given the state of the law at the time the officers re-approached and searched the car in the curtilage of his home, a reasonably well-trained officer would not have known that the automobile

exception was inapplicable and that the warrantless search was unconstitutional considering all the circumstances. Therefore, the Court ruled that the good faith exception to the exclusionary rule applies here.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0718211.pdf

Hypes v. Commonwealth: September 6, 2022

Pulaski: Defendant appeals his convictions for Possession of a Firearm and Drugs on Fourth Amendment grounds.

Facts: The defendant carried a firearm and methamphetamine in his vehicle. An officer stopped the defendant's truck, which carried "Farm Use" tags, for a traffic violation. The defendant took several minutes to stop his vehicle and could not produce a registration for the vehicle. The officer learned that the defendant's privilege to drive was suspended, but that the defendant had no notice of the suspension. While waiting for a response regarding the defendant's VIN #, the officer called for a K9 officer. The dog alerted on the car. Officers searched the car and found a handgun underneath the front passenger seat, next to a glass pipe used to smoke methamphetamine.

The defendant moved to suppress, contending that the officer impermissibly extended the traffic stop in violation of *Rodriguez.* At the motion to suppress, the officer testified that he started to prepare the paperwork when he received the VIN information. He was still working on it when the K9 unit arrived and proceeded to conduct the dog sniff, which took about five minutes. The officer testified that it took him at least thirteen minutes to complete the paperwork, and the trial court found that he was still working on the paperwork when the K9 completed the dog sniff. The trial court denied the motion to suppress.

Held: Affirmed.

The Court repeated that, under *Rodriguez,* tasks that fall within the lawful scope of a traffic stop include those related to securing officer safety, maintaining the safety of the highways, checking the driver's license, inspecting the vehicle's registration and proof of insurance, and determining whether the driver has outstanding warrants. Tasks that exceed the mission of the stop include questioning the motorist about his criminal history and waiting for the arrival of a K-9 unit to conduct a dog sniff. However, in this case, the Court noted that it was permissible for the officer call for the K-9 unit while he awaited the VIN results that he had requested, as that did not prolong the stop.

The Court also explained that it was reasonable for the officer to determine whether the truck properly bore farm-use tags and whether other violations existed. Since the defendant lacked written proof of registration, the officer had to seek that information from the sheriff's office. The Court wrote that "While an officer must be "reasonably diligent" in completing "traffic-based inquiries expeditiously…the standard is reasonableness, not maximum speed. Thus, as long as officers complete

their duties with "reasonable diligence" and do not act to prolong the stop "for purposes beyond the mission of the stop," courts do not require that they act in the fastest or most efficient manner possible.

In a footnote, the Court declined to address whether a trial court may properly rely on an officer's state-of-mind testimony in determining whether a traffic stop is improperly prolonged under *Rodriguez*.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1227213.pdf

Pettis v. Commonwealth: August 23, 2022

Mecklenburg: The defendant appeals his convictions for Drug Distribution, Possession of a Firearm, and related offenses on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, sold illegal drugs and kept drugs and a firearm in his car. The defendant drove to a business in a neighboring county and fired multiple gunshots, fleeing in his vehicle. Surveillance video captured the shooting and police issued a lookout for the defendant and his car.

An officer saw the defendant driving recklessly and noticed that the vehicle matched the lookout. After the defendant stopped his car on his own, the officer approached and noticed that the defendant matched the description of the lookout as well. The officer detained the defendant and smelled the odor of marijuana emanating from the vehicle. Based on the odor, the officer searched the car and found the defendant's firearm, over 100 grams of methamphetamine, cocaine, scales, baggies, multiple cell phones, and money.

The defendant moved to suppress the search, but the trial court denied the motion. [*Note: The search was conducted prior to the effective date of § 18.2-250.1(F) (current version at Code § 4.1-1302(A)), which prohibited searches based solely on the odor of marijuana. – EJC*].

Held: Affirmed. The Court agreed that the odor of marijuana gave the officer probable cause to search the vehicle for drugs. The Court ruled that the search was reasonable under the Fourth Amendment because it was supported by probable cause and confined to places in which evidence of the crime could possibly be found.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1133212.pdf

Commonwealth v. White: August 16, 2022

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

Facts: Police stopped the defendant's car after seeing it flee just after multiple gunshots were fired. An officer shined his flashlight in the vehicle and observed a brown cigarette that he believed contained marijuana, based on his fifteen years' experience as a police officer. There was no marijuana smell, and the officer did not examine the cigarette. He told the driver and the passenger that he found what he believed was marijuana, and the defendant, the passenger, responded that he would "take the charge." The law in effect at the time of the stop had reclassified marijuana possession as a civil offense, punishable by a penalty of not more than $25.

The officer then searched the car, based on the discovery of marijuana. The officer opened the locked glove compartment, opened it, and discovered a handgun.

The trial court granted the defendant's motion to suppress on the grounds that the officer did not have "probable cause to search the vehicle for a civil penalty offense."

Held: Affirmed, Motion Properly Granted. The Court ruled that the officer's belief that the hand-rolled cigarette was contraband, even combined with the defendant's statement, failed to establish probable cause for the search. The Court did not address the trial court's reason for granting the motion.

The Court explained that, regardless of the status of marijuana at the time of the offense, under settled precedent "probable cause cannot be established 'solely on the observation of material which can be used for legitimate purposes, even though the experience of an officer indicates that such material is often used for illegitimate purposes.'" The Court noted that, in *Buhrman*, the Court had held that an officer's observation of a hand-rolled cigarette was insufficient to establish probable cause, despite the defendant's "acting 'intoxicated' and 'suspicious.'" Thus, unless the "incriminating character of the object" is immediately apparent, an officer is not authorized by any exception to the warrant requirement to conduct a search without additional information to establish probable cause.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0365221.pdf

Torrence v. Commonwealth: August 16, 2022

Pittsylvania: Defendant appeals his convictions for PWID Methamphetamine, Possession of a Firearm, and related offenses on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, carried a handgun and sold methamphetamine. Police arrested another man who offered to provide them with information about the defendant. The informant provided a detailed statement to the police regarding his past criminal behavior, including drug distribution. The informant, while already in police custody, said he could set up a drug transaction with the defendant. The informant contacted the defendant to learn if he could get one or two ounces of methamphetamine and split the profit with him. The defendant responded by providing prices and the informant suggested that they meet at their "usual spot."

The defendant then reported that he was going home to pick up the methamphetamine and handgun that the informant had requested. The defendant texted the informant to be sure he was "going to be there" at 8:00 p.m. as agreed. Then, at 8:00 p.m., just as the informant had said and just as the defendant himself had indicated in his text messages, the defendant arrived at the designated location driving the specific type of vehicle that the informant had described.

Officers stopped the defendant's vehicle and searched it. Prior to trial, the defendant moved to suppress. He argued that the automobile exception did not apply because the officers had the opportunity to obtain a warrant after they stopped the truck. He also argued that the informant's information did not provide probable cause to stop and search the truck. The trial court denied the motion.

Held: Affirmed. The Court held that the trial court did not err by ruling that the officers had both exigent circumstances and probable cause to search the defendant's truck without a warrant. The Court concluded that probable cause, combined with the ready mobility of the truck, permitted the officers to conduct a warrantless search of the vehicle under the automobile exception.

Although the informant had not previously provided information leading to arrest and conviction, in this case the Court pointed out that the police had a host of other evidence regarding his veracity and reliability, as well as extensive information regarding the basis of his knowledge. The totality of the circumstances included corroboration in the form of real-time telephone calls and text messages between the informant and the defendant setting up the illegal transactions, contacts that were personally witnessed by law enforcement. The Court concluded that these circumstances provided more than enough support for the trial court's ruling that the police had probable cause to believe that the defendant's truck contained methamphetamine and a handgun at the time of the search.

The Court agreed that the informant's information was well-corroborated and established his veracity, reliability, and basis of knowledge. That corroboration included telephone calls, text messages, and the arrival of the defendant (the person whom the informant had identified in a photo) at the designated location at the agreed-upon time in the anticipated vehicle. The Court found that these circumstances, viewed in their totality, were sufficient to provide the officers with probable cause to believe that the appellant's truck contained illegal drugs and a firearm.

The Court rejected the argument that the police could have obtained a warrant to search the truck and that therefore its mobility did not permit a warrantless search. The Court wrote: "The fact that the police might feasibly have frozen the scene using such a method in order to secure a warrant is simply not dispositive of whether the search was reasonable under the Fourth Amendment. Consequently, subject to our analysis of the probable cause component, the automobile exception fully supports the trial court's determination that the officers were not required to obtain a warrant before searching" the defendant's vehicle. The Court explained that "ready mobility depends solely upon whether the automobile itself is operational or reasonably appears to be, not on whether law enforcement are capable of temporarily disabling it such as by physically blocking it in, detaining the driver, or taking his keys."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1183213.pdf

Rogers v. Commonwealth: July 19, 2022

Lancaster: Defendant appeals his convictions for Abduction and Possession of Ammunition by Felon on grounds including Fourth Amendment, Refusal to Disqualify the Prosecutor, and Admission of Prior Bad Acts at Sentencing.

Facts: The defendant, a felon, abducted and held his estranged wife until she was able to escape. The victim later informed police there was ammunition in the home. The victim had lived in the marital home since marrying the defendant. Although the victim and lived with her mother after the defendant behaved violently towards their child, the victim continued to go back and forth to the house to get her belongings. Police obtained a search warrant and visited the home. The victim let them in and police located the ammunition.

The defendant moved to suppress the evidence, claiming that the search warrant affidavit for the ammunition was defective. The affidavit detailed the officer's conversation with the victim in which she told him that there was ammunition in the residence and that it had "always been" there. The defendant claimed that the affidavit was defective because it did not say where in the house the ammunition was located or whether the ammunition belonged to the defendant. He also argued that the affidavit omitted that the defendant had already been arrested on other charges and that the victim, who was pressing charges against him, was the person who told the police about the ammunition.

Prior to trial, the defendant moved to disqualify the Commonwealth's Attorney. The defendant offered evidence from a witness who testified that the prosecutor told her that the defendant was one of four county residents who belonged in jail. She said that the prosecutor asked about the defendant's medical history because he wanted him incarcerated long enough to "die in prison." According to the witness, the prosecutor urged her to press additional charges against the defendant and to testify at the sentencing hearing. He told her to consider that the defendant would "attack [the prosecutor] and his family" if the defendant were "let go."

In response, the prosecutor admitted that he "did identify people . . . walking the streets of Lancaster County" whom he "thought were dangerous." He wanted to prosecute the defendant, he stated, because he was convinced that the defendant was dangerous and violent. The prosecutor testified that he did not know the defendant personally and bore no animus towards him. He said there was "no personal interest here. There is only an interest in locking up violent people, protect[ing] the public. That is it." The trial court denied the defendant's motion to disqualify the prosecutor.

At sentencing, the Commonwealth provided testimony by two other victims who described other numerous acts of violence by the defendant, other than those in this case. The defendant objected, but the trial court overruled the objection. The trial court also admitted, over the defendant's objection, previous civil protective orders entered against the defendant.

Held: Affirmed.

Regarding the search warrant, the Court noted that the defendant had identified no legal authority that the search warrant affidavit—which was regular on its face—had to contain the details he

enumerated. The Court also found that the search was a valid search as a consensual search. The Court repeated that a person who has "joint access or control for most purposes" may also consent. Under that standard, the Court concluded that the victim had authority to consent to the search.

Regarding the defendant's motion to disqualify the prosecutor, the Court found that the alleged remarks did not reflect a conflict of interest. The Court ruled that the defendant had failed to prove that the prosecutor had any "direct personal interest" in the outcome arising from "animosity, a financial interest, kinship, or close friendship." The Court also ruled that the prosecutor was well within his authority to bring the abduction charge, even though it had been nolle pros'd earlier. The Court wrote: "Yes, Spencer was highly motivated to charge and convict Rogers. But Rogers failed to prove that Spencer instituted charges against him because Rogers had chosen to exercise a legal right."

Regarding the defendant's prior bad acts, the Court repeated that evidence of unadjudicated criminal conduct is admissible at sentencing if it bears indicia of reliability. The Court rejected the defendant's argument that 19.2-295(1) imposes a limitation that prior bad acts may only be admitting during the rebuttal phase of a sentencing after a bench trial.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0713212.pdf

Johnson v. Commonwealth: June 28, 2022

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

Facts: The defendant, a convicted felon, carried a concealed handgun. Officers approached the defendant, who was intoxicated, and his companions. When an officer began to frisk one of the men, the defendant started running away. The officers ran after him for about twenty-five feet before the defendant hit a guardrail and stumbled. When the defendant tripped, a firearm fell from his waistband. The officers subdued him and recovered the gun.

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

Held: Affirmed. The Court reasoned that the series of events constituted a source of the firearm's discovery independent of any police seizure or attempted pat down. Accordingly, the Court agreed that the trial court did not err in denying the motion to suppress the firearm evidence.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1169211.pdf

Commonwealth v. Branch: June 21, 2022

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

Facts: Officers stopped the defendant's vehicle for a traffic violation. One officer saw a partially open container of liquor in the passenger seat of the vehicle. He asked the passenger for ID and when the passenger opened her purse and wallet, the officer saw marijuana inside the wallet. The offense took place in May of 2021, a time when marijuana possession was not a crime but a "civil offense" that was punishable by "a civil penalty of no more than $25."

The passenger admitted that it was marijuana, stated that she just purchased it, and claimed that she thought it was legal. The officer smelled marijuana when the passenger opened her purse but did not smell marijuana before. After he seized the marijuana, the officer still smelled marijuana, though he did not smell any marijuana in the vehicle.

Officers searched the vehicle and found a handgun. The defendant moved to suppress the evidence. The circuit court granted the motion suppress, finding that found that the search based on the marijuana was illegal because the marijuana was only subject to a civil penalty. The circuit court stated the officers would not "be justified in searching the vehicle based on, quote, a little bit of weed, end quote, and a smell specifically in light of the code section [prohibiting a search based on the odor of marijuana]." Additionally, the circuit court found the open container did not provide probable cause for a search of the vehicle because the city code section did not prohibit the open container and there was no evidence that the defendant had consumed alcohol while driving.

Held: Affirmed. The Court held that the totality of the circumstances did not provide the officers with probable cause to search the vehicle. The Court found that neither the open container, without evidence of the defendant having consumed alcohol, and the passenger's decriminalized marijuana, without evidence of suspicious circumstances or criminal activity, amounted to probable cause to search the vehicle.

The Court first examined § 18.2-323.1, noting that it only prohibits consuming alcohol while driving, not possessing open containers in a vehicle. The Court then examined the presumption under that Coed section that the driver has consumed alcohol when:

(i) an open container is located within the passenger area of the motor vehicle,
(ii) the alcoholic beverage in the open container has been at least partially removed and
(iii) the appearance, conduct, odor of alcohol, speech, or other physical characteristic of the driver of the motor vehicle may be reasonably associated with the consumption of an alcoholic beverage.

§ 18.2-323.1(B). In this case, the Court found that, assuming the open container contained alcohol that was at least partially removed, the Commonwealth did not establish the rebuttable presumption because the officers did not testify that the defendant's appearance or conduct evidenced alcohol consumption.

Beyond failing to establish the rebuttable presumption, the Court complained that the Commonwealth offered no other evidence giving rise to probable cause that the defendant consumed alcohol while driving. Therefore, the Court concluded, the officers did not have probable cause to search the vehicle for contraband or evidence of a crime relating to alcohol consumption.

Regarding the marijuana possession, the Court cited cases from Georgia and Connecticut that found that illegal marijuana in a passenger's wallet cannot by itself establish probable cause that the vehicle contains contraband or evidence of a crime. The Court contended that the Commonwealth had not provided any other facts or factors that indicated that marijuana may be in the vehicle. In the Court's view, "the sight and smell of [the] small amount of personal, decriminalized marijuana contained in her wallet, without any other suspicious circumstances, did not provide the officers with probable cause to search the vehicle for other contraband or evidence of a crime."

Judge Beales filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0132221.pdf

Commonwealth v. Spivey: June 14, 2022

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

Facts: An officer stepped out of his patrol car and approached the defendant on the street and asked: "What's going on, man?" The officer asked if he could see the defendant's identification card and asked the defendant and his companion to step to the side of the road, out of traffic. When they arrived, the officer asked for the defendant's identification a second time to write down his information.

While the officer was still holding onto the defendant's identification, writing down his information, the defendant said, "Look like somebody wanted, man, for you to do all that." The officer replied, "I'm just asking for your information, that's all man." The officer then returned his identification and asked how to pronounce the defendant's name and whether he had anything illegal on him. The defendant said no, and then said, "Why you tryin' to search me?" The officer said that he was only asking whether the defendant had anything illegal on him, and the defendant said no.

The officer persisted and said: "The cigarette box you put in your pocket, there's nothing in there?" The officer explained to the defendant that he saw him put the box in his pocket when he first pulled over. In response to the question, the defendant answered no, while feeling around his pockets without locating the cigarette box. The officer continued to insist, three times, that the defendant had a cigarette box in his pocket, despite the defendant's repeated denials. Another officer arrived, immediately parked, and walked up directly behind the defendant.

The defendant finally pulled out the box, with the second officer standing right behind him, hand on his firearm, while the officer simultaneously reached for the box asking, "May I see it?" The defendant finally agreed, revealing heroin. He later admitted he regularly sold heroin.

Prior to trial, the defendant moved to suppress the search. The trial court granted the motion to suppress. The trial court explained that the encounter was at first consensual, but that the nature of the interaction shifted once the defendant asked why the officer wanted to search him and the officer made the "pointing motion" to show that "what he was interested in was that cigarette package." Under the

"totality of the circumstances," the court found "there was a detention without reasonable articulable suspicion" and granted the motion to suppress.

Held: Affirmed, motion properly granted. The Court wrote: "We cannot say the trial court's factual findings were plainly wrong or without evidence to support them, or that the court's ultimate conclusion was in error." The Court acknowledged that when an officer merely asks for a person's identification, even for investigatory purposes, that is not enough to show the person was seized without more. On the other hand, the Court explained that when an officer explicitly tells the defendant that he is suspected of a crime, that is strong reason to believe that a reasonable person would not have felt free to go on his way. The Court pointed out that the officer did not tell the defendant he was free to go, but otherwise did not give any further explanation about why the encounter was not a consensual encounter.

The Court refused to consider the Commonwealth's argument that the trial court made an error of law by applying a subjective standard, in that it focused on whether the defendant felt free to terminate the encounter, rather than consider whether a "reasonable person" would have felt free to decline the request. The Court ruled that the Commonwealth procedurally defaulted that argument.

The Court also rejected the defendant's argument that the Commonwealth petitioned for pretrial appeal too soon, only four days after it filed the notice of transcript in the trial court under § 19.2-402(B). The Court ruled that this provision does not require the Commonwealth to wait a certain period after providing notice about the transcript before the Commonwealth may file its petition for appeal.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0082221.pdf

Guilty Pleas - Withdrawal

Virginia Supreme Court

DeLuca v. Commonwealth: April 13, 2023
Aff'd Court of Appeals Ruling of October 26, 2021
Alexandria: Defendant appeals his convictions for Indecent Liberties and Online Child Exploitation on Refusal to Permit Withdrawal of his Guilty Plea

Facts: The defendant solicited a child he was tutoring on the Internet and convinced him to engage in various sexual activities, including anal intercourse. In his plea colloquy, the defendant represented that he had "discussed with my attorney any registration consequences under the Sex Offender and Crimes Against Minors Registry Act pursuant to Virginia Code § 9.1-900 et seq." and also affirmed that he "understood that as a consequence of this stipulation, my pleas will implicate a

statutory duty to register under the Sex Offender and Crimes Against Minors Registry Act pursuant to Virginia Code . . . § 9.1-900 et seq."

At sentencing, however, the defendant sought to withdraw his guilty plea, claiming that he was "mistaken as to the effect" of the pleas because he believed he would need to register as a sex offender for only ten years and not for the remainder of his life. He claimed that claimed that two prior attorneys and his retained counsel that represented him at the time of his pleas had provided inaccurate information regarding his registration obligation. He also alleged that he had "looked" at books in the law library at the jail and conducted research on the Internet that confirmed his mistaken belief that his registration obligation would last only ten years.

However, during cross-examination, the Commonwealth played a recording of a jailhouse phone call between the defendant and his brother. During the conversation, the defendant discussed his thoughts about seeking to withdraw his guilty pleas, implying that the victim likely would not want to go forward with the case because "he's going to just want it gone and done and over with." The defendant also expressed his preference to have a different judge sentence him.

The defendant's counsel then offered to provide his own "evidence" about the defendant's misunderstanding. The Court construed that as an attempt to testify, but offered to permit defense counsel to testify, over the Commonwealth's objection. Defense counsel conceded that he did not "know whether I gave him that incorrect information" but stated that he did not "think it originated with me." Counsel thought the defendant had developed the misimpression through "faulty research" and bad advice from prior counsel. He confirmed that the defendant had asked him to verify his understanding and that he had failed to "verify it correctly."

The trial court denied the defendant's motion to withdraw his plea, finding it incredible that three attorneys and the defendant's own research would all reach the same incorrect conclusion. The trial court also found that there would be prejudice to the Commonwealth due to the lapse of time and the failure of memory. The trial court also found that the defendant had made no showing of a good faith defense.

On appeal, the defendant complained of the trial court's refusal to permit him to withdraw his plea. The defendant also argued that the trial court erred by requiring defense counsel to testify during his motion to withdraw his guilty plea because doing so deprived him of the right to counsel. The Court of Appeals affirmed the trial court.

Held: Affirmed. The Supreme Court issued an order simply stating that the Court "affirms the judgment of the Court of Appeals for the reasons stated in *DeLuca v. Commonwealth*, 73 Va. App. 567 (2021)."

The Court of Appeals had first ruled that the defendant's Sixth Amendment right to counsel was not violated. The Court agreed that, in general, lawyers should not appear as witnesses in cases in which they are counsel. However, the Court also noted that there are exceptions to that rule, including RPC 3.7(a)(3), which allows a lawyer to appear as both counsel and a witness in the same proceedings if "disqualification of the lawyer would work substantial hardship on the client."

In this case, because counsel's testimony was never "prejudicial" to the defendant, the Court of Appeals had found that counsel's appearance as both lawyer and witness at the hearing was not automatically prohibited by the lawyer-witness rule. The Court of Appeals had pointed out that

counsel's response to open-ended question asked by the trial court allowed him to provide the information he would have offered via proffer, and the mere fact that he was under oath and subject to cross-examination did not prevent him from attempting to advance the defendant's interests.

The Court of Appeals then applied § 19.2-296 and held that the trial court did not err in refusing to allow the defendant to withdraw his guilty pleas. In this case, the Court noted that the trial court's finding that the defendant's motive for withdrawing the pleas was a lie was a finding that the motion to withdraw was not filed in good faith. The Court of Appeals had agreed that the defendant's own words in the jail recording supported a conclusion that he was seeking to withdraw his pleas because the victim, now an adult, might decide to let the matter drop and in hopes of manipulating the proceedings so his case would be heard before a different judge.

Supreme Court Order At:
https://www.vacourts.gov/opinions/opnscvwp/1220185.pdf
Original Court of Appeals Ruling At:
https://www.vacourts.gov/opinions/opncavwp/1151204.pdf

Virginia Court of Appeals
Unpublished

Thomas v. Commonwealth: April 11, 2023

Fauquier: Defendant appeals his conviction for Unlawful Wounding on Refusal to Allow Withdrawal of his Guilty Plea.

Facts: On the morning of his trial for Aggravated Malicious Wounding, the defendant reached a plea agreement with the Commonwealth to reduce the offense to Unlawful Wounding. Under the agreement, the defendant would be sentenced within the guidelines. The trial court engaged in a plea colloquy in which the defendant agreed that he intended to plead no contest. The trial court then found the facts sufficient for a finding of guilt, but it withheld a finding of guilt and took the plea agreement under advisement, deferring adjudication of guilt to consider whether to accept the plea agreement. The Court stated that it would amend the indictment if it accepted the agreement.

The trial court then ordered preparation of a presentence report and sentencing guidelines. It continued the case to April 2020. Soon thereafter, COVID resulted in a closure of normal court proceedings.

During COVID, the parties re-negotiated the terms of the plea agreement. The parties reached this agreement in part because, of the Commonwealth's two main witnesses, one had died and the other had new felony charges. Under the new agreement, the defendant would plead guilty to misdemeanor assault and battery and receive an agreed sentence. Noting that the court was limiting appearances to agreed dispositions, the parties requested a hearing before an available judge who was not the original judge.

The parties presented the new judge with the new plea agreement, which referenced the original plea agreement but did not recite the procedural history or posture of the agreement. Neither party orally referred to the earlier agreement. The new judge accepted the plea and sentenced the defendant according to the terms of the new plea agreement.

One week later, the original judge issued an order staying the new judge's ruling and, after a hearing, vacated those orders, including the sentencing order. The defendant then moved to withdraw his original guilty plea to Unlawful Wounding. The original judge denied the motion and found the defendant guilty of Unlawful Wounding. The Commonwealth and the defense both filed objections, but the trial court rejected them and sentenced the defendant under the original plea agreement.

Held: Affirmed.

The Court first noted that the trial court had been presented and taken under advisement the original plea, as it was permitted to do both by Rule 3A:8 and its inherent authority. The Court then found that, at a minimum, the defendant was required to either present the new plea agreement to the same trial judge that already had taken the agreement under advisement or otherwise inform the circuit court that he requested that the issue be withdrawn from the circuit court's consideration. The Court wrote: "The parties simply presented a new plea agreement to a different judge without clearly informing that judge that a prior plea agreement was under consideration by another judge. We will not enable this type of gamesmanship and allow parties to ignore courts acting within their lawful authority."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1234214.pdf

Moore v. Commonwealth: March 14, 2023

Gloucester: Defendant appeals his conviction for Murder on Refusal to Permit Withdrawal of his Guilty Plea.

Facts: The defendant and his confederates conspired to rob a man at gunpoint, under the pretext of selling him marijuana. The defendants all brandished firearms and demanded the victim's money, but when the victim refused and fled, one of the defendant's confederates shot the victim numerous times at close range, killing him. The defendant and his confederates then fled the scene, running over the victim's body as they drove away.

At a guilty plea hearing, the defendant agreed that the Commonwealth's proffer of evidence was sufficient to sustain a conviction. Based on his plea and the Commonwealth's proffer, the trial court convicted him of second-degree murder and continued the matter for sentencing. Later, the defendant moved to withdraw his guilty plea, contesting the facts presented by the Commonwealth that established his guilt as a principal in the second degree.

The defendant argued that he had a good faith basis to withdraw his guilty plea because he was not aware of the plan to shoot the victim, made no overt act to support that plan, and was not aware

that this was a required element of his charge. In addition, he contended that his co-defendants' statements contradicted each other. The defendant also argued that his prior counsel did not properly explain that presence or awareness of a crime is insufficient to constitute guilt under the doctrine of principal in second degree and that prior counsel told him that "he cannot win this case." The trial court denied the motion.

Held: Affirmed. The Court ruled that the defendant failed to provide a reasonable basis for contesting his guilt. The Court found that the alleged defense amounted "to an unsupported credibility challenge and is not a reasonable defense, sustained by proofs, sufficient to justify withdrawing his guilty plea."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0669221.pdf

Keeling v. Commonwealth: November 15, 2022

Chesapeake: Defendant appeals his conviction for PWID Marijuana on Refusal to Permit Withdrawal of Guilty Plea.

Facts: The defendant pled guilty to possessing more than one ounce of marijuana with intent to sell, give, or distribute. The defendant's plea did not arise from a plea agreement with the Commonwealth, nor did he seek an *Alford* or "no contest" plea. At his plea hearing, the defendant pled guilty and, in a colloquy with the trial court, confirmed that he did so because he was in fact guilty. He also affirmed that he had not been made any offer or promise in exchange for pleading guilty.

Prior to the sentencing hearing, the Commonwealth filed two supplemental discovery responses under seal. The responses reported that two officers who had been involved in the case were no longer employed by the Department. One had been terminated "after an Internal Affairs investigation," which "did not involve any cases on which he worked or in which he testified." The other officer was terminated because of "issues involving veracity," not pertaining to "any criminal investigations he conducted or was involved with."

At the sentencing hearing, the defendant moved to withdraw his guilty plea based on the Commonwealth's supplemental discovery responses. Beyond the information provided in the supplemental responses, he did not know the details of why the officers no longer worked for the Department; nor did he know "what part they played" in his case.

The trial court denied the defendant's motion.

Held: Affirmed. The Court ruled that the trial court did not err in finding that the defendant failed to meet his burden to withdraw his guilty plea.

The Court repeated that, on a motion to withdraw a guilty plea, the defendant bears the burden of establishing a reasonable basis for contesting guilt. The Court then cautioned that raising a credibility challenge does not equate to proffering a defense sustained by proofs and thus is insufficient to justify

withdrawing a guilty plea. In this case, the Court found that the defendant's plea of guilty because he was "in fact guilty" readily undercuts any argument that the potential impeachment of an officer is a reasonable basis for contesting his guilt.

In a footnote, the Court noted that, had the defendant entered an *Alford* plea, thereby maintaining his innocence while acknowledging the sufficiency of the evidence to convict him, this appeal "may have presented differently." The Court reaffirmed, however, that the defendant would still confront the same requirement to establish good faith and to provide a reasonable basis for contesting guilt and that the same *Parris* standard would have applied.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1362211.pdf

Gary v. Commonwealth: October 4, 2022

Henrico: Defendant appeals his convictions for Murder and Use of a Firearm on Denial of a Continuance and Motion to Withdraw his Plea.

Facts: The defendant confronted a man and shot him in the head, killing the victim. On the morning of trial, the defendant sought a continuance, stating that he needed it to secure the testimony of two unidentified defense witnesses. Defense counsel explained that the defendant had provided him with the names of the two witnesses for the first time that morning. Emphasizing that the case had been on the docket for months and a pre-trial order governing witnesses had been entered, the trial court denied the continuance motion.

During jury selection, the parties reached a plea agreement. Pursuant to the agreement, the defendant entered a no-contest pleas to the reduced charge of second-degree murder and the related firearm offense.

Prior to sentencing, though, the defendant moved to withdraw his plea. He testified that, when the court denied his continuance motion, he was distressed due to the absence of witnesses necessary to his defense. He said that he feared being convicted of first-degree murder and receiving a longer sentence than the one offered in the plea agreement. He suggested that he "numbly" answered the questions in the plea colloquy to "get the situation over with" because it was "overwhelming." The defendant further asserted that he sought to withdraw his pleas because he "didn't know it was that high," logically referring to the sentencing range for the reduced charge of second-degree murder.

The trial court denied the motion, finding that the defendant had failed to satisfy the "good faith" requirement.

Held: Affirmed. The Court held that the trial court did not err by denying the defendant's motion for a continuance on the morning of trial or his subsequent motion to withdraw his no-contest pleas.

Regarding the denied continuance, the Court applied the "two-pronged test" from *Lebudun.* That test requires the Court to ask whether the trial court abused its discretion and whether the defendant was prejudiced. The Court noted that, in a proffer of evidence, it is not sufficient for a party

to proffer "merely his theory of the case" rather than the substance of the excluded evidence. In this case, the Court complained that, at the time the defendant sought his last-minute continuance, he did not proffer to the trial court the nature of the testimony that the alleged missing witnesses would provide, whether their presence could be secured at a subsequent proceeding, or even their names.

Regarding the motion to withdraw the plea, the Court agreed that the evidence supports the finding that the defendant did not act in good faith in making and seeking to withdraw his pleas. The Court noted that the defendant never clearly explained why he decided only the night before trial that he wanted to call the owner of the truck (presumably his cousin) and its unnamed additional user as witnesses to provide an alternative theory regarding the source of the primer residue.

The Court repeated that, when a defendant seeks to withdraw his plea merely because he is "fearful of his possible sentence," the motion to withdraw is not made in good faith. "Fear of the sentence simply did not provide a good faith basis for seeking to withdraw the pleas." The Court also noted that the timing and sequence of the relevant events provides additional evidence supporting the trial court's finding of a lack of good faith. The Court noted that "Allowing the appellant to withdraw the pleas under these circumstances would permit him to obtain indirectly what he had been unable to obtain directly—a continuance of his trial."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1045212.pdf

Indictment

Virginia Court of Appeals
Published

Ellis v. Commonwealth: July 19, 2022
75 Va. App. 162, 875 S.E.2d 91 (2022)
Newport News: Defendant appeals his conviction for Driving Suspended, arguing his Summons was Void.

Facts: A law enforcement officer issued the defendant a Virginia Uniform Summons which charged the defendant with "Driving Suspended DUI Related" in violation of 18.2-272 ([Newport News Ordinance §] 26-8)." The summons incorrectly cited Newport News Ordinance § 26-8 as the local ordinance incorporating § 18.2-272. Although the summons cited the wrong ordinance number, § 26-8, there is an ordinance, § 26-72, that legally incorporates Code § 18.2-272,

The district court convicted the defendant of driving on a suspended license, DUI related. The defendant appealed his conviction to the circuit court. The defendant later entered into a written plea agreement which stated that the defendant was charged with "one count of Driving under Suspension: Failure to Maintain Insurance, a Misdemeanor, in violation of § 46.2-302 of the Code of Virginia."

However, the defendant later filed a motion to vacate his conviction. He argued that the summons was void ab initio because Newport News Ordinance § 26-8 does not incorporate Title 18.2 of

the Virginia Code, meaning that the summons failed to state an offense. The trial court denied that motion.

Held: Affirmed. The Court rejected the defendant's argument on the grounds that the officer's summons was not an act of the court and thus cannot be void ab initio. The Court ruled that the summons gave the defendant notice of the gravamen of the offense and thus it was not fatally defective. As such, the circuit court did not err by amending the charged offense and convicting the defendant of driving with a suspended license, insurance related, under § 46.2-302.

The Court repeated that both the Supreme Court and the Court of Appeals have consistently held that a mis-recital of a code provision in a charging document does not necessarily invalidate a conviction. Instead, the Court repeated, an incorrect code or ordinance citation will not render a summons invalid "when the defendant plainly had notice of the true nature of the charge against him or her. Additionally, while a charging document may list the subsection of a statute under which the Commonwealth intends to proceed, it is not required. In this case, because the defendant had sufficient notice of the gravamen of the offense, the mis-recital of the ordinance number did not render the summons "so defective as to be in violation of the Constitution."

Judge Chaney filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0818211.pdf

Virginia Court of Appeals
Unpublished

Cole v. Commonwealth: September 27, 2022

Hopewell: Defendant appeals his conviction for Possession of a Firearm by Felon on Due Process Notice and *Brady* discovery grounds.

Facts: The defendant, a convicted felon, stole several items, including a firearm, while at the victim's house. At witness had seen the defendant at the home earlier and noted that he had a "small black and gray" gun with him. Later, after the victim discovered and reported the theft, the defendant returned the firearm, apologized for stealing her firearm, and requested that she "drop the charges." The victim asked for the other stolen items to be returned. At first, the defendant claimed that he thew them away, but later he relented and returned the other items. When he was at the victim's home, he opened his backpack, and the victim saw a sawed-off shotgun inside it.

The Commonwealth charged the defendant with possession of a firearm by a felon. During the prosecutor's opening statement at trial, he mentioned that the defendant brought a firearm with him to the victim's house when he first went and again when he returned, that time with a sawed-off shotgun in his backpack. The defendant objected to the admission of testimony about any guns other than the

one stolen because he had received no information about either of them before trial. He objected on Due Process Notice and *Brady* grounds. He also contended that the witness' testimony that he brought a gun with him when he first came to the house and the victim's testimony that she saw a sawed-off shotgun in his backpack were prior inconsistent statements. He argued that they were inconsistent because neither witness provided that evidence during her testimony in general district court or her police interview, suggesting that the statements could have served as impeachment of those witnesses.

The trial court overruled the objection.

Held: Affirmed. The Court held that the notice that the defendant received of the charge against him satisfied due process. In addition, the Court held that nondisclosure of the challenged testimony before trial did not violate the defendant's rights pursuant to *Brady*.

Regarding the defendant's Notice claim, the Court noted that the indictment set forth the charge against the defendant and followed the language of § 18.2-308.2. It also alleged that the crime occurred in Hopewell on or about October 1, 2020. Therefore, the Court concluded that the indictment "named the accused, described the offense charged, and identified the location" and a date of the alleged crime in compliance with § 19.2-220. The Court also found that the indictment was sufficient to adequately apprise the defendant of "the nature and character" of the charge against him.

In this case, the Court explained that the Commonwealth was not required to give the defendant notice of the witness' statement that he initially brought a firearm with him or of the victim's statement that she saw a sawed-off shotgun in his backpack. Consequently, the Court ruled that the admission of the challenged testimony did not deprive the defendant of his due process right to be apprised before trial of the basis of the charge against him, which was sufficiently set forth in the indictment.

Assuming without deciding that the challenged testimony was impeachment evidence, the Court noted that it was disclosed to the defendant during trial. The Court repeated that "*Brady* is not violated, as a matter of law, when impeachment evidence is made 'available to a defendant during trial if the defendant has sufficient time to make use of it at trial." In this case, the Court noted that counsel did not request a continuance or even a recess. The Court rejected the defendant's hypothesis that, had he known of this testimony before trial, he might have been able to identify witnesses to contradict the witnesses, finding that he did not demonstrate that the evidence was material within the meaning of *Brady*.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1204212.pdf

Joinder & Severance

Virginia Court of Appeals
Published

Hargrove v. Commonwealth: May 2, 2023

King William: Defendant appeals his convictions for Murder, Robbery, and related offenses on issues of Joint Trial, Sixth Amendment confrontation, and Exclusion of Evidence.

Facts: The defendant and his confederate shot and killed an 8-year-old child while robbing the victim's family. The defendant and his confederate targeted the family after the father had posted on social media about recent lottery winnings. Over a week later, police arrested the defendant in Richmond in possession of a firearm. The defendant later pled no contest to possession of that firearm. Subsequently, DFS determined that the gun was used in the murder.

The police also seized a cell phone from the defendant during his arrest. The defendant admitted to police that it was his phone. A data extraction revealed "selfies" of the defendant, an associated email address, and several internet searches made the day after the crime, including searches for "crime reports for King William County, VA." The data extraction also revealed that prior to the robbery and murder, the defendant and his co-defendant exchanged several text messages about meeting that night and had discussed a planned "lick" or robbery. FBI Special Agent Jeremy D'Errico also later testified about how he used cell site records to track the defendant and his confederates' movements.

Prior to trial, the Commonwealth moved in limine to admit the evidence of the firearm and the defendant's conviction. The defendant objected, but the trial court overruled his objection. The trial court also granted a joint trial of the defendant and his co-defendant, over the defendant's objection.

At trial, three different witnesses, two friends and an inmate, testified that the co-defendant confessed to them after the murder. The defendant objected to that evidence on *Crawford* confrontation grounds, but the trial court overruled his objection.

The defendant introduced testimony from his girlfriend at trial. The court sustained the Commonwealth's objection to questions about the defendant's financial stability as not relevant to robbery. The defendant later proffered that the girlfriend would have testified that the defendant made thousands of dollars a night running card games and was doing well financially. The defendant also sought to introduce testimony from the girlfriend that he "often" left his phone at his residence and that "several times" in the past, another person answered when she called the defendant's phone. The court excluded the evidence because the girlfriend could not testify to the whereabouts of the phone on the day of the murder.

Held: Affirmed.

The Court first held that the admission of the co-defendant's confessions did not violate the defendant's Confrontation Clause rights. The Court first examined the "*Bruton*" doctrine, which states that at a joint trial, the admission into evidence of a non-testifying co-defendant's out-of-court confession violates the Confrontation Clause if the confession incriminates the other defendant. The Court concluded that, because *Crawford* limited the scope of the Confrontation Clause to testimonial statements, and the *Bruton* doctrine depends on the Confrontation Clause, it therefore follows that *Crawford* limited *Bruton's* protections to those statements that implicate the Confrontation Clause— to

wit: testimonial statements. In this case, the Court ruled that *Bruton* did not apply because the defendant could not show that the confessions he challenged were "testimonial" statements.

The Court pointed out that out-of-court statements are "testimonial" if, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. In this case, the Court found that the three confessions were non-testimonial. The Court reasoned that when the co-defendant confessed, a reasonable person would not have intended to create a statement "for use in an investigation or prosecution of a crime;" Instead, a reasonable person in the co-defendant's position was likely to confide in people he was close to, whom he did not anticipate would participate in his prosecution.

Regarding the joint trial, the Court acknowledged that prejudice may result if evidence against a defendant, if tried alone, is admitted against a co-defendant in a joint trial. In this case, the Court concluded that the evidence admitted specifically against the defendant failed to establish a sufficient basis for concluding the jury was prevented from making a reliable judgment about his guilt or innocence.

Regarding admission of the prior conviction, the Court noted that, in pleading no contest to a charge as set forth in the indictment, the defendant agreed to or admitted that the facts set forth in the indictment were true. Further, the Court rejected the defendant's contention that nothing in the guilty plea admitted a connection to the particular firearm. The Court concluded that the conviction was highly relevant to prove the defendant's identity, presence, and involvement in the crimes, and therefore the court did not err in admitting the evidence.

Regarding the defendant's girlfriend's excluded testimony, the Court found that the proposed testimony was irrelevant. Regarding the witness' testimony about the defendant's income, the Court repeated that although lack of motive is generally admissible to prove lack of a reason or intent to commit an offense, the proffered evidence would not have established that "logical tendency." Regarding the witness' testimony about the defendant's phone, the Court observed that the defendant was attempting to establish that he was not in possession of the cell phone on the night of the murder. The witness, however, was unable to testify as to the location of the cell phone that night. Therefore, the Court found no abuse of discretion in the court's determination that the proffered testimony about the cell phone lacked relevance and was therefore inadmissible.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1351212.pdf

Virginia Court of Appeals
Unpublished

Coleman v. Commonwealth: May 16, 2023

King William: Defendant appeals his convictions for Murder, Robbery, Burglary, and related offenses on Joinder with a Co-Defendant.

Facts: The defendant and his co-defendant shot and killed an 8-year-old child while robbing the victim's family. The defendant and his confederate targeted the family after the father had posted on social media about recent lottery winnings. The defendant later confessed to the murder to several people. Over a week later, police arrested the co-defendant in Richmond in possession of a firearm. The co-defendant later pled no contest to possession of that firearm. Subsequently, DFS determined that the gun was used in the murder.

The police also seized a cell phone from the co-defendant during his arrest. The co-defendant admitted to police that it was his phone. A data extraction revealed "selfies" of the co-defendant, an associated email address, and several internet searches made the day after the crime, including searches for "crime reports for King William County, VA." The data extraction also revealed that prior to the robbery and murder, the defendant and his co-defendant exchanged several text messages about meeting that night and had discussed a planned "lick" or robbery. FBI Special Agent Jeremy D'Errico also later testified about how he used cell site records to track the defendant and his confederates' movements.

Prior to trial, the Commonwealth moved to the join the two defendants for trial, which the trial court granted over the defendant's objection. The defendant had objected that joinder prejudiced him because he could not confront or cross-examine evidence solely applicable to the co-defendant, who did not testify.

Held: Affirmed. The court found that the defendant failed to demonstrate prejudice from joinder of the two trials. The Court complained that the defendant did not established why evidence introduced against the co-defendant would have automatically been attributed to the defendant absent his ability to cross-examine or confront the co-defendant. Further, the Court observed that the fact that some evidence was introduced only against the co-defendant did not constitute actual prejudice to the defendant.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0223222.pdf

Cage v. Commonwealth: December 13, 2022

Virginia Beach: Defendant appeals his 141 convictions related to Attempted Murder and Malicious Wounding of Police Officers and Possession of Child Pornography on Joinder and Exclusion of Evidence grounds.

Facts: The defendant opened fire on a team of police officers—wounding a detective—as they entered his apartment to serve a search warrant for child pornography. After an extended standoff, as the defendant walked out of the apartment, he did not obey the officers' commands and a police dog broke loose from its handler, rushed the defendant, and bit the upper part of his back leg. Police recovered over 14,000 images of child pornography on the various computers and external drives in the defendant's residence.

Before trial, the Commonwealth filed a motion for joinder, pursuant to Rule 3A:10, as to the child-pornography charges and shooting charges, asking for a single trial for all the charges against the defendant. The trial court joined the offenses over the defendant's objection.

The Commonwealth also filed a motion in limine to exclude any evidence of the police dog attacking the defendant. The defendant contended that the dog bite was relevant to the credibility of the testifying police officers—including whether they announced their presence and whether the defendant or the police fired first. He also contended the evidence would have established the police used "aggressive tactics" during the raid. None of the officers who testified at trial witnessed the dog bite take place. The trial court excluded the evidence.

A jury convicted the defendant on all 144 charges related to both the shooting and the recovered child pornography.

Held: Affirmed.

Regarding the joinder issue, assuming without deciding the trial court erred in joining the offenses for a single trial, the Court concluded that the overwhelming evidence of the defendant's guilt rendered that putative error harmless. The Court noted that some evidence relating to the child pornography charges would be admissible in a separate trial on the shooting charges, and vice versa, to prove motive, intent, and lack of mistake. However, rather than examining the evidence in detail, the Court simply concluded that the evidence in this case was so overwhelming as to each charge that admitting all the evidence would be harmless in any event.

Regarding the issue of the police dog attack, the Court ruled that the trial court did not err in excluding the evidence of the police-dog attack. The Court observed that the dog bite did not affect the likelihood that the testifying officers were truthful when recounting their initial confrontation with the defendant or whether they knocked and announced themselves. Finding so would impute any possible bias from the dog's handler to the other officers on the scene that day. Because a reasonable jurist could conclude the evidence was not relevant, the Court ruled that the trial court did not abuse its discretion.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0978211.pdf

Jury Instructions

Virginia Court of Appeals
Published

Harvey v. Commonwealth: January 24, 2023

Richmond: Defendant appeals his convictions for Sexual Assault, Malicious Wounding, Burglary, and Unlawful Filming on Refusal to Strike a Juror, Fourth Amendment, Discovery of Jail Calls, and Admission of Prior Bad Acts.

Facts: In March 2018, the defendant pushed a woman to the ground and attempted to sexually assault her, while carrying a cellphone. Then, over a couple of days in May 2018, the defendant followed three college students back to their residences, where he broke into their apartments and sexually assaulted them while they were unconscious, filming the incidents on his phone. In the third case, which is the case charged in this incident, the victim woke up during the assault. The defendant struck her, breaking a bone in her face and knocking her out.

In September 2018, police investigated the defendant for assaults on other women where he lifted their clothes to photograph them. The defendant voluntarily surrendered his phone to police, who days later obtained a search warrant for the phone and an SD card in that phone, seeking data for six days during the September time frame only. In October, police obtained a second search warrant to include evidence from May 2018. That warrant revealed videos that the defendant had taken of his sexual assaults in May.

DNA evidence linked the defendant to the two initial assaults. DNA evidence also linked the defendant to two crimes in 2015, including another burglary incident where the defendant entered an apartment and filmed a woman in the shower. The victim in this case identified the defendant at trial. The defendant also had two previous convictions for unlawful filming at the time of this trial. Police arrested the defendant, and he was held without bond.

In December 2019, the defendant moved to suppress the evidence from the second search warrant. In January 2020, the trial court granted that motion. Two weeks later, police obtained a third search warrant. The defendant again moved to suppress the evidence from that warrant, which the trial court granted again.

In July 2020, one day after the trial court suppressed the third warrant, police obtained a fourth search warrant. At that point, law enforcement had possessed the phone for almost two years. Unlike the second and third warrants, the fourth one included limitations on the time periods for which data was sought, covering one month in 2015 and six months in 2018, two periods during which several crimes had occurred that the defendant was suspected of committing. The affidavit was also much more detailed than the second and third warrants because it added information obtained in a separate search of the SD card from the defendant's phone.

The fourth search warrant also limited the examination of the phone itself to applications that could hold video or photographic data. Finally, the warrant restricted the search to files created between dates that were book-ended by the crimes of 2015 and those of 2018. The defendant moved to suppress the fourth search warrant, but the trial court denied the motion.

Prior to trial for this offense, the Commonwealth sought a ruling permitting it to introduce evidence of the offenses against the two other victims from earlier in May 2018. The defendant objected, arguing that the evidence was overly prejudicial and insufficiently related, as the defendant could simply have downloaded the video of the assault against this victim from the Internet. The trial court admitted the evidence over the defendant's objection, ruling that the acts themselves were "idiosyncratic enough" in terms of temporal and geographic proximity, the assault and how it "was done," and the fact that the acts were filmed. The trial court, however, agreed to instruct the jurors that they could consider evidence that the defendant committed a crime other than the one for which he

was on trial only as evidence of his intent, identity, and "the unique nature of the method of committing the crime charged in connection with the crime for which he [was] on trial and for no other purpose."

At trial, during voir dire, the prosecutor asked the jurors whether they would be able to watch a video showing the rape of the unconscious victim. One juror said that she had a friend who was raped while unconscious. She initially stated that she would "be fine" considering the rape charge fairly "without a video" but that "with a video" and considering the defendant's purported defense of consent, she was "not sure she could do that fairly." In response to further questioning, the juror responded that she could evaluate evidence in addition to the video but would probably be "swayed" by the video. The juror also volunteered what she knew about the law of unconsciousness and consent.

The trial court then clarified that, after receiving the court's instructions on the law of consent, the juror would be free to consider all the evidence and would need merely to "be open to consider" the defense. The juror replied that she "would try to" and "thought" she could do so. The trial court again instructed her that she would have to wait for the evidence and that the voir dire was just to "know" if she "could apply the law that the court would give her" After that further explanation by the court, the prosecutor again asked the juror whether she could consider evidence that the alleged victim consented and evidence that she did not consent. Both times the juror responded, "Yes," and "Absolutely." Following additional questioning, defense counsel objected to the seating of that juror. The trial court denied the motion to strike her for cause.

On the second day of trial, the Commonwealth introduced a jail phone call from two years before. On the call, the defendant asked a woman if she heard that there were "fractured faces involved." The defendant stated, "I don't know how I'm supposed to live with myself after that. I didn't realize there was that much damage done." The Commonwealth had told the defendant about the provided the call as discovery on the day before trial. The defendant asked the trial court to exclude the recording due to the alleged discovery violation. The trial court denied the motion and admitted the recording.

[*Great job to Josh Boyles and Sarah Heller, who tried this case for the Commonwealth – EJC*].

Held: Affirmed.

The Court first ruled that the trial court's denial of the defendant's motion to strike the juror was not error. The Court examined the record and was satisfied that the trial court was able to assess whether the juror was impermissibly biased or would be able to apply the law in the instructions after the presentation of all the evidence. To the extent the juror gave responses that were unclear, the Court noted that the trial court clarified them and confirmed that the juror could sit impartially. The Court found that the record revealed that the juror did not demonstrate a fixed bias and that the trial court's questioning and instruction constituted appropriate clarification, not improper rehabilitation.

The Court then affirmed the denial of the defendant's motion to suppress the fourth search warrant. The Court began by holding that the trial court did not err by concluding that the particularity requirement of the Fourth Amendment was satisfied. The Court found that the challenged search warrant satisfied the constitutional particularity requirement because it listed the specific crimes about which the evidence was sought and the specific places on the defendant's cell phone where the officers were authorized to look for that evidence.

The Court then concluded that, under the Fourth Amendment, there was proof of a constitutionally sufficient nexus between the phone and the crimes under investigation. The Court rejected the defendant's argument that evidence of a nexus between his cell phone and the nine crimes of which police suspected him was lacking because there was evidence in only one case that the assailant used a phone to record the potential crime, the 2015 incident in which a woman saw a cell phone that was possibly recording sticking through her shower curtain.

The Court examined the nine groups of offenses from 2015 and 2018, noting that video evidence was strongly suspected to be involved in 5 of those cases. Along with the defendant's two previous convictions for unlawful filming and the two videos discovered by law enforcement in the first search warrant, the Court found that the evidence provided "more than enough evidence" to support the trial court's finding that an adequate nexus existed for probable cause to search the defendant's phone for videos and photographs created during the two listed time frames.

The Court then turned to the defendant's argument that the search of his cell phone was unreasonable under the Fourth Amendment based on the length of time it took the Commonwealth to obtain a valid search warrant. The Court acknowledged that this was an issue of first impression in the Commonwealth. The Court repeated that a seizure that is lawful at its inception can nevertheless violate the Fourth Amendment if its manner of execution unreasonably infringes possessory interests protected by that amendment. The Court explained that assessing the reasonableness of the duration of the retention of the item seized includes factors such as (1) the significance of the interference with the person's possessory interest; (2) the duration of the delay; (3) the presence or absence of consent to the seizure; and (4) the government's legitimate interest in holding the property as evidence.

Regarding the defendant's interest in the phone, the Court noted that the defendant was incarcerated and could not lawfully possess the phone, and therefore the seizure did not deprive the defendant of any direct interest in possessing the phone. The Court also noted that defense counsel received a disk containing all the data on the phone during discovery. Lastly, the defendant did not request his phone back for almost two years. Consequently, the Court found that the degree of interference with his possessory interest before the police obtained a valid warrant related to the charges at issue was minimal.

The Court agreed that personal property without independent evidentiary value may not be kept indefinitely. Here, however, the Court noted that the Commonwealth repeatedly sought subsequent warrants to permit it to search the defendant's phone for evidence of specific additional crimes that he was suspected of committing, and it had a strong interest in retaining the property while doing so in as prompt a manner as possible. Lastly, the Court found that the officers involved therefore acted diligently, if imperfectly, to obtain a valid warrant permitting the search that is the subject of this appeal.

Regarding the jail phone call, the Court noted that defense counsel had at least a full business day to evaluate it before trial and did not request a continuance. The Court found that the defendant did not establish prejudice on appeal, and the trial court therefore did not abuse its discretion by admitting the recording of the phone call.

Lastly, the Court addressed the defendant's argument that the evidence of the two other offenses in May 2018 was inadmissible regarding this offense. The Court noted that the defendant took all three videos with a single phone and that the contents of the videos and the ways in which the two

sets of crimes were committed involve distinct similarities. The Court explained that the defendant's theory that he downloaded the videos from the Internet did not render the evidence of the crimes against the two other victims inadmissible to prove identity in part through modus operandi.

In this case, the Court noted that both the burglary and aggravated sexual battery charges included the element of intent to commit rape or some other act of sexual abuse. The Court repeated that the prosecution is required to prove every element of its case and is entitled to do so by presenting relevant evidence in support of the offenses charged. The Court wrote that: "A defendant cannot prevent the prosecution from doing so simply because he takes the position that the offense did not occur or that someone else committed it and therefore intent is not genuinely in dispute."

Consequently, the Court ruled that other-crimes evidence was relevant to prove identity (both independently and through modus operandi) and intent. The Court found that the probative value of the evidence on the combination of elements for which it was offered—identity and intent—outweighed the obvious yet incidental prejudice. Considering the record as a whole, the Court concluded that the trial court did not abuse its discretion by admitting the video and related evidence of the defendant's rape in the earlier part of May 2018. The Court also noted that the trial court limited the impact of the other-crimes evidence through a cautionary instruction directing the jury to consider the evidence for the limited purposes of his intent, identity, and modus operandi.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0723212.pdf

Bista v. Commonwealth: December 6, 2022

Fairfax: Defendant appeals his convictions for Child Sexual Assault on Hearsay grounds.

Facts: The defendant sexually assaulted a child. The victim was eleven years old at the time and suffered from autism. The child's mother discovered the assault after personally witnessing the defendant assaulting the victim. After police began an investigation, a forensic interviewer conducted a recorded interview with the victim. The child described several assaults by the defendant. Police also obtained DNA evidence that identified the defendant as the perpetrator. The victim then testified at a preliminary hearing.

Prior to trial, the defendant asked the trial court to evaluate the victim's competency to testify. After a hearing, the trial court determined that the victim did not have the "capacity to comprehend the legal significance of an oath," "distinguish truth from a falsehood," or "understand the questions propounded and make intelligent answers." Accordingly, the trial court concluded that the victim was "not competent to testify at this time."

Before trial, the Commonwealth moved the trial court to admit the victim's out-of-court disclosures to her parents, teacher, and the forensic interviewer under § 19.2-268.3. The interviewer was no longer employed at the forensic facility, but the executive director authenticated the video from the forensic interview. The defendant objected, but the trial court overruled the objection.

The defendant then moved to exclude the video of the forensic interview from trial under the

Sixth Amendment's Confrontation Clause. Although the defendant acknowledged that he had a prior opportunity to cross examine the victim at preliminary hearing, he argued that the examination was defective because at the time:

(1) the defendant "did not face a rape charge";

(2) "[n]either complete discovery nor all of [the victim's] school records had been disclosed";

(3) the defendant was unaware of additional statements "to the victim's parents and her teacher" admitted at trial;

(4) the victim "purposefully" lied regarding certain facts; and

(5) the victim's autism—"the condition that rendered her incompetent"—made her cross-examination "meaningless."

The trial court overruled the defendant's objection.

At trial, the defendant also proffered two proposed jury instructions regarding witness competency. The first instruction provided: "A person is incompetent to testify if the court finds that the person does not have sufficient physical or mental capacity to testify truthfully, accurately, or understandably." The other instruction stated: "A child is competent to testify if it possesses the capacity to observe events, to recollect and communicate them, and has the ability to understand questions and to frame and make intelligent answers, with a consciousness of the duty to speak the truth."

The trial court rejected the instructions. Instead, the trial court instructed the jury: "The Court's competency ruling explains [the victim]'s unavailability at this trial. Credibility determinations as to witnesses and other evidence are determined by you."

Held: Affirmed. As a matter of first impression, the Court held that that §19.2-268.3 does not condition admissibility on the declarant's competency to testify. Thus, the Court held that the trial court correctly concluded that the victim's incompetency to testify did not automatically render her hearsay statements inadmissible.

The Court noted that the United States Supreme Court has considered statutes similar to § 19.2-268.3 in the context of the Confrontation Clause and recognized that a child sexual assault victim's incompetency to testify does not per se render the child's out-of-court disclosures inadmissible. The Court analogized this case to the *Massey* case, where the defendant faced charges of rape and abduction and the victim died after testifying at the preliminary hearing but before trial.

The Court also examined the child's statements and agreed that her previous disclosures were inherently trustworthy. The Court examined the factors under § 19.2-268.3(B)(1) and agreed that the evidence supported admitting the child's previous disclosures. The Court found that the evidence established the victim's "personal knowledge of the event" and that she provided detailed and largely consistent accounts of the assault to her parents, teacher, and the forensic interviewer.

Regarding the forensic interviewer's statements, the Court simply found that the Confrontation Clause did not apply to the interviewer's statements because they were not hearsay. The Court noted that, at trial, the Commonwealth did not offer the interviewer's statements for their truth, but solely to "provide context" for the jury to understand the victim's disclosures of sexual abuse. As non-hearsay, her statements did not implicate the Confrontation Clause.

Regarding the jury instructions, the Court ruled that the trial court correctly denied the defendant's proffered jury instructions because they created a risk of confusing or misleading the jury and the alternative instruction fairly covered the same issues. The Court found that the defendant's instructions would have advised the jury that the trial court had already determined that the victim was unable to discern the truth. Thus, the Court expressed that the proffered instructions might have confused the jury by suggesting that the trial court's competency ruling was a commentary on the victim's credibility.

Judge Lorish filed a dissent, contending that "out-of-court testimonial statements must be introduced by the Commonwealth at a prior hearing for a defendant to have a constitutionally adequate opportunity for cross-examination about those statements." The dissent focused on whether the prior opportunity to cross-examine required by the Confrontation Clause is statement or declarant specific. The dissent concluded that the defendant "had no opportunity to cross-examine" the victim about her forensic interview statements because the Commonwealth did not introduce those statements or any testimony about them during the preliminary hearing.

The majority, however, rejected the dissent's argument because the defendant had not made that argument at trial. The majority did not reach the merits of that argument.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0904214.pdf

Holmes v. Commonwealth: November 22, 2022

Augusta: Defendant appeals her convictions for Racketeering on Jury Instruction Issues and sufficiency of the evidence.

Facts: The defendant operated a criminal enterprise that sold methamphetamine in quantities of a pound and greater. At trial, several cooperating witnesses who had been the defendant's accomplices testified about purchasing pounds of methamphetamine from the defendant on several occasions. The witnesses were longtime methamphetamine users and testified that they were familiar enough with the drug to identify it. The accomplices testified that they communicated with the defendant about purchasing and distributing large quantities of methamphetamine, which she then either delivered or directed to be delivered to Augusta County, and for which she collected large payments.

The trial court gave various jury instructions, including the model "you are the judges of the facts" instruction, the model presumption of innocence instruction, and the model circumstantial evidence instruction.

The trial court rejected three of the defendant's proposed instructions. The first stated that: "Although one or more witnesses may positively testify as to an alleged fact and although that testimony may not be contradicted by other witnesses, you may altogether disregard that testimony if you believe it to be untrue." It went on to state that "If you believe from the evidence that any witness has knowingly testified falsely as to any material fact in this case, you have a right to discredit all of the

testimony of that witness or to give to such testimony such weight and credit as in your opinion it is entitled."

The second instruction that the trial court rejected stated that "Where a fact is equally susceptible to two interpretations, one of which is consistent with the defendant's innocence, you may not arbitrarily adopt the interpretation which finds him guilty."

The last instruction that the trial court rejected was the "great care and caution" instruction regarding accomplice testimony, and it stated as follows:

> "You have heard testimony from accomplices in the commission of the crime charged in the indictment. While you may find your verdict upon their uncorroborated testimony, you should consider such testimony with great care and you are cautioned as to the danger of convicting the defendant upon the uncorroborated testimony of an accomplice or accomplices. Nevertheless, if you are satisfied from the evidence of the guilt of the defendant beyond a reasonable doubt, the defendant may be convicted upon the uncorroborated evidence of an accomplice or accomplices."

In rejecting this jury instruction, the court held that the instruction was not warranted because the accomplice testimony was not uncorroborated.

Held: Reversed and Remanded. The Court held that the trial court erred in finding that the accomplice testimony of the accomplices was sufficiently corroborated when it refused the last jury instruction. Because this error was not harmless, the Court reversed and remanded for a new trial.

The Court first found that the evidence was "more than sufficient" to prove the Racketeering offense. Regarding the lack of chemical testing, the Court repeated that users and addicts, if they have gained familiarity or experience with a drug, may identify it.

Regarding the first rejected instruction, the Court agreed that the instruction was an accurate statement of the law. However, the Court found that the model "you are the judges of the facts" instruction fairly and adequately instructed the jury on the principles of law discussed in the rejected defendant's instruction, and therefore a duplicative instruction would inappropriately "single out for emphasis a part of the evidence tending to establish a particular fact."

Regarding the second rejected instruction, the Court again found that the presumption of innocence and circumstantial evidence instructions fairly and adequately instructed the jury on the principles of law discussed in the defendant's rejected jury instruction. The Court explained that to nevertheless grant the defendant's instruction would have been duplicative, inappropriately singled out a particular fact or issue, and may have caused confusion to a jury.

However, regarding the third rejected instruction, although the testimony of the accomplices corroborated each other, the Court found that the "danger of collusion between [these three] accomplices and the temptation to exculpate themselves by fixing responsibility upon others" was not alleviated where the sole corroboration was the testimony of another accomplice to the crime.

The Court explained that the correct standard for determining whether a cautionary instruction should be granted becomes this: "is corroborative evidence lacking?" If it is, the instruction should be granted. The Court then explained that proper standard for determining whether sufficient corroboration exists to refuse the cautionary instruction is: "[T]he corroboration or confirmation must relate to some fact (or facts) which goes to establish the guilt of the accused." Thus, the corroborative

evidence, standing alone, need not be sufficient either to support a conviction or to establish all essential elements of an offense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0251223.pdf
and
https://www.vacourts.gov/opinions/opncavwp/0250223.pdf

Virginia Court of Appeals
Unpublished

Jackson v. Commonwealth: April 25, 2023

Amelia: Defendant appeals his conviction for Distribution, Second Offense on Jury Instruction, Juror Selection and Misconduct issues, Admission of a Prior Conviction, and denial of a Continuance at Sentencing.

Facts: The defendant distributed cocaine after having previous convictions for that offense. During voir dire, a juror stated that she knew the defendant because she "know[s] a lot of people in Amelia County." She said she "never spent time with" the defendant and further explained, "I know his wife more than I know him. I don't spend time with her either, but I know her." Despite this, she maintained that her knowledge of the defendant would not impact her ability to judge the case fairly and impartially. No one moved to strike the juror and she sat on the panel at trial.

At trial, the Commonwealth introduced the defendant's prior conviction and sentencing order from the same jurisdiction involving a defendant with the same name and birth date as the defendant. The defendant objected, arguing that the Commonwealth did not establish that the defendant was the person named in the order, but the trial court overruled the objection.

At trial, a cooperating witness testified for the Commonwealth. The defendant requested a jury instruction based on U.S. v. Luck, but the trial court denied it. The instruction would have stated: "The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant."

At sentencing, the defendant informed the court that he was not ready to proceed with sentencing as scheduled because he still wished to file a motion to set aside the verdict; in addition, believing the trial court would grant the motion for transcripts, he had informed three of his sentencing witnesses that they did not need to appear for the hearing. The trial court denied the continuance.

After trial, the defendant filed a motion to set aside the verdict, asserting that several years earlier, the same juror who had denied knowing the defendant had a conversation with the defendant's wife, in which the juror made comments about the defendant's previous infidelity to his wife. After the trial, the wife alleged that the juror approached her stating, "I'm so sorry." The defendant argued that

the juror misrepresented her impartiality under oath during voir dire because she minimized the extent to which she knew the defendant and how that prior knowledge affected her opinion of him. He asserted that the conversation with the wife, despite being nearly a decade old at the time of trial, demonstrated that the juror "held a poor opinion" of the defendant's character and thus secretly harbored bias towards him. The trial court denied the motion and refused to hold an evidentiary hearing regarding the allegation.

Held: Affirmed.

Regarding the prior conviction, the Court repeated that the Identity of names carries with it a presumption of identity of person, the strength of which will vary according to the circumstances. The Court ruled that the trial court did not err in admitting the prior conviction order and allowing the jury to determine if the defendant was the same person named in the order.

Regarding the rejected jury instruction, the Court found that under Lovitt, "the law of this Commonwealth does not require a fact finder to give different consideration to the testimony of a government informant than to the testimony of other witnesses."

Regarding the juror, the Court pointed out that the juror affirmed during voir dire that she could make an impartial decision based on the evidence at trial. The Court also noted that, when she acknowledged during voir dire that she knew the defendant, the defendant did not question her about any specifics of that relationship or what opinion she held of the defendant. The Court ruled that the trial court reasonably determined that the defendant had not presented credible allegations of bias that undermined the prior determination of impartiality reached by the court at the conclusion of the voir dire process.

Regarding the defendant's request to continue sentencing, the Court ruled that the defendant failed to demonstrate prejudice from the denial of the continuance. The Court agreed that the defendant released his sentencing witnesses at his own peril based on a mere assumption that the court would grant the continuance.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0437222.pdf

Jung v. Commonwealth: March 21, 2023

Fauquier: Defendant appeals his conviction for Murder on Exclusion of Previous Prosecutor's Decisions, Mentioning Hearsay in Opening, Admission of Photos, and Jury Instruction Issues.

Facts: In 2008, the defendant stabbed a Buddhist monk to death. Police identified the defendant as the killer and in 2010, police interviewed the defendant. He told police that when he discovered the victim's body, he decided to "run away" and immediately drove to New York. The defendant told police that he "must have killed" the victim, although he could not remember doing so. The Commonwealth charged the defendant with the murder in 2020.

The Commonwealth filed a pretrial motion in limine to bar the defense from eliciting testimony about whether the prosecution had been "previously declined or refused." The defendant argued he should be able to show that he was not "fleeing from prosecution because there hadn't been a prosecution that had been initiated." The Commonwealth granted the motion in part but allowed the defendant to "show that there was no outstanding warrant" between 2008 and 2020. The trial court emphasized that the parties were not permitted to discuss "whether the Commonwealth had agreed to prosecute or not prosecute or how many Commonwealth's attorneys were involved."

In its opening statement, the Commonwealth referred to expected testimony from a witness that the victim feared the defendant after the victim removed him as a temple director. The defendant objected that the statement would be hearsay. The trial court overruled the objection. During the witness' testimony, the defendant again objected based on hearsay, arguing that the witness could not testify about anything that the victim said. The trial court sustained the objection. The witness testified that the victim was "paranoid" after the defendant was removed as a director and wanted the witness to be present at the temple when the defendant was there. He did not repeat specific statements that the victim made to him.

At trial, the Commonwealth, over the defendant's objection, introduced six photographs of the defendant's former residence. The photos were taken in 2008 when the police searched the house, within weeks of the murder. They showed that the house was vacant. The defendant argued that the photos were not relevant. The trial court admitted the photographs into evidence.

At trial, the Commonwealth presented evidence that the defendant wrote a bad check, drank alcohol excessively, and gambled. During the jury instruction phase, the Commonwealth offered an instruction that the jury could "consider the character of [the defendant] when proven by the evidence, whether good or bad, along with the other facts and circumstances in the case in determining his guilt or innocence." The defendant objected to the instruction, but the trial court overruled the objection.

Held: Affirmed.

Regarding the decisions of the three prior prosecutors not to charge the defendant, the Court held that the trial court properly granted the Commonwealth's motion in limine. The Court agreed that the decisions made by prior prosecutors about the defendant's case, rooted in prosecutorial discretion, were not relevant to the jury's determination of guilt or innocence based on the evidence presented at trial in 2021. The Court found that informing the jury that prior Commonwealth's Attorneys had elected not to prosecute the case would have impermissibly colored the jury's interpretation of the evidence. The Court agreed that the trial court correctly excluded "improper and confusing evidence." The Court noted that the trial court permitted proper information for the jury to consider that supported the defendant's factual point that the lengthy delay was not due to him absconding.

Regarding the Commonwealth's reference to hearsay in opening statement, the Court observed that, during the witness' testimony, he did not repeat what the victim had told him, but instead he said that the victim became "paranoid" after the defendant was removed as a director of the temple. The witness also stated that the victim asked him to be at the temple whenever the defendant was there. The Court concluded that his testimony supported the prosecutor's opening remark in sum and substance that the victim feared the defendant and it was relevant to explain the relationship between the two men. The Court also pointed out that the trial court specifically instructed the jury prior to

opening statements that they are "what [the attorneys] expect the evidence to be" but are "not evidence and you must not consider [them] evidence."

Regarding the photos of the vacant house, the Court ruled that the challenged photographs were relevant to the defendant's consciousness of guilt. The photos were relevant to support the Commonwealth's theory that the defendant did not intend to return after fleeing to New York.

Lastly, regarding the jury instruction, the Court ruled that, although the character instruction was based on Virginia Criminal Model Jury Instruction 2.200 and was a correct statement of the law, the trial court abused its discretion in giving the instruction because it applies only when "the defendant has offered character evidence." The Court pointed out that the defendant did not testify or offer evidence of his good character, and consequently the instruction did not apply.

However, although the Court held that giving the instruction in this case was error, the Court then ruled that the error was harmless.

Tags: Evidence – Charging Decisions; Opening Statement – Hearsay Testimony; Evidence – Photos – Relevance; Jury Instructions – Defendant's Character

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0529224.pdf

Eckerd v. Commonwealth: March 14, 2023

Augusta: Defendant appeals his convictions for Possession of Child Pornography on Denial of a *Franks* Hearing, Jury Instruction Issues, and Juror Misconduct.

Facts: The defendant possessed child exploitation images. His girlfriend discovered the images and enlisted a friend to examine the defendant's electronic devices. The friend discovered more images and the two reported it to the police. The victim specifically described that she "caught her boyfriend … looking at animated child pornography" and that she found an image on his phone "that was borderline child pornography." An officer obtained a search warrant for the devices based on their reports. The warrant revealed multiple child exploitation images.

The defendant moved to suppress, seeking a *Franks* hearing to challenge the search warrant. The defendant alleged that the affidavit's use of the word "nude" to describe pictures of toddlers that the friend saw when he examined the defendant's external hard drive was false. The defendant argued that the word "nude" was false because the friend's written statement to the police did not include that word, and because the friend, during testimony at a preliminary hearing, described the toddlers as "clothed." The trial court denied him a *Franks* hearing.

At trial, over the defendant's objection, the trial court instructed the jury that an element of the offense of possession of child pornography (second offense) is "that this possession occurred subsequent or in addition to at least one other possession" The trial court also instructed the jury, over the defendant's objection, that "The second or subsequent possession need not occur on a separate date or time, but must involve a separate child pornography file."

At trial, the defendant contended that the jury should have been instructed about the alleged dates of the offenses in the jury's "finding instructions." The trial court refused.

After the jury rendered its guilty verdict, the trial court polled the jury twice — once for the first offense and once for the eleven second or subsequent offenses. After trial, the defendant moved to set aside the verdict. The defendant attached an internal sheriff's office email which stated:

> "[A juror] called this morning to report that he was very disturbed by a court process that he was involved in 9/30/21. He said that he felt threatened, and was threatened in the bathroom, and felt like he had to vote the way of the majority. He talked endlessly about the trial process and was upset that a 2-day trial had been turned into a one-day trial where the jury was forced to stay late in the evening. He complained that the judge only gave them one break the entire day."

The complaining juror did not name the other juror who supposedly threatened him. Despite the Sheriff's attempts to reach this juror, the juror never responded to the Sheriff's numerous efforts to contact him or ever spoke with the Sheriff regarding the alleged threat. The trial court denied the motion.

Held: Affirmed.

Regarding the *Franks* hearing, the Court held that the defendant was not entitled to a *Franks* hearing because, even without the word "nude," the statements of the witnesses demonstrated that probable cause existed to support the search warrant, and the affidavit correctly stated that the toddler that the friend saw in the image was positioned in a lewd sexual manner.

The Court repeated that if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing pursuant to *Franks* is required. In this case, the Court concluded that, given all the circumstances set forth in the affidavit, it was "reasonable to believe" that child exploitation material would be found on the defendant's devices. The Court explained that "the word "nude" was simply not necessary to the finding of probable cause, and therefore no *Franks* hearing was required."

Regarding the jury instruction on the second offense, the Court concluded that the instruction accurately defined the elements of possession of child pornography—and possession of child pornography, second or subsequent offense. In addition, the Court ruled that the jury instruction was appropriate here where twelve separate images of child pornography were found on the defendant's external hard drive.

Regarding the defendant's request to instruct the jury on the date of the offenses, the Court held that none of the jury instructions were required to contain the alleged date of the offense as listed in the indictments because in a felony case the Commonwealth may prove the commission of a crime charged on a date different from that alleged in the indictment and because time was not an element of the offenses. The Court ruled that the trial court properly instructed the jury that a violation of § 18.2-374.1:1 required proof beyond a reasonable doubt that the defendant "knowingly possessed child pornography"— and that each subsequent violation required proof that the defendant possessed a separate child pornography image. Consequently, given that time is not a material element of an offense under either § 18.2-374.1:1(A) or (B), and that the instruction properly covered the actual elements of

the offenses, the Court ruled that the trial court did not err by refusing to include the dates of the charged offenses in the jury instructions.

Regarding the alleged threat by a juror, the Court held that it was not an abuse of discretion to deny the defendant's motion to set aside the jury's verdict, given that the defendant could present only minimal facts about a vague supposed threat from a juror to another juror while in a bathroom at the courthouse. The Court ruled that the trial court did not err, given that the jury verdict was clearly shown to be unanimous after being polled twice, given that the complaining juror never responded to the Sheriff's efforts to follow up with him on those vague allegations, and given that the record contained no real proffer of any details of what the juror claimed happened at the courthouse.

In a footnote, the Court pointed out that the trial court could not consider much of the defendant's claim because a juror is precluded from testifying as to any matter or statement occurring during the jury's deliberations. In addition, the Court pointed out that Virginia Rule of Evidence 2:606(b)(i) states that, during an inquiry into the validity of a verdict, "[t]he court may not receive a juror's affidavit or evidence of a juror's statement" on "any statement made or incident that occurred during the jury's deliberations." In this case, the Court found the juror's allegations in this case to be so vague that none of the exceptions to Rule 2:606(b) applied.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0218223.pdf

Dillon v. Commonwealth: January 10, 2023

Pittsylvania: Defendant appeals his conviction for Drug Possession on Jury Instruction issues.

Facts: The defendant possessed cocaine. At trial, the trial court gave the model instruction for drug possession and also the model instruction for possession.

The defendant also requested instructions to the jury that stated:

1. "Felonious is a technical word of law which means done with intent to commit [a] crime; of the grade or quality of a felony."

2. "Felonious Intent is intent to commit an actus reus without any justification, excuse, or other defense."

3. "Actus Reus is the wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability."

4. "Mens Rea [is] the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime."

The trial court denied the instructions.

Held: Affirmed. The Court concluded that the trial court did not abuse its discretion in refusing the defendant's proffered instructions.

The Court found that the trial court's model instructions fully and fairly covered the relevant principles of law therefore rendering additional, repetitious instructions unnecessary and within the

sound discretion of the trial court to refuse. Furthermore, the Court ruled that the trial court did not abuse its discretion when it refused the defendant's additional instructions as confusing to the jury; the elements and burden of proof were succinctly articulated in the model instructions used by the court and the Latin superfluous to understanding the relevant law.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1299213.pdf

Moisin v. Commonwealth: August 2, 2022

Norfolk: Defendant appeals his convictions for Child Sexual Assault on jury instruction issues.

Facts: For several years, the defendant sexually assaulted two very young children. At trial, over the defendant's objection, the court gave Model Jury Instruction 2.600, which stated: "You may infer that every person intends the natural and probable consequences of his acts." He argued that the instruction was not appropriate for the case and impermissibly shifted the burden of proof to him.

[*Note: In the 2021 Revision to the Model Jury Instructions, the committee removed that instruction from the list of "Model" instructions, without explanation. That instruction no longer appears in the published list of Model Jury Instructions – EJC]*.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion by instructing the jury that it could infer that a person intends the natural and probable consequences of his acts.

The Court first ruled that the evidence fairly raised the issue of whether the defendant intended the natural and probable consequences of his acts. The Court agreed that sexual gratification can be a natural and probable consequence of a man touching the intimate parts of a female. The Court explained that the challenged instruction simply informed the jury that it could use its common sense to infer that the defendant's conduct evinced an intent to be sexually gratified. The Court found that the instruction accurately reflected the law and was relevant to the jury's determination of the element of intent.

The Court then rejected the defendant's argument that the instruction impermissibly shifted the burden of proof to him. The Court noted that the Court of Appeals and Virginia Supreme Court repeatedly have upheld the instruction.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1038211.pdf

Jury Selection

Fourth Circuit Court of Appeals

U.S. v. Colon: April 11, 2023

E.D.Va: Defendants appeal their convictions for Distribution on Sixth Amendment Fair Cross Section grounds.

Facts: The defendants conspired to distribute cocaine and heroin. Prior to trial, the court sent out a jury questionnaire that asked several questions regarding COVID, including the jurors' vaccination status, potential exposure, and risk factors. Based on the results, the court struck all potential jurors who indicated that they were not vaccinated. The defendants objected, contending that the district court's sua sponte decision to strike unvaccinated prospective jurors for cause from a properly assembled venire during the COVID-19 pandemic violated the Sixth Amendment's fair-cross-section requirement.

Held: Affirmed. The Court ruled that the fair-cross-section requirement applies to jury venires, not petit juries, and the district court's decision to strike unvaccinated jurors based on their perceived inability to serve without creating unnecessary safety risks affected the composition of the petit jury for this particular case, not the individuals represented in the venire from which the petit jury was selected.

The Court held that the Sixth Amendment's fair-cross-section requirement does not apply to the district court's decision to strike the unvaccinated potential jurors for cause related to COVID-19 safety risks. The Court first noted that the district court's strikes took place after the venire was assembled. The Court then noted that, in *Holland v. Illinois,* the US Supreme Court rejected the attempt to extend the fair-cross-section requirement from the venire to the petit jury. Instead, the fair-cross-section requirement applies only where groups are excluded for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case. In this case, the Court agreed that the district court's safety reasons related to the potential jurors' ability to serve in this case.

In a footnote, the Court also acknowledged the inherent power of the courts to manage their own affairs to achieve the orderly and expeditious disposition of cases, so long as the exercise of that power represents a reasonable response to the problems and needs confronting the court's fair administration of justice.

Full Case At:
https://www.ca4.uscourts.gov/opinions/224187.P.pdf

Virginia Court of Appeals
Published

Warren v. Commonwealth: March 7, 2023

Chesapeake: Defendant appeals his conviction for DUI on Jury Selection issues and denial of his Defense of Necessity.

Facts: An officer stopped the defendant for driving 96 in a 60 mile-per-hour zone and learned that the defendant was intoxicated. The defendant claimed that he had just received a phone call from his cousin's girlfriend, who told him that his cousin had been shot, and was dying of a wound in front of his grandmother's home. The defendant told the officer that he got in his car and drove back to Portsmouth, because he had the belief that given the situation, it would take an ambulance quite a while to get to that scene to take his cousin to the hospital to receive medical treatment. The cousin died from that gunshot wound later that evening. The defendant's BAC was .12.

Prior to trial, the Commonwealth raised a pre-trial motion to object to the defendant's presentation of a necessity defense. The trial court required the defendant to lay a foundation for the testimony he intended to present to the jury by proffering evidence on each element of the necessity defense at the motion in limine. The defendant proffered the facts of the case and the trial court ruled that the facts were insufficient to support a defense of necessity and granted the Commonwealth's motion.

During voir dire of the jury pool, a juror stated that he had been convicted of felony DUI. However, the juror stated that that the governor had restored his civil rights, although he did not know when or which governor restored his rights. The Commonwealth investigated and the evidence showed that the juror was twice convicted of felony DUI. The VCIN record reflected these convictions and did not show that his rights had been restored. When the court accessed the Governor's website for any clarifying information on the rights restoration, the website did not show records matching the juror's name, which he testified had never changed. The trial court struck the juror due to his felony conviction.

Held: Affirmed.

The Court first ruled that under § 8.01-338, the fact of the juror's two felony convictions coupled with the lack of clear evidence that his rights had been subsequently restored supported the trial court's reasonable doubt as to the juror's qualifications to serve as a juror.

Regarding the defense of necessity, the Court ruled that the trial court did not err in requiring the defendant to lay a foundation for the testimony he intended to present to the jury by proffering evidence on each element of the necessity defense at the motion in limine. The Court repeated that the essential elements of this defense include:

(1) a reasonable belief that the action was necessary to avoid an imminent threatened harm;

(2) a lack of other adequate means to avoid the threatened harm; and

(3) a direct causal relationship that may be reasonably anticipated between the action taken and the avoidance of the harm.

In this case, the Court ruled that the necessity defense failed because the defendant proffered no evidence to support the second element: a lack of other adequate means to avoid the threatened harm. The Court noted that the defendant did not proffer any evidence that he called 911 or anyone else to help his cousin and found them unavailable. The Court also complained that the defendant did not proffer that he called other family members to help his cousin; nor that he attempted to get someone else to drive him to his cousin to avoid his driving under the influence.

The Court concluded that the trial court did not abuse its discretion by excluding the defendant's proffered "necessity" evidence because it lacked relevance. The Court observed that the evidence was only relevant to the necessity defense, and such evidence became immaterial to the case

when he failed to proffer minimal evidence as to each element of the defense. The Court wrote: "We are sympathetic to Warren's desire to be with his fatally wounded cousin. Nevertheless, his claimed unawareness of other adequate means to get aid to his cousin does not satisfy the requirement that no other adequate means were available to aid his cousin."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0533221.pdf

Rock v. Commonwealth: January 24, 2023

Alleghany: Defendant appeals his convictions for Child Sexual Assault on Denial of Voir Dire on Sentence.

Facts: The defendant sexually assaulted an eight-year-old child. The Commonwealth indicted the defendant for several charges, including three counts of sodomizing a child younger than 13 years old, under § 18.2-67.1(A)(1), charges for which the defendant faced a mandatory minimum sentence of life in prison on each charge if convicted.

The defendant requested a jury trial on the charges but did not request sentencing by a jury. Prior to trial, the Commonwealth filed a motion in limine to exclude any mention to the jury of the mandatory life sentences that the defendant would receive if convicted of the sodomy charges. The Commonwealth argued that because the defendant had not requested that a jury fix his sentence, he had no statutory right to notify the jury of the mandatory life sentences. The defendant objected, maintaining that the law allowed him to tell the jury that the convictions would carry mandatory life sentences. The trial court granted the Commonwealth's motion.

Held: Affirmed. The Court held that § 19.2-262.01's provision allowing the parties to inform jurors of the "potential range of punishment" applies only when a defendant "is tried by a jury and has requested that the jury ascertain punishment" under § 19.2-295. The Court explained that "§ 19.2-262.01's straightforward language dictates a straightforward rule: the relevant provision of the statute applies only where a defendant has requested jury sentencing." The Court ruled therefore that the trial court did not err in granting the Commonwealth's motion in limine.

The Court noted that the court and parties had no need to ascertain whether the jurors could "sit impartially in the sentencing phase of the case" under § 19.2-262.01; Nor did the jurors have any other legitimate need for information about the possible sentences the defendant could receive, as the possible sentences were irrelevant to the issue of guilt. Accordingly, the Court concluded that cases in which a defendant has not requested jury sentencing fall outside of the relevant provision of § 19.2-262.01, and instead the principles outlined in *Walls*, *Hill*, and *Thomas* still control.

In a footnote, the Court also rejected the argument that the constitutional concerns in capital sentencing are not present when a defendant faces a mandatory life sentence. In another footnote, the Court cautioned that reading the statute to allow a defendant to encourage the jury to acquit the defendant even though the evidence might prove him guilty such a system would be an unreasonable result.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0343223.pdf

Virginia Court of Appeals
Unpublished

Smith v. Commonwealth: January 31, 2023

Newport News: Defendant appeals his conviction for Child Sexual Assault on Refusal to Strike Jurors for Cause.

Facts: The defendant repeatedly sexually assaulted a child.

During voir dire, a prospective juror told the trial court that she was scheduled to work on one of the days set for trial. She stated that her company was "short of employees" and she was not sure if anybody could cover her shift or not. In response to the trial court's inquiries, she explained that she worked at a retail store and agreed to contact her employer and ask if another employee could cover her shift. On the topic of understanding English, the juror stated that she did not have jury duty in her country. The defense moved to strike that juror for cause "based upon the language issue." The trial court declined to strike her for cause, noting that the court was "comfortable with her ability to understand at this point."

During voir dire, the defense asked a second juror whether it was "possible you might not be able to give my client a fair and impartial trial based upon the fact that you are a parent and the alleged victim in this case is the stepdaughter of my client?" The second juror responded: "It's possible. I don't know what he did." The defendant moved to strike the juror for cause. The trial court then asked the second juror whether he would "be able to listen to the evidence and the law as I instruct you at the end of the trial and give both sides a fair and impartial trial?" The second juror answered: "Yes." The trial court also declined to strike this juror for cause.

Held: Affirmed.

Regarding the first juror, the Court noted that the trial court had found that she understood English well enough to impartially serve on the panel. The Court found it important that, before the first juror's colloquy with the prosecutor regarding her ability to understand English, the juror and the court discussed her concerns about missing work. The Court also observed that the trial court could also consider that the first concern the juror raised regarding jury service was her work schedule, not her limited understanding of English. Additionally, the Court quoted the U.S. Supreme Court that "jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges."

Regarding the second juror, the Court repeated that the test of impartiality is not the absence of any preconceived views but the juror's ability to lay aside those views and render a verdict based on the law and the evidence. In this case, the Court acknowledged that the second juror noted the possibility

that his views as a parent could influence his ability to be impartial; however, the Court pointed out that when the trial court specifically asked if he would "be able to listen to the evidence and the law" and "be able to be fair and impartial to both sides," he answered, "Yes." Additionally, the Court noted that the juror had affirmed earlier in the voir dire that he understood the presumption of innocence and was able to follow the rule of law. Accordingly, viewing the voir dire as a whole, the Court ruled that the trial court did not abuse its discretion by finding that the second juror could be fair and impartial.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0180221.pdf

Harris v. Commonwealth: October 11, 2022

Loudoun: Defendant appeals his conviction for Assault and Battery on Juror Selection issues.

Facts: During voir dire at the defendant's trial for an assault, a potential juror said that she had been a victim of sexual assault and domestic violence. But she was also "very aware that people make accusations that are not true" that "can destroy someone's life." She said it was "a deeply-felt situation" that she "would be very concerned about." When the Commonwealth asked if she could presume the defendant's innocence, she responded, "I think so because I have also known personally some people who have been put through the wringer that were found to be completely innocent of things, so I am very much aware that that's not to be taken lightly."

Upon further questioning by defense counsel, the potential juror said that "domestic abuse [was] a huge issue for [her]" and that her "biggest fear" was that "nothing ever be tainted by false accusations because that works against anybody who has ever been abused." She admitted concern that she would "bend over backwards so much with the burden of proof" because false accusations caused her to "just go crazy." When asked if she could still follow the court's instructions, she answered, "Yeah, I think so." The trial court struck the juror for cause on the Commonwealth's request, over the defendant's objection.

Defense counsel told the jury that it would hear evidence that the defendant had been drinking and asked if any prospective jurors had a "history with alcoholism" or would discount the defendant's testimony if they heard that he had been drinking. Another potential juror answered that his father was an alcoholic. He stated that he was "very well aware of what alcoholics can do, how they lie, how they deceive"; he said it would be "hard to say how that would play into [his] thought processes." When defense counsel asked if that would affect the potential juror's ability to weigh the evidence, he responded, "No. Not weighing the evidence, but just understanding the nature of alcoholics." The trial court denied the defendant's motion to strike that juror for cause.

Held: Affirmed.

Regarding the first juror, the Court found that the trial court reasonably concluded that the potential juror's ambivalent answer — "I think so" — to the question of whether she could follow the

law did not rehabilitate her ability to be impartial. The Court repeated that merely giving "expected answers to leading questions" does not rehabilitate a prospective juror.

Regarding the second juror, the Court noted that there was evidence presented that the defendant was an alcoholic. The Court pointed out that the juror expressed no view about the credibility of a witness who had merely consumed alcohol on a particular occasion.

Full Case at:
https://www.vacourts.gov/opinions/opncavwp/1413214.pdf

Grant v. Commonwealth: August 30, 2022

Hampton: Defendant appeals his conviction for Possession of a Firearm on Admission of Video Evidence, Allowing Replay of Evidence, Striking a Juror for Cause, and Denial of a Mistrial.

Facts: The defendant, a convicted felon, carried a firearm to a gambling house. A surveillance camera recorded a security guard taking the firearm from the defendant. Once inside, the defendant then obtained another firearm from a friend. Later, several men entered and shot several people, including the defendant. The defendant went to the hospital with another victim, but not before retrieving his original firearm from the security guard. The other victim died at the hospital.

Police interviewed the defendant and he confessed to carrying the firearm. He also identified himself and his firearm in the surveillance video. At trial, the defendant objected that the admission of the surveillance video violated the Confrontation Clause because the custodian of the video could not be confronted and cross-examined. The trial court overruled his objection.

During jury selection, one juror revealed that her brother had a felony conviction. She stated that there was nothing about that case that would prevent her from being a fair and impartial juror in the instant case. The Commonwealth then asked: "during the trial you may hear testimony that the Defendant was shot on the very same date that he allegedly committed this crime. Would the fact that the Defendant got shot make you feel sympathetic toward him?" The juror responded that it would. However, the juror denied that it would affect her judgment regarding guilt, innocence, or sentence.

The Commonwealth moved to strike the juror for cause based on her response that she would feel sympathetic toward the defendant if he was shot. Over the defendant's objection, the trial court granted the motion.

At trial, when the Commonwealth played the audio-recorded police interview for the jury, there was a problem with low volume. On the second day of trial, the Commonwealth replayed the final ten-to-twelve minutes of the recorded police interview for the jury over the defendant's objection. The defendant unsuccessfully argued that this replay prejudiced him by giving undue emphasis to this portion of the Commonwealth's evidence. The trial court found that when the recording was first played for the jury, the "audio quality was compromised at best, or it had some type of feedback." The trial court gave the jury an instruction that explained that the purpose of the replay was "so you can hear that evidence and evaluate that evidence."

At the end of the trial, the jury returned a verdict. The trial court assembled and polled the jurors. However, during polling, one of the jurors stated "no" to the question "is this your unanimous verdict." The trial court instructed the jurors to return to deliberations. The trial court instructed the jury:

> "to deliberate to make sure everyone's views are fully and fairly expressed in whatever verdict you have. If you are at an impasse and you have some interest in retiring for the night, that is fine. We will entertain that. Just let the deputies know. But I at least want to give the jury, out of my presence, out of the Court's presence, the opportunity to fully and fairly express their views and see where it goes from there. All right. So the Court does not find the verdict is unanimous at this time. I'm going to instruct you to retire to resume your deliberations, and we'll just stand by and let us know."

The trial court denied the defendant's motion for a mistrial. The jury later returned with a unanimous verdict.

Held: Affirmed.

The Court first addressed the video surveillance video and ruled that admission of the surveillance video did not violate the Confrontation Clause because the video served as a silent witness, not as the statement of a missing or unavailable witness. The Court then addressed the replay of the audio recording, and concluded that, since the purpose of the replay was not to emphasize the evidence but to ensure that the jury had an opportunity to hear and consider the evidence, the trial court did not abuse its discretion in allowing the replay of a segment of the recorded police interview.

Regarding striking the juror for cause, the Court did not find manifest error in the trial court's finding of a high potential that the juror would not be impartial based on the totality of her answers.

Lastly, the Court ruled that the trial court did not err in denying the defendant's motion for a mistrial based on a polled juror's statement that the reported guilty verdict was not her verdict. The Court explained that, when the polling of the jury revealed that the guilty verdict was not unanimous, the trial court was authorized to direct the jury to resume deliberations. The Court pointed out that Rule 3A:17(D) provides that "[i]f upon the poll [of the jury], all jurors do not agree, the jury may be directed to retire for further deliberations or may be discharged."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0827211.pdf

Juror Misconduct

Virginia Court of Appeals
Unpublished

Jackson v. Commonwealth: April 25, 2023

Amelia: Defendant appeals his conviction for Distribution, Second Offense on Jury Instruction, Juror Selection and Misconduct issues, Admission of a Prior Conviction, and denial of a Continuance at Sentencing.

Facts: The defendant distributed cocaine after having previous convictions for that offense. During voir dire, a juror stated that she knew the defendant because she "know[s] a lot of people in Amelia County." She said she "never spent time with" the defendant and further explained, "I know his wife more than I know him. I don't spend time with her either, but I know her." Despite this, she maintained that her knowledge of the defendant would not impact her ability to judge the case fairly and impartially. No one moved to strike the juror and she sat on the panel at trial.

At trial, the Commonwealth introduced the defendant's prior conviction and sentencing order from the same jurisdiction involving a defendant with the same name and birth date as the defendant. The defendant objected, arguing that the Commonwealth did not establish that the defendant was the person named in the order, but the trial court overruled the objection.

At trial, a cooperating witness testified for the Commonwealth. The defendant requested a jury instruction based on U.S. v. Luck, but the trial court denied it. The instruction would have stated: "The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant."

At sentencing, the defendant informed the court that he was not ready to proceed with sentencing as scheduled because he still wished to file a motion to set aside the verdict; in addition, believing the trial court would grant the motion for transcripts, he had informed three of his sentencing witnesses that they did not need to appear for the hearing. The trial court denied the continuance.

After trial, the defendant filed a motion to set aside the verdict, asserting that several years earlier, the same juror who had denied knowing the defendant had a conversation with the defendant's wife, in which the juror made comments about the defendant's previous infidelity to his wife. After the trial, the wife alleged that the juror approached her stating, "I'm so sorry." The defendant argued that the juror misrepresented her impartiality under oath during voir dire because she minimized the extent to which she knew the defendant and how that prior knowledge affected her opinion of him. He asserted that the conversation with the wife, despite being nearly a decade old at the time of trial, demonstrated that the juror "held a poor opinion" of the defendant's character and thus secretly harbored bias towards him. The trial court denied the motion and refused to hold an evidentiary hearing regarding the allegation.

Held: Affirmed.

Regarding the prior conviction, the Court repeated that the Identity of names carries with it a presumption of identity of person, the strength of which will vary according to the circumstances. The Court ruled that the trial court did not err in admitting the prior conviction order and allowing the jury to determine if the defendant was the same person named in the order.

Regarding the rejected jury instruction, the Court found that under Lovitt, "the law of this Commonwealth does not require a fact finder to give different consideration to the testimony of a government informant than to the testimony of other witnesses."

Regarding the juror, the Court pointed out that the juror affirmed during voir dire that she could make an impartial decision based on the evidence at trial. The Court also noted that, when she acknowledged during voir dire that she knew the defendant, the defendant did not question her about any specifics of that relationship or what opinion she held of the defendant. The Court ruled that the trial court reasonably determined that the defendant had not presented credible allegations of bias that undermined the prior determination of impartiality reached by the court at the conclusion of the voir dire process.

Regarding the defendant's request to continue sentencing, the Court ruled that the defendant failed to demonstrate prejudice from the denial of the continuance. The Court agreed that the defendant released his sentencing witnesses at his own peril based on a mere assumption that the court would grant the continuance.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0437222.pdf

Hetle v. Commonwealth: February 14, 2023

Fairfax: Defendant appeals his convictions for Murder and Use of a Firearm on Juror Misconduct and Admission of Prior Bad Acts.

Facts: After a series of disputes, the defendant shot his neighbor repeatedly, killing him.

During trial, a juror saw a trial spectator photograph some of the jurors outside the courthouse the day before. The juror informed the trial court that she did not communicate with anyone else about her reported observations. The trial court instructed the juror not to share her reported observations with anyone else.

At trial, over the defendant's objection, his son testified that the defendant had referred to the victim "in a racial derogatory manner." Specifically, the defendant's son testified that at least ten times, the defendant referred to the victim using racial slurs which the defendant's son identified.

At trial, the Commonwealth also introduced a defendant's recorded telephone call from jail to the defendant's wife. The defendant objected that because the call was an intended confidential spousal communication, the call was protected from disclosure under § 19.2-271.2 and inadmissible under Virginia Rule of Evidence 2:504(b). The defendant argued that his call from the jail to his wife was protected from disclosure as an intended confidential communication because the jail's telephone system provided his only means of communicating with his wife while he was incarcerated. The trial court overruled the defendant's objection.

Held: Affirmed. The Court held that the trial court did not err in refusing to remove the juror mid-trial when the juror assured the court that her observation of a trial spectator photographing jurors

outside the courthouse would not affect her performance of her duties as a juror in accordance with her instructions and her oath. Additionally, the Court held that the trial court's contested evidentiary rulings did not constitute reversible error.

Regarding the juror, the Court found that, given the juror's assurances that

(i) her observation of a trial spectator photographing jurors would not affect her ability to be fair and impartial and

(ii) she would not inform her fellow jurors about her observation,

the Court ruled that the trial court did not abuse its discretion by refusing to remove the juror. The Court agreed with the trial court that there was no basis for finding that the juror's reported observation would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath.

Regarding admission of the defendant's racial slurs, the Court held that the trial court did not err in admitting testimony about the defendant's use of racial slurs in reference to the victim. The Court held that the trial court did not abuse its discretion in finding that the danger of unfair prejudice did not substantially outweigh the probative value of the contested evidence. The Court reasoned that the defendant's use of racial slurs in reference to the victim related to the malice element of murder. The Court concluded that the trial court reasonably concluded that the evidence of the defendant's use of racial slurs did not invite the jury to decide the case based on an unrelated factor or on inflamed passions instead of probative evidence.

Regarding the jail call, the Court noted that both parties were advised that it might be recorded and subject to monitoring at any time. In addition to the automated message informing the defendant and his wife that the call was subject to monitoring and recording, the Court noted that the defendant told his wife that the call was being recorded and she replied, "I know." Under these circumstances, the Court found that the defendant's phone conversation did not qualify as a communication made privately between spouses.

The Court concluded that, even if the defendant had no means of having private, confidential communications while he was incarcerated, this circumstance would not protect his monitored communications from disclosure as if they were private, confidential communications. Thus, the Court ruled that the recorded call was not a confidential communication as defined in Rule 2:504(b)(2) and the trial court did not err in admitting the call into evidence.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0304224.pdf

Terry v. Commonwealth: December 13, 2022

Danville: Defendant appeals his conviction for Murder, Use of a Firearm, and Shooting into a Vehicle on Juror Misconduct issues.

Facts: The defendant shot and murdered a man. Prior to trial, the parties conducted extensive voir dire and struck several jurors due to their relationships with various witnesses.

After trial, the defendant filed a motion to set aside the verdict. His motion to set aside alleged that one of the jurors answered questions falsely on voir dire regarding her relationship to the victim, the defendant, and to the Commonwealth's key witness. The trial court held a hearing and called the juror as a witness.

At the hearing, the juror explained that she did not acknowledge a relationship with the witnesses or the victim during voir dire because she didn't recognize them by name only. She knew the witness by a different name and had not seen him in years, she worked with the victim four years prior, for only two weeks, and knew him by a different name, and she barely knew the defendant. The defendant himself denied having ever spoken to the juror in his life. The juror testified that she did not even know the victim's real name, that she had known him for only two weeks, and that she found out about his death through Facebook (as opposed to a call from a family member or mutual friend). According to her testimony, she did not even look up the events surrounding his death. The juror testified that she made her decision based on the evidence at trial and was not biased.

The trial court found the juror to be credible and believed her explanations. The trial court denied the defendant's motion.

Held: Affirmed. The Court did not find error in the trial court's decision and explained that it was not plainly wrong for the court to determine the juror answered honestly during voir dire, and her incorrect answer was not given intentionally.

The Court applied the U.S. Supreme Court's test from *McDonough*. Under this test, a litigant must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.

The Court found that the defendant failed to prove that a relationship between the juror and witnesses, victim, or defendant would have supported a valid challenge for cause. The Court acknowledged that a relationship by blood or marriage to a party or victim is one of the exceptional circumstances in which the potential for prejudice is inherent. However, in this case, the Court found that the relationship between the witnesses and the juror was not sufficient to establish inherent prejudice. The Court noted that § 19.2-262.01 considers whether the juror is related to either party, and this inherent prejudice also applies where a juror is related to a victim. However, in this case, the Court noted that the defendant provided no evidence as to why the juror would be biased against the defendant simply because she had known him in childhood.

Regarding the juror's relationship with the victim, the Court found that the relationship between the juror and the victim did not call into question most of the factors in § 19.2-262.01 or Rule 3A:14; the juror was not related to the victim, had no interest in the cause, did not indicate she had formed any opinion about guilt, and did not acknowledge she was sensible of any bias or prejudice therein. The only factor the Court considered is whether her relationship with the victim caused her to develop a bias against the defendant. The Court emphasized that, even where a juror has some type of non-familial relationship to the defendant, they are not necessarily incompetent to serve as a juror.

Lastly, the Court also rejected the defendant's argument that the Court should reverse the trial court "because it must maintain public confidence in the integrity of the judicial system, including jury selection." In a footnote, the Court acknowledged that allowing a juror to remain impaneled despite a familial relationship to a witness may, in some cases, be sufficient to erode public confidence. However,

in this case, the Court pointed out that the juror was only alleged to be related to a witness, and the nature of their relationship was not proven. The Court found that insufficient to establish that the juror's position on the jury would erode public confidence in the integrity of the criminal justice system. "For non-familial relationships, the public confidence principle requires a contemporaneous or continuing relationship, which was not proven here."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0187213.pdf

Juveniles

Virginia Court of Appeals
Unpublished

Lowe v. Commonwealth: February 14, 2023

Greene: Defendant appeals the Dismissal of his Appeal from J/Dr Court on Waiver of his Appeal.

Facts: The defendant entered into a plea agreement in the JDR court where the Commonwealth had entered a nolle prosequi on one charge of assault and battery on a family or household member under § 18.2-57.2, the defendant stipulated to facts sufficient on a charge of simple assault under § 18.2-57 that had been committed against a family or household member, and the JDR court found that the defendant was eligible for a deferred disposition under § 18.2-57.3. The JDR court placed the defendant on probation for six months with the condition that he have no direct or indirect non-work-related contact with the victim.

The JDR court indicated these rulings by checking off certain boxes and writing on the back of the arrest warrant, in addition to entering a "Probation Intervention Order" stating that the court was deferring judgment and was placing the defendant on supervised probation for six months. The JDR court also checked a box on the dispositional section on the back of the arrest warrant that stated, "First Offender order attached and incorporated." However, the JDR court did not check the box on the back of the arrest warrant stating that the court would "place accused on probation, §§ 4.1-305, 18.2-57.3, 18.2-251, 19.2-303.2, or 19.2-303.6."

Soon thereafter, the defendant violated probation. The JDR court adjudicated the defendant guilty of simple assault under § 18.2-57 after finding that he violated his probation by making derogatory and threatening comments towards the victim on his personal social media account. The defendant appealed the finding to the circuit court, but the Commonwealth moved to dismiss the appeal under § 18.2-57.3(F). The defendant objected that § 18.2-57.3(F) did not apply to him, contending that that JDR courts do not have jurisdiction over simple assault charges under § 18.2-57 where the victim is not a family or household member.

The circuit court found that, pursuant to § 18.2-57.3(F), the defendant waived his right to appeal the judgment of the JDR court. The circuit court acknowledged that the JDR court did not check off the

box on the back of his arrest warrant stating that the court was placing him on probation under § 18.2-57.3. However, the circuit court reasoned that the JDR court would not have had the authority to grant the defendant a deferred disposition and place him on probation subject to certain conditions unless the JDR court was acting pursuant to its statutory authority under § 18.2-57.3.

Held: Affirmed.

The Court first held that the JDR court had subject matter jurisdiction over the case under §16.1-241(J). The Court reasoned that, given the limited record of the JDR court proceedings, whether the defendant entered into a deferred disposition under § 18.2-57.3 was a question of fact for the circuit court to decide. The Court granted the Commonwealth "the reasonable and fairly deducible inference" that the JDR court, in entering a deferred disposition under § 18.2-57.3, did so based on the fact that the defendant had committed simple assault under § 18.2-57 where the victim was a family or household member.

The Court then concluded that the defendant was therefore subject to the requirement in §18.2-57.3(F) that he shall have no right to appeal to the circuit court if he was adjudicated guilty after violating a term or condition of his probation. Accordingly, pursuant to § 18.2-57.3(F), the Court ruled that the defendant had no right to appeal to the circuit court. Thus, the Court found that the defendant was not denied his statutory right to appeal to the circuit court under § 16.1-296.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0236222.pdf

Unger v. Commonwealth: January 10, 2023

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

Facts: The defendant has a four-year-old son who is on the autism spectrum. Due to previous issues, the defendant must follow a safety plan set up by DSS regarding her child, who often had absconded from the home. As part of the plan, the defendant had since put multiple locks on the doors and installed an alarm system. She also built a six-foot-tall fence around the property. Nevertheless, possibly because the defendant may have left a deadbolt unsecured, the child escaped the home early one morning.

At approximately 7 a.m., a neighbor located the child in a backyard and brought the child back to the defendant's home. The neighbor spent several minutes banging on the defendant's door until the defendant finally answered. The defendant revealed that she had been asleep. The defendant was angry and yelled at the neighbor, but took her child back into the home. The neighbor estimated that from when she found the child to when he was returned to the defendant was at least 20 minutes.

The Commonwealth brought the charge in this case by direct indictment. Prior to trial, the defendant argued that the circuit court did not have jurisdiction over this matter pursuant to § 16.1-241. The defendant contended that, because this was a criminal case with a minor victim, it could not be

brought by direct indictment to the circuit court because § 16.1-241 vests "exclusive original jurisdiction" in J&DR courts over matters involving "[a]ny parent . . . of a child . . . [w]ho has been abused or neglected." The trial court rejected this argument.

Held: Reversed. The Court ruled that the circuit court had jurisdiction to hear the defendant's case. However, the Court found that the evidence was insufficient to prove a willful act or omission, and therefore the Court held that the trial court erred in finding the defendant guilty of contributing to the delinquency of a minor.

The Court first rejected the defendant's argument regarding jurisdiction. The Court applied the Supreme Court's ruling in *Payne*, which held that, although § 16.1-241 vests in J&DR courts exclusive original jurisdiction to conduct preliminary hearings in certain cases, this jurisdiction does not extend to when a grand jury directly indicts a defendant. Instead, under *Payne,* where an adult accused is directly indicted by a grand jury, without having been previously arrested and charged, the jurisdiction of the circuit court is thereby invoked, and no preliminary hearing is required, even though the victim of the crime involved may be a juvenile.

The Court repeated that that the legislative purpose of § 16.1-241 is to afford juvenile defendants and juvenile victims the protection and expertise of the juvenile court during the preliminary, or certification, hearing stage of a criminal prosecution. Where there is a direct indictment, however, the Court explained that those preliminary stages are not at issue, and there are no protections or considerations that can be given a juvenile victim in a J&DR court that cannot be afforded in or commanded by a court of record following a grand jury's direct indictment of a defendant. In this case, the Court found no logical reason to conclude that the reasoning articulated in *Payne* does not apply with equal force to misdemeanor charges.

However, in this case, the Court found that the defendant's acts and omissions here did not satisfy the "willful" requirement. The Court repeated that under § 18.2-371.1, a parent's act or omission is "willful" only if an objectively reasonable person would understand that injury to the child is likely to result.

In this case, even given the child's propensity to abscond, the Court stated: "we cannot say that the law supports criminalizing a parent or guardian's failure to directly surveil their child every moment of a day… Here, viewed in the light most favorable to the Commonwealth, Unger was home, sleeping in T.W.'s bed, when he snuck out. She possibly had failed to secure one of the house's door locks the night before. An objectively reasonable person would not say that this was a willful act or omission that created a "substantial risk" of harm to T.W., or that this amounted to an "unreasonable absence or the mental or physical incapacity" on the part of Unger."

In a footnote, the Court distinguished the standard for felony child neglect under § 18.2-371.1 from the standard in this case. The Court explained that, although felony child neglect also involves a "willful act or willful omission," it also must be "so gross, wanton and culpable as to show a reckless disregard for human life," which is not required for a misdemeanor.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0003222.pdf

Mistrial

Virginia Court of Appeals
Unpublished

Veney v. Commonwealth: March 14, 2023

Richmond: Defendant appeals his convictions for Murder and related offenses on Denial of a Mistrial.

Facts: The defendant shot and killed a man. At trial, a witness testified that the defendant had tried to buy a gun from him before the murder but that he did he did not sell a gun to him. The Commonwealth then asked the witness about contrary statements he made to the grand jury in the same case. After acknowledging that he had previously testified that he sold a gun to the defendant on the night in question, the following exchange occurred:

Q: Which story is the truth?
A: This is the truth I'm telling you right now.
Q: Why didn't you tell the truth to the grand jury?
A: At the time, I was just scared.
Q: Who were you scared of?
A: I was scared of the whole fact, you know, being involved.
Q: Being involved, or were you scared of a person?
A: Scared of — well, scared of a person also.
Q: What person were you scared of?
A: [The defendant.]

Defense counsel objected and sought a mistrial. The Court sustained the objection but denied the motion for mistrial, instead giving a cautionary instruction to the jury. The defendant argued that, once the trial court determined that the testimony was prejudicial, it was compelled to grant the motion for a mistrial.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion in denying the motion for a mistrial.

The Court noted that the trial court promptly and explicitly instructed the jury to disregard the objectionable testimony and to not consider it when weighing the evidence. In this case, the Court pointed out that the evidence established multiple acts of aggression by the defendant from which the jury could have inferred malice. The Court also pointed out that the challenged testimony did not come from the Commonwealth's principal witness; instead, he was only one of multiple witnesses who interacted with the defendant that night.

The Court distinguished this case from *Mills,* noting that, unlike the trooper in *Mills*, the witness was not a law enforcement officer with experience testifying in court or the semblance of expert knowledge. "Simply put, the evidence does not suggest that the testimony remained on the minds of the jury and influenced their verdicts."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0691212.pdf

Rogers v. Commonwealth: December 13, 2022

Accomack: Defendant appeals his conviction for Conspiracy to Commit Capital Murder and related charges on Denial of a Mistrial.

Facts: While incarcerated, a man arranged to have the defendant and another man kill an informant who had provided information against him. After he and his accomplice shot the informant, the defendant contacted the man again for payment. At trial, the prosecutor asked the investigating officer about his investigation into the defendant's brother. The following testimony ensued:

Q: Did you participate in any investigations concerning [the defendant]?

A: Yes, sir. Over the years—I've been on the task force for twelve years.

Q: Without going into Mr. Rogers' –

A: On several instances I've dealt with [the defendant]. Yes.

Q: Most recently being?

A: Most recently is two drug purchases in 2017 which led to a search warrant at his residence . . .

Q: And prior to—had that gone to trial?

A: One of the undercover buys has gone to trial. [The defendant]was found guilty. There is another one that's still pending sentencing; and the results of the search warrant just came back with DNA testing and fingerprints; and [the defendant], and the other brother, Rovante, have all been charged with conspiracy to commit—excuse me—conspiracy to distribute cocaine.

The defendant immediately moved for a mistrial, arguing that the prosecutor "led" the officer to testify about the defendant's pending charge and that the officer's remark was too prejudicial to be cured by an instruction. The trial court struck the testimony from the record and instructed the jury not to consider it. The trial court denied the motion for mistrial.

Held: Affirmed. The Court found that the trial court correctly concluded that, in the context of the Commonwealth's entire case, the officer's isolated statement about the defendant's pending drug charge was not so prejudicial that it could not be cured by an instruction to the jury. The Court contrasted this case with the *Lewis* and *Robinson* cases, where a prosecutor repeatedly asked improper questions. In this case, though, the Court noted that the prosecutor's questions attempted to solicit testimony about the investigation into the defendant's brother, not the defendant.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1242211.pdf

Grant v. Commonwealth: August 30, 2022

Hampton: Defendant appeals his conviction for Possession of a Firearm on Admission of Video Evidence, Allowing Replay of Evidence, Striking a Juror for Cause, and Denial of a Mistrial.

Facts: The defendant, a convicted felon, carried a firearm to a gambling house. A surveillance camera recorded a security guard taking the firearm from the defendant. Once inside, the defendant then obtained another firearm from a friend. Later, several men entered and shot several people, including the defendant. The defendant went to the hospital with another victim, but not before retrieving his original firearm from the security guard. The other victim died at the hospital.

Police interviewed the defendant and he confessed to carrying the firearm. He also identified himself and his firearm in the surveillance video. At trial, the defendant objected that the admission of the surveillance video violated the Confrontation Clause because the custodian of the video could not be confronted and cross-examined. The trial court overruled his objection.

During jury selection, one juror revealed that her brother had a felony conviction. She stated that there was nothing about that case that would prevent her from being a fair and impartial juror in the instant case. The Commonwealth then asked: "during the trial you may hear testimony that the Defendant was shot on the very same date that he allegedly committed this crime. Would the fact that the Defendant got shot make you feel sympathetic toward him?" The juror responded that it would. However, the juror denied that it would affect her judgment regarding guilt, innocence, or sentence.

The Commonwealth moved to strike the juror for cause based on her response that she would feel sympathetic toward the defendant if he was shot. Over the defendant's objection, the trial court granted the motion.

At trial, when the Commonwealth played the audio-recorded police interview for the jury, there was a problem with low volume. On the second day of trial, the Commonwealth replayed the final ten-to-twelve minutes of the recorded police interview for the jury over the defendant's objection. The defendant unsuccessfully argued that this replay prejudiced him by giving undue emphasis to this portion of the Commonwealth's evidence. The trial court found that when the recording was first played for the jury, the "audio quality was compromised at best, or it had some type of feedback." The trial court gave the jury an instruction that explained that the purpose of the replay was "so you can hear that evidence and evaluate that evidence."

At the end of the trial, the jury returned a verdict. The trial court assembled and polled the jurors. However, during polling, one of the jurors stated "no" to the question "is this your unanimous verdict." The trial court instructed the jurors to return to deliberations. The trial court instructed the jury:

> "to deliberate to make sure everyone's views are fully and fairly expressed in whatever verdict you have. If you are at an impasse and you have some interest in retiring for the night, that is fine. We will entertain that. Just let the deputies know. But I at least want to give the jury, out of my presence, out of the Court's presence, the opportunity to fully and fairly express their views and see where it goes from there. All right. So the Court does not find the verdict is unanimous at this time. I'm going to instruct you to retire to resume your deliberations, and we'll just stand by and let us know."

The trial court denied the defendant's motion for a mistrial. The jury later returned with a unanimous verdict.

Held: Affirmed.

The Court first addressed the video surveillance video and ruled that admission of the surveillance video did not violate the Confrontation Clause because the video served as a silent witness, not as the statement of a missing or unavailable witness. The Court then addressed the replay of the audio recording, and concluded that, since the purpose of the replay was not to emphasize the evidence but to ensure that the jury had an opportunity to hear and consider the evidence, the trial court did not abuse its discretion in allowing the replay of a segment of the recorded police interview.

Regarding striking the juror for cause, the Court did not find manifest error in the trial court's finding of a high potential that the juror would not be impartial based on the totality of her answers.

Lastly, the Court ruled that the trial court did not err in denying the defendant's motion for a mistrial based on a polled juror's statement that the reported guilty verdict was not her verdict. The Court explained that, when the polling of the jury revealed that the guilty verdict was not unanimous, the trial court was authorized to direct the jury to resume deliberations. The Court pointed out that Rule 3A:17(D) provides that "[i]f upon the poll [of the jury], all jurors do not agree, the jury may be directed to retire for further deliberations or may be discharged."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0827211.pdf

Plea Agreements

Virginia Court of Appeals
Unpublished

Rivas-Marquez v. Commonwealth: June 21, 2022

Spotsylvania: The defendant appeals the revocation of his suspended sentence on Unconscionability.

Facts: The defendant sexually assaulted a four-year-old child. As part of the plea agreement to Indecent Liberties, the trial court imposed a total sentence of fifty years in prison, with forty-eight years suspended. The plea agreement further provided that the defendant, a citizen of El Salvador whose presence in the United States violated federal immigration laws, "shall immediately upon the completion of his active incarceration leave the United States either through deportation or at his own expense" and that he "shall not return to the United States." The defendant agreed that, if he returned to the United States, he would be in violation of the plea agreement and "shall serve the remainder of his suspended sentence as active incarceration and the sentences shall run consecutively."

As a result of his conviction, the federal government deported the defendant. Howeve, the defendant returned unlawfully. At his probation revocation hearing, the defendant claimed that (1) he

did not speak English well and did not understand the terms to which he had agreed and (2) the terms excessively punished reentering the United States. The trial court rejected his arguments.

Held: Affirmed. In a *per curiam* opinion, the Court noted that unconscionability contains both procedural and substantive components, both of which must be met to render a contractual provision unenforceable. In this case, the Court complained that the defendant provided no evidence that the procedures were insufficient to counteract any inequity arising from his language skills.

Analyzing the agreement's fairness, the Court explained, required that it assess not only what the defendant gave up in the agreement, but also the benefit he received. The Court pointed out that, at the time the defendant entered into the agreement, he was charged with four counts of rape and one count of attempted forcible sodomy. Because the victim was under eighteen years old, had the defendant been convicted of these charges at trial, each rape conviction would have carried a mandatory life sentence. The Court found that the agreement was not substantively unconscionable.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0944212.pdf

Pretrial Identification

Fourth Circuit Court of Appeals

U.S. v. Ivey: February 14, 2023

N.C.: Defendant appeals his convictions for Robbery and Use of a Firearm on Pretrial Identification issues.

Facts: The defendant and a confederate robbed a nightclub and killed a patron, shooting him several times. Police responded quickly and identified the defendant's vehicle, which matched a description given by victims. The defendant and his confederate eluded police briefly, crashed, and then fled on foot. Police immediately captured the defendant's confederate. Police also recovered a gun, stolen money, stolen personal property, and a hooded sweatshirt that had the defendant's DNA from the vehicle.

Police then captured the defendant nearby. While the defendant was in handcuffs in the back of a police cruiser, police brought 14 witnesses from the robbery to the defendant's location for a "show-up" identification. The officer told each witness that the individual the witness was about to see "fits the description somehow" of an alert that was put out of the robbery/homicide at the club, but she didn't know whether he was the perpetrator. Although she told each witness that the witness did not have to make an identification, the officer did not ask the witnesses to describe the suspects before allowing them to observe the defendant.

Only two witnesses identified the defendant, stating that he "looked like" one of the perpetrators. The officer did not ask the witnesses how sure they were that they had correctly identified

the defendant as one of the perpetrators. One of the witnesses told police that the defendant had been wearing a black T-shirt; in fact, he had been wearing a hooded sweatshirt. However, when police captured him and held him during the show-up, the defendant was wearing a black t-shirt.

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

Held: Affirmed.

The Court first concluded that the procedure used during the show-ups in this case was impermissibly suggestive and that the identifications were not sufficiently reliable. Therefore, the Court held that the identifications should not have been admitted into evidence. However, in this case, the Court found that the evidence that the defendant was guilty was overwhelming, and therefore, the error was harmless.

In this case, while the facts of the show-up may not have constituted a due process violation, the Court expressed the view that they were highly suggestive of the defendant's guilt. The Court also found that the admonishments that the officer gave to the witnesses "were not enough to overcome the strong inference of guilt -- and the corresponding risk of misidentification -- resulting from the other circumstances of the show-ups."

The Court complained that the officer's failure to ask the witnesses two of the most important questions guiding reliability analysis, that is, if the witness could describe the perpetrator and how certain the witness was in their identification, prevented the Court from determining that the identifications were reliable, as it had in *Saunders*.

Judge Rushing filed a concurring opinion, in which he disagreed with the finding that the identification procedure was impermissibly suggestive.

Full Case At:
https://www.ca4.uscourts.gov/opinions/184296.P.pdf

Virginia Court of Appeals
Unpublished

Sample v. Commonwealth: June 28, 2022

Northampton: Defendant appeals his conviction for Attempted Robbery on Admission of an Out-of-Court and In-Court Identification.

Facts: The defendant attempted to rob the victim at gunpoint, but the victim resisted and fought off the defendant after a struggle. During the struggle, victim was "face-to-face" with the defendant, although the defendant wore a mask over his nose and mouth. Although it was nighttime, the area was well-lit. When police responded, the victim described the defendant in great detail and provided his direction of travel.

The description that the victim provided matched the defendant almost exactly and he lived in the direction of travel that the victim described. The officer recognized the defendant from the victim's description and retrieved a photo of the defendant. The victim's description of the defendant was accurate to within an inch of the defendant's actual height, within several pounds of his actual weight, and within a year of his actual age. While the victim incorrectly said that he thought the defendant was white, the defendant is of mixed race and the officer described him as "pale-ish."

Within an hour of the attack, the officer showed the single photo to the victim, stating, "I have a picture of somebody that I was thinking about, but I don't know if, you said you just saw their eyes." He then showed the victim a photo of the defendant on his phone, and the victim immediately said, "Yep." The officer then asked, "That's him?" The victim replied, "Yep." The officer then asked again, "You think that's definitely him?" The victim reiterated, "Yeah, those big brown eyes, yep." The victim then said that the defendant was "light complected like that." The officer then asked, "kind of like pale-ish?" The victim replied, "Yeah."

Police recovered the gun, a BB gun, from the crime scene. DFS located the defendant's DNA on 3 places on the gun, including the trigger.

Prior to trial, the defendant moved to exclude the victim's identification, but the trial court denied the motion.

Held: Affirmed. In a footnote, the Court noted that the law is clear that an officer's suggestive photo identification procedure is not a rule requiring automatic exclusion. Instead, only if the photo identification procedure is suggestive does a court apply the *Neil v. Biggers* factors. The Court ruled that the out-of-court identification satisfied all five of the factors determining reliability in *Neil v. Biggers.*

The Court noted that the victim had the opportunity to view the defendant and explained clearly how he displayed a high degree of attention during the time of the attempted robbery. Most importantly, the Court explained, the victim stated three times that he was certain that the defendant was his assailant when he viewed a photo of him within less than an hour of the attempted robbery.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0161211.pdf

Restitution

Virginia Court of Appeals
Unpublished

Puckett v. Commonwealth: August 9, 2022

Patrick: Defendant appeals his sentence for Malicious Wounding on the Restitution Award.

Facts: The defendant attacked and stabbed the victim repeatedly from behind as he was walking away, declaring that he was "killing" the victim. The victim suffered serious injury as a result. After

convicting the defendant, the trial court ordered the defendant to pay $22,691.01 in restitution to the Virginia Department of Medical Assistance Services ("DMAS"), which had paid the medical bills for injuries suffered by the victim. The restitution order below did not award the actual victim of the malicious wounding any restitution.

Held: Reversed. The Court found it significant that the trial court stated that it was "required" to make an award, which the Court extrapolated from to conclude that, in the Court's view, the trial court did not grant discretionary restitution under § 19.2-305 (to an aggrieved party), but instead granted mandatory restitution under 19.2-305.1(B).

The Court examined § 19.2-305.1(B), the mandatory restitution statute, which specifically breaks down restitution awards based on the nature of the loss and to whom the award is made: "any person who … commits, and is convicted of, a crime in violation of any provision in Title 18.2 shall make at least partial restitution for any property damage or loss caused by the crime or for any medical expenses or expenses directly related to funeral or burial incurred by the victim or his estate as a result of the crime…." The Court rejected the Commonwealth's argument that any party suffering an economic loss is a victim for purposes of § 19.2-305.1(B).

The Court contrasted that statute with § 19.2-305, which states: that a "defendant placed on probation following conviction may be required to make at least partial restitution or reparation to the aggrieved party or parties for damages or loss caused by the offense for which conviction was had…" The Court reasoned that "victims" and "aggrieved parties" are not synonymous. Thus, the Court concluded that §§ 19.2-303 and 19.2-305 allow restitution to an "aggrieved party," which can include an individual who is not necessarily the direct subject of the crime. However, with respect to medical expenses, the victim who has incurred these expenses would be the proper recipient of the award pursuant to § 19.2-305.1(B).

The Court found that DMAS was not a "victim" in this case under § 19.2-305.1(B) and that it was not established that these medical expenses were "incurred by the victim" of the defendant's malicious wounding. The Court reasoned that an insurer does not suffer an unexpected hardship or loss by virtue of a victim's wounds; rather, it pays his medical expenses based on a contractual or (in DMAS' situation) statutory obligation.

The Court thus ruled that the trial court erred in concluding that it was required to make a restitution award to DMAS. The Court remanded the case to the trial court for the limited purposes of determining whether, consistent with § 19.2-305.1(B), the evidence supported an award of restitution to the victim for any "medical expenses . . . incurred by the victim . . . as a result of the crime." On remand, the Court also explained that the trial court may also consider, in its discretion, whether to award restitution to "an aggrieved party" (such as DMAS) under §19.2-305, rather than 19.2-305.1(B).

The Court concluded by warning that, when determining non-mandatory restitution under §19.2-305, a court "is well-advised to consider an offender's ability to pay," citing a recent concurrence by Judge Raphael in *Tyler v. Commonwealth*.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1002213.pdf

Copeland v. Commonwealth: December 29, 2022

Suffolk: Defendant appeals the Restitution award in her sentence for Embezzlement.

Facts: The defendant, while working as a cashier at a grocery store, embezzled money by stealing from her cash drawer for several months. The defendant admitted that she had stolen thousands of dollars to get her nails done and purchase a car. The store estimated that they were missing $27,458.56, but only had captured the defendant on video stealing about $8,000. During an interview, a loss prevention officer asked the defendant if the estimate of $27,458.56 restitution claim was accurate, and the defendant stated that it "probably" was a "reasonable figure for the total she had taken."

At a restitution hearing, the trial court awarded the full $27,458.56 over the defendant's objection.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion in awarding restitution in the amount of $27,458.56.

The Court repeated that, in seeking restitution, the Commonwealth is charged with proving damages by a preponderance of the evidence. Since only a preponderance of the evidence was necessary in this case to support the trial court's restitution award, the Court found that the loss prevention officer's testimony concerning the store's automated process for identifying the amount of shortages, the surveillance videos, and the defendant's previous admission that the total amount she was accused of embezzling was "probably right," met the preponderance of evidence standard.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0085221.pdf

Tyler v. Commonwealth: July 26, 2022

Charlottesville: Defendant appeals her sentence on Embezzlement on the Restitution Award.

Facts: The defendant embezzled nearly $650,000 from a law firm where she worked as a bookkeeper for seventeen years. After the theft, the Virginia State Bar investigated the law firm and sanctioned the firm for misconduct. The firm admitted that nobody at the firm reviewed the firm's bills or bank statements, which resulted in the firm failing to identify the embezzlement for over eight years. The VSB decision focused on the firm's failure to "perform the accountings, audits, reconciliations, or other responsibilities of client trust accounts," keep proper records, oversee, or reconcile accounts, and supervise the defendant, its nonlawyer employee.

At sentencing, the trial court awarded restitution for the amount stolen, as well as expenses of approximately $125,000. These expenses included:

(1) office expenses totaling $922.02, which included costs to order new checks for the new accounts the firm opened, change the office locks, and pay an overdraft fee;
(2) malpractice and real estate insurance costs totaling $14,060.50, which related to a tail end coverage fee and one of the firm's insurers' legal fees after the insurer sued the firm;
(3) legal fees totaling $14,622.50 arising from a lawsuit a client brought against the firm, the firm's lawsuit against Tyler, and other unspecified legal fees;
(4) forensic accounting costs totaling $34,493.75, including costs related to calculating the embezzled amount (forensic accounting fees). The firm had to hire a second accounting firm after the first accounting firm realized it lacked the resources to untangle the embezzlement's complexity;
(5) the Virginia State Bar sanction fee and audit costs totaling $11,216.30, resulting from a VSB complaint which alleged the firm failed to maintain certain records, reconcile its accounts, and oversee nonlawyer employees; and
(6) anticipated future costs totaling $29,075, which included costs for VSB-required audits every six months and for the forensic accountant's testimony.

The defendant objected to each of these expenses except the forensic accountant's testimony costs.

Held: Reversed in part, Affirmed in part. The Court agreed with the defendant that some of the expenses were too attenuated from her crime.

The Court began by repeating that a loss or damage is not too remote if a defendant's offense is a "but for" cause of the harm. The Court explained that examining "proximate cause" principles adds to a trial court's toolbox in reviewing restitution cases, but it does not control it. The Court emphasized that the law gives a trial court "freedom to draw on experience, common sense, and other legal principles in deciding whether a loss or damage was directly caused by the defendant's offense."

The Court first agreed that trial court properly awarded office expenses, such as changing account numbers, ordering new checks, and changing the office locks, because the defendant's conduct directly caused the expenses, and the firm incurred the expenses to restore it to its pre-crime status. The Court also agreed that the trial court properly awarded insurance costs. The Court noted that the costs were a result of lawsuits and fees caused by the defendant's thefts.

The Court also ruled that the trial court properly awarded litigation costs due to lawsuits from clients who did not receive money that the defendant stole. Lastly, the Court agreed that the because the defendant's embezzlement directly caused the firm to incur costs for forensic accounting, the trial court properly awarded the forensic accounting fees, as well as the forensic accountant's testimony fee.

However, regarding the VSB fees, the Court ruled that the defendant's crime was not the "but for" cause of the fees because the firm had independent duties to maintain and reconcile various financial records and supervise nonlawyer employees. The Court noted that the firm was independently required to maintain certain records, reconcile its client accounts, and supervise nonlawyer employees, regardless of whether the defendant was embezzling funds.

In this case, the Court noted that it was the firm's failed compliance that led to the VSB fees. The defendant's embezzlement was merely the "but for" cause of the revelation of the misconduct in which the firm was already engaging. Because the firm could have been sanctioned regardless of the

defendant's embezzlement, her crime was not a "but for" cause of the VSB fees. Therefore, the Court reversed the trial court's award of the VSB fees as restitution.

The Court also reversed the anticipated future costs consist of the audits the VSB required the firm to conduct every six months for two years. The Court explained that the defendant's embezzlement was not the "but for" cause of the audit expenses.

Judge Raphael filed a concurring opinion, proposing a different theory of restitution. He proposed that the VSB fees were subject to the 1775 doctrine of *ex turpi causa*, a doctrine that neither side had brought up in this case. Under that ancient theory, "No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If . . . the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, . . . he has no right to be assisted." Judge Raphael contended that the firm's costs were due to their own violation of the Rules of Professional Conduct and therefore were not compensable.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0993212.pdf

Sixth Amendment: Ineffective Assistance

Virginia Supreme Court

DeLuca v. Commonwealth: April 13, 2023
Aff'd Court of Appeals Ruling of October 26, 2021
Alexandria: Defendant appeals his convictions for Indecent Liberties and Online Child Exploitation on Refusal to Permit Withdrawal of his Guilty Plea

Facts: The defendant solicited a child he was tutoring on the Internet and convinced him to engage in various sexual activities, including anal intercourse. In his plea colloquy, the defendant represented that he had "discussed with my attorney any registration consequences under the Sex Offender and Crimes Against Minors Registry Act pursuant to Virginia Code § 9.1-900 et seq." and also affirmed that he "understood that as a consequence of this stipulation, my pleas will implicate a statutory duty to register under the Sex Offender and Crimes Against Minors Registry Act pursuant to Virginia Code . . . § 9.1-900 et seq."

At sentencing, however, the defendant sought to withdraw his guilty plea, claiming that he was "mistaken as to the effect" of the pleas because he believed he would need to register as a sex offender for only ten years and not for the remainder of his life. He claimed that claimed that two prior attorneys and his retained counsel that represented him at the time of his pleas had provided inaccurate information regarding his registration obligation. He also alleged that he had "looked" at books in the law library at the jail and conducted research on the Internet that confirmed his mistaken belief that his registration obligation would last only ten years.

However, during cross-examination, the Commonwealth played a recording of a jailhouse phone call between the defendant and his brother. During the conversation, the defendant discussed his

thoughts about seeking to withdraw his guilty pleas, implying that the victim likely would not want to go forward with the case because "he's going to just want it gone and done and over with." The defendant also expressed his preference to have a different judge sentence him.

The defendant's counsel then offered to provide his own "evidence" about the defendant's misunderstanding. The Court construed that as an attempt to testify, but offered to permit defense counsel to testify, over the Commonwealth's objection. Defense counsel conceded that he did not "know whether I gave him that incorrect information" but stated that he did not "think it originated with me." Counsel thought the defendant had developed the misimpression through "faulty research" and bad advice from prior counsel. He confirmed that the defendant had asked him to verify his understanding and that he had failed to "verify it correctly."

The trial court denied the defendant's motion to withdraw his plea, finding it incredible that three attorneys and the defendant's own research would all reach the same incorrect conclusion. The trial court also found that there would be prejudice to the Commonwealth due to the lapse of time and the failure of memory. The trial court also found that the defendant had made no showing of a good faith defense.

On appeal, the defendant complained of the trial court's refusal to permit him to withdraw his plea. The defendant also argued that the trial court erred by requiring defense counsel to testify during his motion to withdraw his guilty plea because doing so deprived him of the right to counsel. The Court of Appeals affirmed the trial court.

Held: Affirmed. The Supreme Court issued an order simply stating that the Court "affirms the judgment of the Court of Appeals for the reasons stated in *DeLuca v. Commonwealth*, 73 Va. App. 567 (2021)."

The Court of Appeals had first ruled that the defendant's Sixth Amendment right to counsel was not violated. The Court agreed that, in general, lawyers should not appear as witnesses in cases in which they are counsel. However, the Court also noted that there are exceptions to that rule, including RPC 3.7(a)(3), which allows a lawyer to appear as both counsel and a witness in the same proceedings if "disqualification of the lawyer would work substantial hardship on the client."

In this case, because counsel's testimony was never "prejudicial" to the defendant, the Court of Appeals had found that counsel's appearance as both lawyer and witness at the hearing was not automatically prohibited by the lawyer-witness rule. The Court of Appeals had pointed out that counsel's response to open-ended question asked by the trial court allowed him to provide the information he would have offered via proffer, and the mere fact that he was under oath and subject to cross-examination did not prevent him from attempting to advance the defendant's interests.

The Court of Appeals then applied § 19.2-296 and held that the trial court did not err in refusing to allow the defendant to withdraw his guilty pleas. In this case, the Court noted that the trial court's finding that the defendant's motive for withdrawing the pleas was a lie was a finding that the motion to withdraw was not filed in good faith. The Court of Appeals had agreed that the defendant's own words in the jail recording supported a conclusion that he was seeking to withdraw his pleas because the victim, now an adult, might decide to let the matter drop and in hopes of manipulating the proceedings so his case would be heard before a different judge.

Supreme Court Order At:
https://www.vacourts.gov/opinions/opnscvwp/1220185.pdf
Original Court of Appeals Ruling At:
https://www.vacourts.gov/opinions/opncavwp/1151204.pdf

Virginia Court of Appeals
Unpublished

Holman v. Commonwealth: June 12, 2022

Rockbridge: Defendant appeals his convictions for First-Degree Murder, Abduction, and related offenses on Sixth Amendment Conflict of Interest and Fifth Amendment *Miranda* grounds.

Facts: The defendant killed his former girlfriend, whom he tricked into meeting him by abducting her co-worker and forcing her to lure the victim to the scene. When his girlfriend fled in a vehicle, the defendant chased her and forced her car off the road, and then shot and killed her. The defendant fled, but police located him and surrounded him. With guns drawn, they ordered him to drop a handgun the defendant was holding. The defendant asked police to shoot him, but they refused, and he dropped his gun. Police placed him in handcuffs and engaged in the following dialogue with the defendant:

Officer: You have anything else on you that's going to hurt us, buddy?
Defendant: Nope.
Officer: Alright. You got anything in your pockets that's going to poke us, stick us? Anything like that?
Defendant: The real gun is over in the other parking lot in Debbie's truck. That one's a fake.
Officer: When you say, "the real gun," what are you talking about?
Defendant: The one that I shot Christina with.
Officer: You shot Christina with that gun?
Defendant: Not that. That's a toy gun.
Officer: Where's Christina at now?
Defendant: Christina's in the car.
Officer: Christina—is she the one in the car?
Defendant: Yea.
Officer: You shot her with the gun that's in your car? Defendant: I shot her with the [unintelligible].

The officer later testified that during the events leadings up to his encounter with the defendant, he had "faced an actively developing situation with limited information and that he did not necessarily know who [the victim] was and whether her location had been discovered by the police."

The defendant moved to suppress his statements due to the lack of *Miranda* warnings, but the trial court denied the motion. During trial, the defendant asked the trial court to remove his attorney, alleging a conflict of interest. The defendant's attorney had previously represented the murder victim's

sister, brother, and niece. However, those people were not co-defendants, witnesses, or otherwise involved in the case.

Held: Affirmed. The Court held that the trial court did not err by declining further inquiry into defense counsel's alleged conflict of interest, and the circuit court did not err by denying the defendant's motion to suppress the statements he made before being given a *Miranda* warning.

Regarding the *Miranda* claim, the Court found that the officer's initial questions were routine questions for police safety that were normally attendant to arrest and custody, and therefore did not constitute "interrogation" for the purposes of *Miranda*. The Court contended that the questions were not reasonably likely to elicit an incriminating response from the defendant, as the officer, who thought the handgun the defendant had been holding was real, could not have reasonably expected that the defendant would respond, "The real gun is over in the other parking lot in [the victim's] truck. That one's a fake." Finally, the defendant's response about the "real gun" was a volunteered statement, and thus is not protected under the Fifth Amendment.

The Court then concluded that the subsequent question ("When you say, 'the real gun,' what are you talking about?") fell under the public safety exception to *Miranda*. The Court noted that the officer believed that the handgun the defendant had been holding was real. Thus, the officer's sudden revelation about the "real gun" located in a vehicle in a public parking lot created an objectively reasonable need for the officer to inquire further to determine whether the real gun posed an immediate risk of danger to either the public or the police.

The Court explained that the officer's questions to the defendant about the victim were based on an objectively reasonable need to obtain more information about a woman that the officer had just learned had been shot and was potentially needing emergency medical care. For the Court, that this emergency pertained to a wounded woman, and not a discarded handgun, did not render the public safety exception to *Miranda* any less applicable, as "nothing in *Quarles* limits the application of the public safety exception to questions about the location of a missing weapon."

Regarding the alleged conflict of interest, the Court pointed out that the murder victim's sister, brother, and niece were not co-defendants at the trial, nor were they called as witnesses by the Commonwealth to testify against the defendant—circumstances that, if alleged, the Court believed could have raised an apparent conflict of interest. The Court contended that the defendant's counsel was in the best position to determine whether her prior representation of the victim's sister, brother, and niece would pose a significant risk of materially limiting her ability to represent the defendant. The attorney, in the Court's view, had the specific knowledge regarding the nature of her prior representation of the relatives, what legal responsibilities she owed to them, and whether those responsibilities could be jeopardized during the trial. The Court wrote: "We decline the invitation to impose a duty on the trial court to conduct further inquiry based on Holman's speculative allegation that, because Ms. Harris had represented Christina's relatives, Ms. Harris deliberately withheld information from Holman out of her bias in favor of Christina's family."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0830213.pdf

Sixth Amendment: Public Trial

Fourth Circuit Court of Appeals

U.S. v. Barronette, et. al.: August 18, 2022
46 F. 4th 177 (2022)
Baltimore: Defendants appeal their convictions for RICO and related offenses on Sixth Amendment public trial grounds.

Facts: The defendants operated a criminal street gang engaged in extensive violence and drug distribution. A wiretap revealed the defendants' communications in which they distributed drugs and tracked people whom they were conspiring to murder.

The trial concerned approximately a dozen murders. Two witnesses for the government were murdered, likely in connection with this case. During trial, two defendants assaulted marshals when being taken out of the courtroom; there was a physical fight in the gallery on the second day of trial; a number of verbal outbursts came from the gallery; a spectator was found in the gallery with a knife; a table in the lobby of the courtroom had been vandalized with the name of the gang scratched into it in several places; and the lead defendant allegedly made a call while imprisoned that had "a plausible interpretation of a request to pack the courtroom" when cooperating witnesses were testifying.

Ten days into the trial, the trial court implemented a partial reduction of the courtroom's capacity after several incidents that raised security concerns. The trial court advised counsel that it would authorize the marshals to limit the number of spectators in the gallery to twenty-five people if they became concerned about the number of people for security reasons and that additional observers would be diverted to an overflow room. Spectators in the overflow room could hear audio, but the video was limited to the seal above the bench.

The defendants argued that the trial court violated their Sixth Amendment rights to a public trial when it limited the number of people who could gather in the public gallery to twenty-five people, even though the courtroom could hold well over a hundred. One defendant moved for a mistrial, noting that on two occasions, marshals did not allow a spectator to go to the overflow room and instead asked to them leave the courthouse. One marshal told a spectator that the courtroom was "at capacity" and there was no "clearance" to open another courtroom. That spectator waited outside the courtroom and was admitted after the mid-afternoon break.

Held: Affirmed. The Court held that the trial court did not violate the defendants' rights to a public trial. The Court assumed, but did not decide, that the trial court had effectively closed the courtroom. The Court then reviewed the factors in *Waller*, which require that:

(1) the party seeking to close the hearing advances an overriding interest that is likely to be prejudiced,

(2) the closure is no broader than necessary to protect that interest,

(3) reasonable alternatives to closing the proceeding [were] considered by the trial court, and

(4) findings adequate to support the closure [were] made by the trial court.

The Court concluded that the trial court's decision to partially reduce the capacity of the courtroom met the *Waller* factors. The Court found that the trial court advanced overriding interests of maintaining order and preventing witness intimidation by ordering the partial closure. The Court found that the capacity restriction was "tailored to serve" the interest of security and preventing witness intimidation.

Full Case At:
https://www.ca4.uscourts.gov/opinions/194123.P.pdf

Speedy Trial

Virginia Court of Appeals
Published

Reedy v. Commonwealth: March 21, 2023

Bristol: Defendant appeals her conviction for Perjury on Constitutional Speedy Trial.

Facts: In February 2020, the defendant provided false information on an application for a concealed handgun permit. A grand jury returned an indictment for perjury in August 2020, and a capias was issued for the defendant's arrest on the same day. The Sheriff's Office received the capias but did not execute it until September 2021.

The defendant was immediately released on bond and her trial was set for November 2021. The defendant then moved to dismiss the case on constitutional speedy trial grounds on November 3, 2021. She contended that the negligent delay in arresting her following her indictment impaired her defense because she has problems with her memory. The trial court denied her motion.

Held: Affirmed. The Court applied the four factors under *Barker v. Wingo*

The Court first found that, because the time between the indictment and arrest exceeded a year, the length of delay was presumptively prejudicial and triggered consideration of the remaining factors. The Court repeated that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. The Court also noted that the defendant timely asserted her rights, filing a motion to dismiss only a few weeks after her arrest.

The Court, though, then found that the Commonwealth's delay in arresting the defendant was a result of negligence rather than deliberate delay. The Court ultimately concluded that any presumed prejudice here was overcome based on the specific facts of this case and therefore the presumptive prejudice analysis did not affect the ultimate outcome in this case. The Court refused to speculate that the defendant's lack of recall of certain dates also meant that she was unable to remember the circumstances surrounding the statements made on her concealed handgun permit application.

The Court distinguished the *Shavin* case, pointing out that in *Shavin*, the length of delay between arrest and trial was five years, but only two and a half years were attributable to the

Commonwealth due to its negligence in bringing the defendant to trial. In a footnote, the Court also called into question the ruling in *Shavin,* in light of the Virginia Supreme Court's ruling in *Doggett* that prejudice will be presumed where a delay is "excessive," not that every delay due to government negligence will result in a presumption of prejudice.

In another footnote, the Court explained that it has made no determination as to whether Virginia courts should consider pre-indictment delay in their consideration of how post-indictment delays weigh against the Commonwealth.

Judge Causey filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0182223.pdf

Osman v. Commonwealth: October 25, 2022

Fairfax: Defendant appeals his convictions for Abduction, Assault, and Violation of a Protective Order on Admission of Prior Bad Acts, Speedy Trial, and Sufficiency grounds.

Facts: The defendant, in violation of a protective order, attacked the mother of his child in a parking lot, beating her and dragging her into a truck he had rented. Prior to the assault, the J/Dr Court had issued a protective order prohibiting the defendant from having contact with his child. The victim was carrying their 2-year-old child in her arms, and the defendant had rigged a child seat inside the truck with zip-ties to restrain the child. An off-duty federal security officer confronted the defendant, but the defendant threatened him with a handgun. Nevertheless, other witnesses summoned the police and the defendant fled. He abandoned his rental truck and hid in New York for several months until his capture and extradition.

After a preliminary hearing in 2019, the defendant requested numerous continuances until the Supreme Court of Virginia issued its first emergency order relating to the COVID-19 pandemic on March 16, 2020.

Prior to trial, the defendant argued a statutory speedy trial motion. After hearing argument on the speedy trial issue, the trial court adjourned the case to the next week for a bench trial. Four days after that decision, the defendant agreed to a joint continuance and then also made subsequent agreements to additional adjournments totaling another 312 days. At one point, the parties agreed to a trial date, but the Commonwealth later discovered that a witness was not available for that trial date and requested and obtained a continuance over the defendant's objection.

Despite objecting to the Commonwealth's continuance request on that date, the defendant did not file another motion to dismiss on speedy trial grounds until July of 2021, the day before trial. Prior to trial, the defendant moved to dismiss the charges for violation of his Constitutional right to speedy trial. At that point, the total delay from his arrest until trial was 965 days. He claimed that, prior to the delay, his parents had been "set to testify in his defense to refute" the victim's allegations but did not provide any details of that testimony and how it would have impacted his defense. The trial court denied the defendant's motion to dismiss.

Prior to trial, the Commonwealth moved to admit several of the defendant's prior bad acts, including the physical and verbal abuse the victim experienced from the defendant during their marriage. The trial court granted the motion, over the defendant's objection. The trial court also issued a limiting instruction to the jury advising them that they could consider such testimony only for the permitted purposes of motive, intent, and prior relationship.

At trial, the defendant argued the abduction of the child was not a felony, but rather than a misdemeanor, under § 18.2-47(D), which makes a parent's abduction of their child punishable as a misdemeanor rather than a felony under certain circumstances.

Held: Affirmed in part; Reversed in part.

Regarding the prior bad acts, the Court ruled that the trial court did not abuse its discretion in admitting evidence of the defendant's prior bad acts. The Court agreed that the prior assaults against the victim had probative value to prove motive and intent and also a prior relationship in this particular case and that outweighed any prejudicial effect.

Regarding Speedy Trial, the Court rejected the defendant's Constitutional speedy trial challenge. The Court applied the four factors of the *Barker v. Wingo* test:

(1) the length of delay,

(2) the reasons for the delay,

(3) the defendant's assertion of his right, and

(4) prejudice to the defendant.

The Court first found that the delay of 965 days from the defendant's arrest until his trial were presumptively prejudicial under the first Barker factor, thus warranting consideration of the other three factors. The Court then noted that the majority of the delay—624 days—resulted from defendant's waivers of speedy trial, both explicitly and by operation of law. Conversely, only 341 days of delay are attributable to the Commonwealth, the vast majority of which is justified based on pandemic-related reasons or the ordinary administration of justice. The Court determined that 140 days were justified as pandemic-related delays.

The Court found that the Commonwealth acted negligently in selecting the June 28, 2021 trial date before confirming the availability of all necessary witnesses for that date. Nevertheless, the Court found no evidence in the record that the Commonwealth should be faulted for any period of delay other than the thirty days between which were the result of the Commonwealth's negligence in determining witness availability.

Regarding the defendant's claim of prejudice, the Court found that the defendant's "bare assertion" of prejudice was not sufficient on its own to establish that the defendant actually suffered any prejudice to his defense. The Court also explained that the defendant's continued acquiescence to adjournments limited the weight given to his assertion of his speedy trial right.

However, regarding the felony conviction for Abduction of the child, the Court reversed the conviction. The Court noted that the protective order in place was issued under § 16.1-253.2, which states that "a violation of a protective order issued under this statute "shall constitute contempt of court."" The Court further noted that § 16.1-253.2(A) explicitly states that "[i]n addition to any other penalty provided by law," a person who commits such violations "is guilty of a Class 1 misdemeanor."

The Court then examined subsections (C) and (D) of § 18.2-47 and found that those sections are mutually exclusive. In other words, a person who commits an abduction, as defined in subsection (A) of § 18.2-47, can only be charged with and convicted of a Class 5 felony—the default penalty provided by subsection (C) of § 18.2-47—if no other subsection providing a different penalty applies. Thus, where a parent's abduction of their child qualifies as a Class 1 misdemeanor under subsection (D) of § 18.2-47, the same conduct cannot also constitute a Class 5 felony because the misdemeanor penalty replaces the statute's default felony penalty.

Accordingly, because the defendant's abduction of his child met the criteria of § 18.2-47(D)—as the defendant is a parent to the child and the abduction was punishable as contempt for violating the protective order —the Court ruled that the trial court erred in convicting the defendant of the felony abduction charge under § 18.2-47.8

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1416214.pdf

Brown v. Commonwealth: September 6, 2022
75 Va. App. 388, 877 S.E.2d 156 (2022)
Danville: Defendant appeals his convictions for Burglary, Robbery, and Use of a Firearm on Statutory and Constitutional Speedy Trial grounds.

Facts: The defendant and his confederates broke into the victim's home, robbed, and sexually assaulted her. The victim was able to escape and reported the attack to the police. Police found the defendant's DNA at the crime scene and the victim identified the defendant in a photo array.

The defendant indicted on January 6, 2020, was arrested on January 9, 2020, and was then held continuously thereafter without bond. His case was scheduled for docket call on February 25, 2020, but he agreed to continue the case to the April docket call. On March 16, 2020, the Supreme Court of Virginia declared a pandemic-related judicial emergency and suspended all non-emergency court proceedings due to COVID-19.

The defendant moved to dismiss on both statutory and Constitutional speedy trial grounds. The defendant argued that § 17.1-330 permits only the tolling of statutory deadlines, not the overriding of "an individual's federal or state constitutional rights such as those embodied in § 19.2-243." The defendant also argued that when the Supreme Court of Virginia tolled the running of speedy trial deadlines, it exceeded its constitutional authority by "intervening in matters that are the province of the legislature." Lastly, the defendant argued that his constitutional speedy trial rights were violated because he was not tried within § 19.2-243's five-month statutory period and no tolling occurred to affect his constitutional claim.

Held: Affirmed. The Court ruled that the COVID-19 pandemic falls within the definition of a "natural disaster" under § 44-146.16, and the Supreme Court acted within the permissible bounds of its authority under § 17.1-330 when it tolled the statutory speedy trial deadlines. The Court also ruled that

no improper usurpation of power occurred when the Supreme Court declared a judicial emergency based on the COVID-19 pandemic.

The Court explained that § 17.1-330 gives the Supreme Court the power to declare a judicial emergency and to toll "deadlines, time schedules, or filing requirements imposed by otherwise applicable statutes, rules, or court orders in any court processes and proceedings" in the event of a disaster—including a "communicable disease of public health threat"—that "substantially endangers or impedes the operation of a court, the ability of persons to avail themselves of the court, or the ability of litigants or others to have access to the court or to meet schedules or time deadlines imposed by court order, rule, or statute." The Court found that the statute demonstrated legislative intent to give the Supreme Court the ability to toll any and all statutory deadlines in the event of a qualifying disaster.

Regarding COVID, the Court observed that the pandemic rendered trials potentially unsafe for witnesses, trial participants, and court personnel for an extended period of time. The Court observed that, to contend with this "communicable disease of public health threat" and "disaster," the Supreme Court proclaimed a judicial emergency precisely as § 17.1-330 contemplated.

Regarding Constitutional Speedy Trial, the Court applied the factors in *Barker v. Wingo*. The Court reasoned that the pandemic-related delay is "valid, unavoidable, and outside the Commonwealth's control." Therefore, the Court concluded that the delay from April 21 until September 4, 2020, was justifiable. The Court also observed that the defendant's objection was merely "pro forma."

The Court rejected the defendant's claim that the five-month deadline applies to Constitutional Speedy trial. The Court also rejected the defendant's argument that the trial court needed to make specific findings before applying the Supreme Court's declaration of a judicial emergency.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0722213.pdf

Virginia Court of Appeals
Unpublished

Johnson v. Commonwealth: April 11, 2023

Martinsville: Defendant appeals his convictions for Abduction, Sodomy, and related charges on Sixth Amendment Speedy Trial grounds.

Facts: The defendant attacked the victim, was arrested in December 2019, and was held without bail. The grand jury indicted the defendant, and he was arraigned in May 2020. Due to the COVID pandemic, the parties continued the trial several times. Three days before the first trial date, the Commonwealth's attorney moved the court for a continuance because he had contracted COVID-19. At the second trial date, the Commonwealth's attorney informed the court that due to the ongoing effects of his COVID-19, he did not feel he could adequately represent the Commonwealth at that time. Another delay followed a court closure due to inclement weather.

In the fall of 2021, the defendant moved to dismiss on constitutional speedy trial grounds. He contended that the Commonwealth failed to show justification for not trying him on any other days between his arrest and the trial date. The trial court denied the motion.

Held: Affirmed. The Court ruled that that the reasons for the delay in bringing the defendant to trial, considered and balanced together with the other factors under *Barker v. Wingo*, overcame the presumptive prejudice of the defendant's lengthy pre-trial incarceration and did not weigh in his favor.

The Court concluded that the 163-day period attributable to the administration of justice here was not accompanied by any evidence of intentional or negligent conduct by the Commonwealth, and thus was fully justifiable. The Court noted that the initial delay due to COVID was justified, and further concluded that the two delays attributable to the Commonwealth due to COVID-19 illness were justified. The Court also concluded that the delay due to public safety concerns arising from inclement weather was valid and fully justified.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0613223.pdf

Jernigan v. Commonwealth: April 4, 2023

Virginia Beach: Defendant appeals his convictions for Sodomy, Robbery, and Abduction on Speedy Trial grounds.

Facts: In 1992, the defendant abducted, sexually assaulted, and robbed a woman outside a video store. Police collected DNA and initially suspected the defendant but were unable to obtain his DNA and were unable to obtain a match using the DNA sample they had. However, in 2016, police sent the kit to be tested with new PCR technology. Based on the new DNA evidence, DFS eliminated two previous suspects before testing the defendant's DNA in 2017 and identified him as the perpetrator. The Commonwealth indicted the defendant in 2017 and soon arrested him.

For two years, the defendant moved to continue the case at least six times and caused the trial to be rescheduled on other occasions until the 2020 COVID pandemic caused further delays. In 2021, the defendant filed a motion to dismiss, asserting that the Commonwealth had violated his constitutional right to a speedy trial. He argued that the 26-year pre-indictment delay violated his due process rights. He also alleged that the delay starting in 2020 was presumptively too long and that it prejudiced him because his health declined, and witnesses' memories faded. The trial court denied the motion.

Held: Affirmed.

Regarding the pre-arrest delay, the Court found that, because the defendant failed to establish intentional delay, it did not need to examine whether he suffered actual prejudice. The Court repeated that, to gain dismissal of criminal charges because of pre-arrest or pre-indictment delay, a defendant must establish that:

(1) the prosecutor intentionally delayed indicting the defendant to gain a tactical advantage and
(2) the defendant incurred actual prejudice as a result of the delay.

Therefore, if the defendant does not demonstrate that the prosecution intentionally delayed indictment to gain a tactical advantage, this Court need not reach the question of whether the defendant incurred actual prejudice.

In this case, the Court noted that the Commonwealth could not know that DNA technology would advance to the point that the small amount of DNA evidence recovered from the PERK would become useful. The Court concluded that the Commonwealth did not intentionally delay in indicting the defendant; it merely could not indict until it had sufficient evidence; that sufficient evidence came in 2016 with the advancement of DNA technology.

Regarding the post-arrest, pre-trial delay, the Court ruled that none of the *Barker v. Wingo* factors weighed in favor of the defendant, so the Court held that the defendant's right to a constitutional speedy trial was not violated. First, the Court examined the reasons for the delay. The Court found that the reasons for mostly attributable to the pandemic and none of the delays were due to the Commonwealth's negligence. The Court also noted that the defendant did not assert his right until May 2021 —over a year after the Supreme Court's first emergency order in response to the COVID-19 pandemic—when the trial court was unable to try him quickly due to public health concerns. Given the defendant's delayed assertion and the trial court's prompt response, the Court found that this factor did not weigh in favor of the defendant. The Court also wrote that his "assertion is even less convincing when considering that he agreed to continue the case after invoking his right to a speedy trial." Finally, the Court noted that the defendant did not show specific prejudice under the fourth Barker factor.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0259221.pdf

Mercer v. Commonwealth: March 28, 2023

Fairfax: Defendant appeals his conviction for Failure to Pay Full Time and Attention on Speedy Trial grounds.

Facts: The defendant was charged with passing while on the shoulder or off a highway in February 2020. His trial date was continued several times in 2020 and 2021 during the period when the Supreme Court declared a judicial emergency in response to COVID-19. The defendant requested one continuance from June 2021 to July 2021. On the July date, a required law enforcement officer did not appear. Over the defendant's objection, the trial was continued to September 2021. The GDC found the defendant guilty. The defendant noted an appeal to the circuit court.

At his bench trial in November 2021, where no prosecutor appeared, the defendant argued that his constitutional speedy trial rights were violated by delays in the district court, but the trial court found no speedy trial violation had occurred.

Held: Affirmed. Applying the four factors from *Barker v. Wingo*, the Court first assumed without deciding that the delay between the infraction and his ultimate trial before the circuit court was long enough to be presumptively prejudicial such that it must consider the remaining factors.

The Court then noted that the delay before the general district court was largely due to the judicial emergency and a motion made by the defendant; only 70 days were due to the non-appearance of a necessary witness. The Court then noted that the defendant did not object to any of the many court-initiated continuances between the first trial date up through the continuance he requested himself. In other words, the defendant readily consented to a trial date 17 months from the infraction. Lastly, the Court noted that the defendant was not able to demonstrate sufficient prejudice from the delay.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1193214.pdf

Fries v. Commonwealth: February 14, 2023

Chesterfield: Defendant appeals his conviction for Aggravated Malicious Wounding on Speedy Trial grounds.

Facts: The defendant stabbed his boyfriend during an argument and then drove him home, rather than the hospital. As a result, the victim fell into a coma for several weeks and suffered permanent injuries. At trial, the defendant contended that the argument led to him acting in the "heat of passion," rather than out of malice.

Police arrested the defendant in January 2020, and he was held without bond. The defendant asserted his speedy trial right for the first time in January 2021. In April 2021, the defendant moved to dismiss under statutory and Constitutional speedy trial. The trial court denied the motion.

Held: Affirmed.

Regarding the defendant's "heat of passion" claim, the Court concluded that evidence here establishes that the defendant acted with malice rather than in the heat of passion. The Court reasoned that the only possible provocation for the stabbing was the heated argument the two had, but the Court repeated that words are never enough to constitute heat of passion.

Regarding statutory speedy trial under § 19.2-243, the Court repeated that under *Ali* and *Brown*, the COVID-19 pandemic qualified as a "natural disaster" for tolling the statutory right to a speedy trial. Therefore, the trial did not violate the defendant's statutory speedy trial right.

Regarding Constitutional speedy trial, the Court repeated that delay is calculated from the time of arrest and that that delay approaching one year is presumptively prejudicial and requires further review. In this case, the Court held that the twelve-month delay attributable to the Commonwealth had a valid justification in the ordinary course of the administration of justice, specifically, the Supreme Court's emergency orders in response to the COVID-19 pandemic.

The Court then applied the four-part test under *Barker v. Wingo.* The Court pointed out that the defendant, who had been in custody since his arrest in January 2020, did not assert his constitutional right to a speedy trial until nearly a year later. The Court found that his assertion of his speedy trial right was merely a formality to preserve the issue for any future appeal.

Regarding the element of "prejudice," the Court quoted the three-tiered test set forth in *Shavin*. As most of the delay was justified by the COVID-19 pandemic, the Court required the defendant to show he was specifically prejudiced by the delay. In this case, the Court found no evidence of prejudice to the defendant.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0989212.pdf

Palmer v. Commonwealth: August 9, 2022

Hampton: Defendant appeals his conviction for Distribution of Cocaine on Sixth Amendment Confrontation and Speedy Trial grounds.

Facts: The defendant sold cocaine on six occasions to a police informant. Police arrested the defendant on the indictment on September 22, 2019. Between the arrest and his trial on June 14, 2021, 631 days elapsed. Twelve days passed between the defendant's arrest and the first hearing where he had counsel appointed. Then, the defendant's counsel concurred to an eleven-day continuance between October 4, 2019, and October 15, 2019. After new counsel was appointed, the defendant did not object to the thirteen-day continuance from October 15 to October 28, 2019. On November 6, 2019, the defendant and the Commonwealth set the trial for April 16, 2020, which was outside the statutory speedy trial period. The trial court then continued the matter due to the COVID pandemic.

Trial finally took place on June 14, 2021. During the trial, the informant testified about each controlled buy. The informant purchased drugs twice from the defendant directly in the first ten days before the third controlled buy, using a nearly identical process.

For the third buy, the defendant orchestrated and coordinated the buy with the informant, and he told the informant where to go. The defendant then texted the informant that his associate had arrived to sell the informant the cocaine. The informant refused to buy the cocaine from the defendant's associate at first. Instead, when the associate arrived at the location and approached the informant's vehicle, the informant told the associate "I don't know you and I'm not getting anything from you. Who are you?" The associate responded that the defendant sent her. The associate told the informant that the defendant "bagged [the cocaine] up." The informant then completed the transaction. A detective then saw the defendant and the associate meet up shortly after the sale.

The defendant objected to the testimony about the associate's statements, arguing it was testimonial hearsay and that the defendant had no opportunity to confront the associate about her statements.

Held: Affirmed. The Court held that the defendant's associate's statements were not testimonial hearsay because they were co-conspirator's statements made in furtherance of the conspiracy. The Court then held that the speedy trial deadline was either waived by the defendant or tolled by the judicial emergency.

The Court first addressed the defendant's argument that his associate's statements to the informant were inadmissible testimonial hearsay and his complaint that the defendant did not have an opportunity to confront the associate about them. The Court ruled that the statements were admissible as an exception to the hearsay rule allowing co-conspirator statements made in furtherance of a conspiracy and were not testimonial. Thus, the Court ruled that the Confrontation Clause's protections did not apply, and the trial court did not err in admitting the statements.

The Court acknowledged that the associate's statements alone did not prove the conspiracy existed. However, the circumstances showed that the defendant and his associate pursued the same object, cocaine distribution, and took steps to achieve it. As a result, the Court agreed that the Commonwealth sufficiently proved a prima facie case that a conspiracy between the two existed. Thus, the Court ruled that the associate's statements were admissible as co-conspirator statements in furtherance of a conspiracy and were, by nature, nontestimonial.

Regarding the defendant's speedy trial claim, the Court repeated that § 19.2-243's restrictions do not apply to speedy trial deadline calculations when a defendant or his counsel requests the continuance, concurs to the Commonwealth's continuance motion, or fails to timely object to that motion. The Court also noted that it charges to a defendant the delay between appointing new counsel for the defendant and the new trial date. Additionally, the Court repeated that it had recently concluded that the judicial emergency orders based on the COVID-19 pandemic tolled statutory speedy trial deadlines under § 19.2-243(7), beginning March 16, 2020, and continuing through June 22, 2022.

The Court noted that the defendant and the Commonwealth set the trial for April 16, 2020, which was outside the statutory speedy trial period. Under § 19.2-243(4) and *Hutchins*, the Court ruled that the defendant concurred to the 162-day continuance because his counsel concurred to a trial date outside the statutory speedy trial deadline.

For the period between April 16, 2020, and the final trial on June 14, 2021, the Court ruled that 424 days of the statutory speedy trial calculations were tolled by the judicial emergency. Thus, only twelve days were attributed to the Commonwealth between the arrest and the first hearing where the defendant had counsel appointed. The Court observed that the defendant then either agreed to or did not object to continuances for 195 days between the first hearing and the original trial date. For the remaining 424 days, the Court ruled that the Commonwealth proved that the delay was based on a reason outlined in Code § 19.2-243: the judicial emergency resulting from the COVID-19 pandemic.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0885211.pdf

Mintee v. Commonwealth: July 12, 2022
On Remand from Va. Supreme Court Ruling of December 16, 2021
Va. Supreme Court Having Rev'd Court of Appeals Ruling of December 8, 2020

Richmond: Defendant appeals his convictions for Robbery and related offenses on Speedy Trial and Recusal 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. The Court of Appeals reversed and dismissed the case on Double Jeopardy grounds, ruling that the trial court abused its discretion when it declared a mistrial over the defendant's objection without detailing its consideration of less drastic alternatives for the record.

The Commonwealth appealed to the Virginia Supreme Court, who reversed the Court of Appeals and re-instated the case. The Court held that the defendant had waived his challenge to the manifest necessity of the mistrial, and consequently, reinstated the trial court's ruling on the motion to dismiss on double jeopardy grounds. The Court ruled that the contemporaneous objection rule required the defendant to object not only to the mistrial, but to the precise point that a manifest necessity did not exist to declare the mistrial. The Court remanded the case to the Court of Appeals for consideration of the defendant's claims regarding the trial court's denial of his motion to dismiss on statutory and constitutional speedy trial grounds and his motion to recuse.

Held: Affirmed. The Court held that the trial court did not err in concluding that the defendant's statutory and constitutional speedy trial rights were not violated or by denying the defendant's motion for the Judge to recuse himself.

Regarding statutory Speedy Trial, the Court repeated that, under *Fisher*, when the first trial ends in a mistrial, a defendant's retrial is '"but an extension of that same proceeding, based upon the same indictment and process and following a regular, continuous order' and without 'implicating a new speedy trial time frame.'" In this case, since the first trial began within the five-month statutory period, the second trial was simply "an extension of that same proceeding, based upon the same indictment and process and following a regular, continuous order" As a result, the Court ruled that the defendant's statutory speedy trial rights were not violated.

Regarding Constitutional Speedy Trial, the Court assumed, without deciding, that the delay of 364 days (twelve months) was presumptively prejudicial and analyzed the delay under the factors in *Barker v. Wingo*. The Court acknowledged that the defendant was only responsible for forty-eight days of the total delay, due to his own requests for delays. The significant delay, however, was occasioned by the trial court's physical inability to attend and preside over the rest of the trial, which, the Court found, "was not anyone's fault." The Court also concluded that the Commonwealth was not negligent; instead, "every portion of the delay attributable to the Commonwealth appears to have been incurred in the ordinary course of the administration of justice."

On the other hand, the Court found that the defendant did not adequately assert his speedy trial rights when the trial court declared the mistrial. The Court observed that the defendant "appeared

to be far more worried about being convicted at any time—past, present, or future— than he did in avoiding the prejudice he might suffer from additional delays." Lastly, the Court ruled that the defendant had not adequately demonstrated prejudice. The Court wrote that his complaints were "nothing more than vague professions of anxiety and not based on specific facts in the record showing he was actually more anxious than the average defendant."

Lastly, the Court rejected the defendant's motion for the trial court to recuse itself. The Court found that the trial court's legal rulings demonstrated an appropriate application of reason and impartiality. The defendant had pointed to instances when the trial court denied his motions, required the filing of voir dire questions before trial, and limited the voir dire questions he could pose. However, the Court explained that the fact that a judge makes adverse rulings against a party does not in and of itself indicate a bias.

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

Carter v. Commonwealth: June 7, 2022

Prince William: Defendant appeals his convictions for Assault on Law Enforcement and related charges on Speedy Trial grounds.

Facts: During an arrest for DUI, the defendant struck a law enforcement officer. During a hearing on March 8— eleven days after the February 25 preliminary hearing—the court set a trial date of September 4, 2019. Both parties orally agreed to the trial date and signed the order, indicating their agreement. However, just a few days before the scheduled trial date, on August 30, 2019, the defendant filed a motion in which his counsel requested to withdraw from representation. The same day, the court appointed a new attorney as his new counsel and *sua sponte* continued the case, setting a new hearing for September 13. The defendant remained in custody throughout the proceedings.

At the September hearing, the defendant's new counsel claimed that the previous attorney set the trial outside speedy trial without his permission. He then moved to dismiss the charges "on the ground that he was not tried within speedy trial under 19.2-243. The trial court denied the motion.

Held: Affirmed. The Court agreed that the "speedy trial clock began ticking on February 25, 2019. Eleven days of the speedy trial period ran before the hearing on March 8." However, the Court also found that, when the defendant's counsel agreed to a trial date of September 4, "that agreement stopped the clock. Under *Commonwealth v. Hutchins*, 260 Va. 293, 297-98 (2000), as here, when a defendant's counsel agrees to an initial trial date outside the speedy trial deadline, that acquiescence

acts as a "continuance" and tolls the speedy trial period." Thus, defense counsel's agreement on March 8 to set a September 4 trial date tolled the statutory speedy trial period until September 4.

The Court also noted that defense counsel did not object to the trial court's *sua sponte* continuance on August 30, so it, too, stopped the clock from running. Therefore, the Court wrote: "no matter which way appellant slices it, his counsel's acquiescence on March 8 to the September 4 trial date pushed his speedy trial deadline beyond his actual January 8, 2020 trial date. Therefore, the deadline of the speedy trial statute was not exceeded."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0941214.pdf

Sentencing

Virginia Court of Appeals
Published

Bland Henderson v. Commonwealth: April 11, 2023

Richmond: Defendant appeals his conviction for Possession of a Firearm by Felon on Denial of his Jury Sentencing Request.

Facts: The defendant possessed a firearm after having a conviction for Robbery. The defendant requested a jury trial but did not request jury sentencing. Then, 13 days before trial, the defendant also requested a jury sentencing. The trial court found that the defendant failed to request it within the 30 days specified by § 19.2-295(A) and denied his request.

Held: Affirmed.

The Court examined the language of § 19.2-295(A), which states "Such request for a jury to ascertain punishment shall be filed as a written pleading with the court at least 30 days prior to trial." The Court ruled that, because the "shall" in § 19.2-295(A) is mandatory and includes no good-cause exception, the trial court did not err in concluding that it lacked discretion to permit a late filing. The trial court therefore correctly concluded that the defendant waived his request for jury sentencing by failing to submit his demand at least 30 days before trial.

The Court, at great length, explored the meaning of the word "shall" in § 19.2-295(A). The Court noted the challenge that the word "shall" poses in statutory interpretation, pointing out that there are more than 26,000 uses of the word "shall" in the Virginia Code. The Court pointed out that in 2020, the Virginia Supreme Court replaced or eliminated more than 1,800 "shalls" from the Rules of Court. The Court also noted that many advocates now discourage the use of "shall" in legislative drafting and encourage the use of words such as "must, may, will, is entitled to," or some other expression.

The Court repeated that, under the 1912 *Pettus* case, "shall" can be read as permissive or mandatory in accordance with the subject-matter and context. The Court also acknowledged that, under

Rickman, a "shall" command in a statute always means "shall, not "may," but also explained that the use of the term "shall" in a statute is generally construed as directory rather than mandatory, and, consequently, no specific, exclusive remedy applies unless the statute manifests a contrary intent. The Court also acknowledged that "shall" may be discretionary if there is a good cause exception or if the statute conflicts with another statute.

The Court held that when a statute or rule uses "shall" to command action by a private litigant, it is best understood as mandatory unless the statutory text or context suggests otherwise. In a footnote, the Court acknowledged that this public-officer/private-litigant distinction results in asymmetrical treatment of the two classes of litigants when shall commands directed at public officers are treated as presumptively directory, not mandatory. However, the Court noted that this distinction dates back to the 1888 *Nelms* decision.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1359212.pdf

Cellucci v. Commonwealth: March 14, 2023
Rev'd Panel Decision of May 17, 2022
Loudoun: Defendant appeals his sentence for Aggravated Malicious Wounding on Denial of a Motion to Reconsider.

Facts: The defendant ambushed a man at work and struck him in the back of his neck with a claw hammer. The victim is now paralyzed from the chest down, cannot walk, and struggles to write or open and close objects because his hands are in a "constant claw state." At sentencing, the defendant presented evidence through his sentencing memorandum, the presentencing investigation report, a forensic psychological evaluation, statements from his family, and his allocution. The trial court sentenced the defendant to life in prison.

The defendant filed a motion to reconsider under § 19.2-303. He did not present any additional evidence but pointed to the evidence he previously submitted. In a detailed, 8-page opinion, the trial court denied the defendant's motion. The trial court found that the defendant "has not presented sufficient evidence to establish . . . that he now, or at the time of the offense, suffers from ASD." Alternatively, the circuit court determined that even if the defendant had ASD, the diagnosis did not qualify as a mitigating circumstance and had no logical nexus to the offense. The circuit court characterized the defendant's ASD evidence as a "dying ember," "vacant, wanting of substance, and only now being emphasized as a post-hearing 'hail Mary.'" It concluded that, after considering all the evidence, "as a matter of fact and law that [the defendant] . . . failed to prove any circumstance in mitigation of his offense."

On appeal, the defendant contended the circuit court abused its discretion in determining the defendant failed to prove any circumstances in mitigation, despite evidence demonstrating his autism spectrum disorder (ASD) diagnosis, lack of criminal history, and demonstrated ability to be rehabilitated.

The Court of Appeals panel reversed. The Court wrote that it "cannot turn a blind eye to a trial court's erroneous legal conclusions and failure to consider all relevant factors when deciding whether to

modify a sentence under Code § 19.2-303." The Court contended that the circuit court was required to review all the evidence the defendant presented and identify any mitigating circumstances. The Court wrote:

"However, the circuit court overlooked Cellucci's lack of criminal history, both before and after the crime, ability to be rehabilitated, and age as mitigating circumstances. In erroneously concluding that Cellucci proved no mitigating circumstances evidence, the circuit court also failed to consider these relevant factors that should have been given significant weight. Thus, the circuit court abused its discretion in concluding that Cellucci failed to prove any mitigating circumstances."

Held: Panel Reversed, Sentence Reinstated. In a 14-3 ruling, the Court of Appeals, sitting *En Banc*, reversed the panel's decision and re-instated the sentence. The Court concluded that the trial court appropriately considered the evidence of mitigating circumstances. The Court found that the trial court acted within its purview in finding that the evidence did not establish mitigating circumstances as contemplated by law. Further, the Court ruled that the trial court was not plainly wrong in finding that the defendant did not prove that he had ASD at the time of the offense.

In a footnote, the Court rejected the defendant's argument that the defendant's age at the time of the offense, his lack of a prior criminal record, and his conduct during the time between the attack and his arrest necessarily and conclusively established circumstances that mitigate his offense.

Judge Ortiz, who had authored the panel opinion, filed a dissent, joined by judges Causey and Callins.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0195214.pdf
Original Court of Appeals Ruling At:
https://www.vacourts.gov/opinions/opncavwp/0195214.pdf

Artis v. Commonwealth: January 17, 2023

Chesapeake: Defendant appeals his conviction and Sentence for Possession of Marijuana on Retroactivity of the Repeal and his Sentence.

Facts: In February 2020, the defendant possessed marijuana. In November 2020 the Commonwealth indicted the defendant for Possession with Intent to Distribute Marijuana. In April 2021, the General Assembly repealed the marijuana possession statute; the repealing act stated that "the repeal of § 18.2-250.1 of the Code of Virginia shall become effective on July 1, 2021." A jury convicted the defendant of possession of marijuana in violation of § 18.2-250.1 in November 2021.

After the trial, the trial court rejected the defendant's argument that his conviction was void ab initio because § 18.2-250.1 was repealed prior to his conviction, and he was therefore convicted for conduct that was no longer a crime.

At sentencing, the Commonwealth introduced for the first time, without objection, evidence showing that the defendant had a prior conviction for marijuana possession. Over objection from

defense counsel, the trial judge imposed an enhanced sentence of twelve months' imprisonment and a $2,500 fine based on the defendant's prior marijuana possession conviction.

Held: Affirmed in Part, Reversed in Part. The Court affirmed the conviction for marijuana possession under § 18.2-250.1 (now repealed), but the Court vacated the sentencing order. The Court remanded the case for resentencing consistent with the penalty range for first-offense marijuana possession under § 18.2-250.1.

The Court first held that § 1-239 has abrogated the common-law rule of abatement in its entirety. As with other retroactivity cases, the Court held that § 1-239 applies in circumstances where the General Assembly explicitly and unambiguously repeals a statute. The Court repeated that the General Assembly's absolute and unqualified repeal of a criminal statute that decriminalizes an offense is not exempt from the requirements of § 1-239. In this case, the Court noted that the absolute repeal of § 18.2-250.1 contained no express language stating that prosecutions still pending under this statute would be abated. Accordingly, pursuant to § 1-239, the defendant's conviction for marijuana possession committed on February 25, 2020, and indicted on November 4, 2020, is not void ab initio.

Regarding sentencing, the Court noted that, under *Pierce,* "in order for the Commonwealth to take advantage of the enhanced punishment provided in [§ 18.2-250.1], it must prove a second or subsequent conviction for unlawful possession of marijuana under Code § 18.2-250.1(A)." The Court noted that *Pierce* did not resolve whether a prior conviction must be proven as an element of the offense or as a sentencing enhancement, but did not answer that question.

In a footnote, the Court reviewed the history of sentencing enhancements going back to 1819. The Court pointed out that not all criminal statutes that address recidivist offenses set forth a "pleading and proof procedure," nor do all statutes that articulate a procedure do so uniformly. The Court also noted that the U.S. Supreme Court's jurisprudence specifically exempts a prior conviction as a constitutionally required fact that must be pled in a charging instrument and found by a factfinder at trial. The Court concluded "Therefore, ultimately resolving and clarifying questions with respect to the use of prior convictions as sentencing enhancements is properly the province of the General Assembly."

In this case, the Court did not resolve that issue and simply found that that the predicate conviction upon which the trial court sought to impose the enhanced punishment was neither alleged nor proven.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1407211.pdf

Laney v. Commonwealth: December 6, 2022

New Kent: Defendant appeals his conviction for Drug Distribution on Admission of Victim Impact Testimony.

Facts: The defendant distributed Fentanyl. He obtained the drugs from a drug dealer on a promise to pay the dealer later. The defendant then brought the drugs to the victim, split the drugs with

the victim, and asked her to pay him the full price of the drugs. She paid the full price and he returned to the dealer and paid the dealer.

After the defendant supplied the drugs to the victim, she died from ingesting the defendant's drugs. Her six-year-old child discovered the victim dead. During the sentencing hearing, the defendant objected to the victim's mother's victim-impact statement and testimony regarding the death of her daughter. The court overruled the objection and permitted both the statement and testimony.

The defendant also argued that his conviction should be reduced to distribution as an accommodation under § 18.2-248(D). The trial court refused.

Held: Affirmed. The Court ruled that the trial court did not err in considering the victim's mother's testimony and written statement at the sentencing hearing. The Court also ruled that the trial court did not abuse its discretion in rejecting the defendant's request for an accommodation disposition under § 18.2-248(D),

The Court repeated that, under *Rock*, nothing in the Crime Victim and Witness Rights Act prohibits a court from admitting relevant evidence or testimony from other witnesses who do not meet the statutory definition of "victim."

Regarding accommodation, the Court explained that, even assuming the defendant wanted to help the victim, the record supports a finding that he also intended to profit by allowing the victim to buy and share drugs that he could not purchase for himself. The Court noted that it was the defendant's burden to prove accommodation; the Commonwealth was not required to establish a lack of intent to profit. Thus, the trial court, as factfinder, was free to reject the defendant's testimony that his only goal was to help his friend and instead conclude that the defendant also intended to use the drugs that the victim paid for, thereby profiting from the transaction.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0833212.pdf

Belcher v. Commonwealth: September 27, 2022
75 Va. App. 505, 878 S.E.2d 19 (2022)
Henry: Defendant appeals her conviction for Identity Fraud on admission of accounting evidence, sufficiency of the evidence, and sentencing in excess of the statute.

Facts: The defendant, a home healthcare provider, used the victim's credit card for her own benefit on numerous occasions. The victim's son discovered the offense by examining the charges and trying to find records about the charges. He fired the defendant. At trial, he testified that he knew the amount of grocery spending decreased after he fired the defendant because he had reviewed the credit card statements and grocery bills. The son explained that his testimony was based upon his review of the credit card statements and his own monitoring of the grocery expenses. The defendant objected to that testimony, but the trial court overruled the objection.

At trial, the defendant argued that because she had authorization to use the victim's credit card, she did not misrepresent her identity and, therefore, could not be guilty of identity fraud.

The jury convicted the defendant of seven misdemeanor counts and one felony count of identity fraud to obtain money, goods, or services, all in violation of § 18.2-186.3. The jury instructions incorrectly stated that the maximum punishment for felony identity fraud was 20 years. The defendant did not object to the instruction. The jury sentenced the defendant to "1 year" on each of the misdemeanor offenses and to 7 ½ years on the felony offense. The trial court, explaining that the jury likely did not understand the difference between twelve months and one year, interpreted each 1-year sentence as a twelve-month sentence.

Held: Affirmed in part, reversed in part. The Court affirmed the convictions but reversed the sentences and remanded the case for re-sentencing.

Regarding the defendant's claim that she had the victim's consent, the Court cited *Taylor v. Commonwealth* from 2020, where the Supreme Court rejected a similar argument. The Court explained that, although the defendant was authorized to use the victim's card, she was not authorized to make purchases for her own benefit.

The Court then ruled that the trial court did not err in admitting the son's testimony regarding the decrease in grocery bills following the defendant's departure. The Court also agreed that whether grocery expenditures went up or down was a fact within the son's personal knowledge and found that the Court properly admitted his testimony. In a footnote, the Court also pointed out that, even if the challenged evidence is viewed as lay opinion evidence under Virginia Rule of Evidence 2:701, it was still admissible on this record. The Court noted that the question of whether grocery bills decreased after the defendant was fired was plainly based on the son's personal observations and perceptions.

Regarding the felony offense, the Court agreed that the jury was erroneously instructed and, as a result, the defendant received a sentence outside the statutorily permitted range. Regarding the misdemeanor offenses, the Court explained that "twelve months is not simply another way of expressing one year, and the phrases do not mean the same thing." The Court reviewed the various ways in which those sentences are different.

The Court declared that, when a sentence is outside the statutorily prescribed range of punishment, a defendant is entitled to a new sentencing hearing. The Court repeated that "it is incumbent on the trial judge not to discharge the jury 'upon the return of an illegal verdict.'" In this case, however, the jury was discharged and released before the sentencing improprieties were examined and "fixed." Instead, the Court explained, a trial court should instruct the jury that its sentence was improper and sent them back to "further consider" their verdict. In this case, though, the trial court revised the improper verdicts itself after the jury was released, which the Court found was impermissible.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0945213.pdf

Maryland v. Commonwealth: September 21, 2022
75 Va. App. 483, 877 S.E.2d 537 (2022)
Richmond: Defendant appeals his sentence for Manslaughter on Denial of Credit for Time Served.

Facts: While awaiting trial for murder, the defendant received a personal recognizance bond and was placed on home electronic monitoring. At his sentencing hearing, the defendant asked the trial court, under § 53.1-187, to credit the time he had spent on pre-trial bond in the home electronic monitoring program against his sentence. He argued that under the 2021 ruling in *King v. Commonwealth*, he had been "in custody" while he participated in the pretrial home electronic monitoring program. The trial court denied the motion.

Held: Affirmed. The Court pointed out that § 53.1-187 states that "[i]n no case is a person on bail to be regarded as in confinement for the purposes of this statute." Thus, under the plain meaning of § 53.1-187, the defendant was not "confined" while on the home electronic monitoring program and was not entitled to credit against his sentence for the time he was on bail.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0254222.pdf

Suhay v. Commonwealth: July 19, 2022
75 Va. App. 143, 875 S.E.2d 82 (2022)
Rockingham: Defendant appeals his conviction for Electronic Solicitation of a Minor on refusal to Defer his Disposition based on his Autism.

Facts: The defendant, who was twenty-four years old, engaged in sexually explicit communications with an eleven-year-old child. The child's grandmother discovered the communications and reported them to the police. Police found that the defendant and the victim exchanged sexually explicit photos and videos. During his police interview, the defendant admitted that he knew the victim was a child and that he knew he could "get in trouble" for his sexual interactions with the victim.

At sentencing, the defendant asked the trial court to grant him a deferred disposition under §19.2-303.6, which permits a trial court to defer adjudication of guilt for a criminal defendant who has been diagnosed with autism spectrum disorder (ASD) if the court finds by clear and convincing evidence that the defendant's criminal conduct was caused by or had a direct and substantial relationship to the disorder. In support, he offered testimony of a licensed clinical psychologist.

The psychologist testified that the defendant's ASD caused him to have difficulty developing, maintaining, and understanding social and romantic relationships, that the defendant throughout his life would spend more time with younger children because they were closer to his development level, that the defendant's ASD caused him to turn to online social media to form relationships that he could not form in real life, that the defendant's ASD made him unable to differentiate between different levels of closeness in relationships, causing him to take his relationship with the victim much more seriously than it was, and that the victim's young age would not have been obvious to the defendant because his ASD would have affected his ability to properly determine the child's age.

In response, the Commonwealth pointed to the fact that the defendant was only diagnosed with Level 1 ASD, the mildest form of autism spectrum disorder, that the defendant had never been

diagnosed with ASD prior to his current criminal charges, and that the defendant was intelligent enough to earn an associate's degree at a community college with a 3.5 grade point average and work at the same plastics factory for five years. The psychologist had concluded in her psychological evaluation that "there is no indication that [the defendant] has any cognitive problems that would have prevented him from understanding the factual illegality of sexual solicitation of a minor."

The trial court denied the defendant's request for a deferred disposition.

Held: Affirmed. The Court held that the trial court did not err in finding that the defendant's solicitation of a minor was not caused by, nor had a direct and substantial relationship to, his autism spectrum disorder and that any error by the circuit court in applying the requirements of § 19.2-303.6 was harmless.

The Court examined the statute and noted that, even if the factual elements of § 19.2-303.6(A) are satisfied, the trial court may still, in its discretion, choose to deny a defendant's request for a deferred disposition. Conversely, the Court concluded, if either of the two factual elements of § 19.2-303.6(A) have not been satisfied, then the necessary implication is that the trial court must deny a defendant's request for a deferred disposition and has no discretion to do otherwise. In that situation, the trial court must deny the defendant's request for a deferred disposition, regardless of the position of the Commonwealth's attorney and the views of the victim.

In this case, the Court noted that the record contained a substantial amount of evidence showing that the defendant was an intelligent individual who was fully aware that the victim was a minor, knew that his sexual interactions with her were illegal, and yet still solicited her for sexual activity. The Court was particularly persuaded by the defendant's police interview, where he admitted that he knew the victim was ten or eleven years old when engaging in sexually explicit communications with her, as well as clearly expressed his knowledge of and regret for the wrongfulness of his actions. The Court concluded that the defendant's understanding of his relationship with the victim, both with respect to her age and to his knowledge of the illegal nature of his interactions with her, contradicted the social "deficit" that the psychologist testified as symptomatic of ASD and supported the trial court's conclusion of no causal connection between the defendant's criminal conduct and his ASD.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0664213.pdf

Virginia Court of Appeals
Unpublished

Campbell v. Commonwealth: April 25, 2023

Prince William: Defendant appeals his probation conditions.

Facts: The defendant was arrested and charged with rape, assault, and related offenses. The trial court convicted the defendant of two counts of assault and battery upon a family member as a third

or subsequent offense within 20 years. The trial court later granted the defendant's petition to expunge his record of any reference to the charges that were amended or nolle prossed, including the rape charge. Subsequently, the record in the case, other than the Commonwealth's version of events in the pre-sentence investigation report, was redacted to remove references to the unadjudicated charges. Upon release from incarceration, the probation office imposed a set of "Sex Offender Special Instructions." Specifically, probation required that the defendant complete two levels of the Sex Offender Treatment Program, submit to sexual history polygraphs, and comply with numerous other conditions, including having no contact with minors. The probation office imposed these restrictions because, upon referral for a psychosexual evaluation, the defendant was determined to be above average risk for sexual offending according to both the Static-99R and Static-2002R. The evaluator diagnosed the defendant with "Adult Sexual Abuse: Confirmed" based upon the offense for which he was convicted.

The defendant filed a challenge to the probation conditions. At a hearing, the probation office evaluator testified that the evaluation instruments she used were invalid for those who have not committed a sex offense.

Held: Reversed. The Court held that it was unreasonable for the trial court to impose sex offender conditions where the defendant had never been convicted for a sex offense and the trial court had expunged the criminal record indicating that he was charged with one.

The Court found that, in this case, the probation restrictions were not tethered to any facts in the record. The Court observed that the record did not suggest that the defendant presented any risk to minors or that his internet use played any role in the crimes of conviction. Given the expungement, the Court found no allegation or conviction of a sexual offense. The Court concluded that no evidence supports the conclusion that the defendant presented a high risk for sex offender "recidivism" because he had never been convicted of a sex offense and the probation officer used diagnostic instruments that were invalid under the circumstances.

The Court analogized this case to two other cases where the Court of Appeals reversed probation conditions: Fazili, where the trial court prohibited the defendant from having or using any device that could access the internet unless approved by his probation officer, and Murry, where the trial court imposed a full Fourth Amendment waiver.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0791224.pdf

Joe v. Commonwealth: April 4, 2023

Stafford: Defendant appeals his convictions for Burglary, Unlawful Filming, and other charges on Admission of Bad Acts evidence at Sentencing.

Facts: The defendant broke into a women's locker room and installed a hidden camera in the ceiling. The defendant later broke into the locker room and installed a contraption to allow him to hide

in the ceiling, only for it to collapse one day while he was hiding in the ceiling. The defendant fled and was captured. Police located his phone in a nearby jurisdiction and examined it. They found many videos that the defendant had taken along with other videos taken under women's skirts and dresses and found child exploitation material.

The Commonwealth sought to introduce the videos and images at sentencing. The defendant objected to the trial court viewing the videos as irrelevant, "associated with an unadjudicated case," and "redundant." The Commonwealth contended that the videos were offered to rebut the defendant's claim in the presentence investigation report that he "would never intentionally harm another person or target a child." The trial court overruled the objection and viewed several of the images and videos.

Held: Affirmed. The Court ruled that the trial court permissibly considered the evidence of the defendant's unadjudicated bad acts and fashioned a sentence consistent with the sentencing ranges as determined by the General Assembly.

The Court found that the trial court was entitled to consider all the relevant and connected facts when determining an appropriate sentence. Additionally, the Court reasoned that the disputed evidence rebutted the defendant's claim made in the presentence investigation report that he "would never intentionally harm another person or target a child," and was probative of his character and amenability to rehabilitation. Moreover, the Court emphasized that the defendant is not permitted to limit the Commonwealth's opportunity to present relevant evidence by stipulating to the criminal activity.

In this case, the Court found that the challenged evidence was probative, material, and relevant to the trial court's duty to determine "a sentence that best effectuates the criminal justice system's goals of deterrence (general and specific), incapacitation, retribution and rehabilitation." Furthermore, the Court found no indication that the trial court based its sentencing decision upon a "strong emotional response" to the challenged evidence.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0966224.pdf

Twyman v. Commonwealth: August 9, 2022

Culpeper: Defendant appeals her conviction for Welfare Fraud on refusal to grant a Deferred Disposition.

Facts: After a trial for Welfare Fraud, the trial stated that it was "going to go ahead and make a finding of guilt today." Immediately after the trial court found the defendant guilty, it stated that it would set the matter for sentencing, in part to consider granting a deferred disposition. However, after hearing arguments and the Commonwealth's objection, the trial court denied the defendant's request for a deferred disposition.

Held: Affirmed. The Court reviewed the rulings in *Starrs*, *Hernandez*, and *Lewis*, and repeated that "once a trial court orally pronounces a defendant guilty, it loses the authority to defer disposition,

even if it has not yet entered a conviction order." The Court noted that, even though the trial court was incorrect in finding that it could have entered a deferred disposition under *Hernandez* and *Starrs* after having issued both oral and written findings of guilt, it nonetheless declined to do so. The Court ruled that, although for the wrong reasons, the trial ultimately reached the right result in declining to grant appellant a deferred disposition.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1228214.pdf

Rogers v. Commonwealth: July 19, 2022

Lancaster: Defendant appeals his convictions for Abduction and Possession of Ammunition by Felon on grounds including Fourth Amendment, Refusal to Disqualify the Prosecutor, and Admission of Prior Bad Acts at Sentencing.

Facts: The defendant, a felon, abducted and held his estranged wife until she was able to escape. The victim later informed police there was ammunition in the home. The victim had lived in the marital home since marrying the defendant. Although the victim and lived with her mother after the defendant behaved violently towards their child, the victim continued to go back and forth to the house to get her belongings. Police obtained a search warrant and visited the home. The victim let them in and police located the ammunition.

The defendant moved to suppress the evidence, claiming that the search warrant affidavit for the ammunition was defective. The affidavit detailed the officer's conversation with the victim in which she told him that there was ammunition in the residence and that it had "always been" there. The defendant claimed that the affidavit was defective because it did not say where in the house the ammunition was located or whether the ammunition belonged to the defendant. He also argued that the affidavit omitted that the defendant had already been arrested on other charges and that the victim, who was pressing charges against him, was the person who told the police about the ammunition.

Prior to trial, the defendant moved to disqualify the Commonwealth's Attorney. The defendant offered evidence from a witness who testified that the prosecutor told her that the defendant was one of four county residents who belonged in jail. She said that the prosecutor asked about the defendant's medical history because he wanted him incarcerated long enough to "die in prison." According to the witness, the prosecutor urged her to press additional charges against the defendant and to testify at the sentencing hearing. He told her to consider that the defendant would "attack [the prosecutor] and his family" if the defendant were "let go."

In response, the prosecutor admitted that he "did identify people . . . walking the streets of Lancaster County" whom he "thought were dangerous." He wanted to prosecute the defendant, he stated, because he was convinced that the defendant was dangerous and violent. The prosecutor testified that he did not know the defendant personally and bore no animus towards him. He said there was "no personal interest here. There is only an interest in locking up violent people, protect[ing] the public. That is it." The trial court denied the defendant's motion to disqualify the prosecutor.

At sentencing, the Commonwealth provided testimony by two other victims who described other numerous acts of violence by the defendant, other than those in this case. The defendant objected, but the trial court overruled the objection. The trial court also admitted, over the defendant's objection, previous civil protective orders entered against the defendant.

Held: Affirmed.

Regarding the search warrant, the Court noted that the defendant had identified no legal authority that the search warrant affidavit—which was regular on its face—had to contain the details he enumerated. The Court also found that the search was a valid search as a consensual search. The Court repeated that a person who has "joint access or control for most purposes" may also consent. Under that standard, the Court concluded that the victim had authority to consent to the search.

Regarding the defendant's motion to disqualify the prosecutor, the Court found that the alleged remarks did not reflect a conflict of interest. The Court ruled that the defendant had failed to prove that the prosecutor had any "direct personal interest" in the outcome arising from "animosity, a financial interest, kinship, or close friendship." The Court also ruled that the prosecutor was well within his authority to bring the abduction charge, even though it had been nolle pros'd earlier. The Court wrote: "Yes, Spencer was highly motivated to charge and convict Rogers. But Rogers failed to prove that Spencer instituted charges against him because Rogers had chosen to exercise a legal right."

Regarding the defendant's prior bad acts, the Court repeated that evidence of unadjudicated criminal conduct is admissible at sentencing if it bears indicia of reliability. The Court rejected the defendant's argument that 19.2-295(1) imposes a limitation that prior bad acts may only be admitting during the rebuttal phase of a sentencing after a bench trial.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0713212.pdf

Statutory Construction - Retroactivity

Virginia Court of Appeals
Published

Artis v. Commonwealth: January 17, 2023

Chesapeake: Defendant appeals his conviction and Sentence for Possession of Marijuana on Retroactivity of the Repeal and his Sentence.

Facts: In February 2020, the defendant possessed marijuana. In November 2020 the Commonwealth indicted the defendant for Possession with Intent to Distribute Marijuana. In April 2021, the General Assembly repealed the marijuana possession statute; the repealing act stated that "the repeal of § 18.2-250.1 of the Code of Virginia shall become effective on July 1, 2021." A jury convicted the defendant of possession of marijuana in violation of § 18.2-250.1 in November 2021.

After the trial, the trial court rejected the defendant's argument that his conviction was void ab initio because § 18.2-250.1 was repealed prior to his conviction, and he was therefore convicted for conduct that was no longer a crime.

At sentencing, the Commonwealth introduced for the first time, without objection, evidence showing that the defendant had a prior conviction for marijuana possession. Over objection from defense counsel, the trial judge imposed an enhanced sentence of twelve months' imprisonment and a $2,500 fine based on the defendant's prior marijuana possession conviction.

Held: Affirmed in Part, Reversed in Part. The Court affirmed the conviction for marijuana possession under § 18.2-250.1 (now repealed), but the Court vacated the sentencing order. The Court remanded the case for resentencing consistent with the penalty range for first-offense marijuana possession under § 18.2-250.1.

The Court first held that § 1-239 has abrogated the common-law rule of abatement in its entirety. As with other retroactivity cases, the Court held that § 1-239 applies in circumstances where the General Assembly explicitly and unambiguously repeals a statute. The Court repeated that the General Assembly's absolute and unqualified repeal of a criminal statute that decriminalizes an offense is not exempt from the requirements of § 1-239. In this case, the Court noted that the absolute repeal of § 18.2-250.1 contained no express language stating that prosecutions still pending under this statute would be abated. Accordingly, pursuant to § 1-239, the defendant's conviction for marijuana possession committed on February 25, 2020, and indicted on November 4, 2020, is not void ab initio.

Regarding sentencing, the Court noted that, under *Pierce,* "in order for the Commonwealth to take advantage of the enhanced punishment provided in [§ 18.2-250.1], it must prove a second or subsequent conviction for unlawful possession of marijuana under Code § 18.2-250.1(A)." The Court noted that *Pierce* did not resolve whether a prior conviction must be proven as an element of the offense or as a sentencing enhancement, but did not answer that question.

In a footnote, the Court reviewed the history of sentencing enhancements going back to 1819. The Court pointed out that not all criminal statutes that address recidivist offenses set forth a "pleading and proof procedure," nor do all statutes that articulate a procedure do so uniformly. The Court also noted that the U.S. Supreme Court's jurisprudence specifically exempts a prior conviction as a constitutionally required fact that must be pled in a charging instrument and found by a factfinder at trial. The Court concluded "Therefore, ultimately resolving and clarifying questions with respect to the use of prior convictions as sentencing enhancements is properly the province of the General Assembly."

In this case, the Court did not resolve that issue and simply found that that the predicate conviction upon which the trial court sought to impose the enhanced punishment was neither alleged nor proven.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1407211.pdf

Goins v. Commonwealth: November 22, 2022

Rockingham: Defendant appeals his conviction for Petit Larceny, 3rd Offense, on Retroactivity of the Statute that Eliminated that Offense.

Facts: In May 2020, the defendant stole property after having been convicted two or more times previously of larceny offenses or of offenses deemed or punishable as larceny. Prior to July 1, 2021, the Virginia Code had provided that a third (or subsequent) conviction for petit larceny was punishable as a Class 6 felony. In February 2021, the General Assembly repealed that enhanced penalty. In this case, the Commonwealth proceeded on the felony offense.

Prior to trial, the defendant filed a motion asking the trial court to treat his offense as a misdemeanor, under the new penalty structure. The trial court denied the motion and found the defendant guilty in October 2021.

Held: Affirmed. Consistent with § 1-239 and *Replenas*, the Court held that the trial court did not err in applying the law in existence at the time that the defendant committed the offense and when the criminal proceedings against him began.

The Court explained that the repeal of § 18.2-104 involved a substantive right to be free from a harsher penalty for subsequent larceny convictions. The Court noted that the legislation repealing §18.2-104 did not include any language expressing a legislative intent to make the repeal effective retroactively— rather than simply prospectively, which is the presumption. Because there was no such substantive right at the time of the offense or when criminal proceedings began against the defendant, the Court held that the trial court did not err in denying the defendant's motion to consider his offense a misdemeanor.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1197213.pdf

Hogle v. Commonwealth: November 15, 2022

Augusta: Defendant appeals his conviction for DUI on Retroactivity of the Prohibition on Law Enforcement Traffic Stops and sufficiency of the evidence.

Facts: In September 2019, an officer stopped the defendant for driving with an expired registration. The defendant admitted consuming "several" shots of tequila earlier in the day, and there were empty mini-bottles of liquor in his car. The officer noted the odor of alcohol on the defendant's breath, his bloodshot eyes, his inability to perform the walk-and-turn test correctly, and his failure to follow any of the instructions on the one-leg test. The officer found a container with marijuana residue and a smoking device in the defendant's car.

The defendant's blood contained a 0.069% BAC, an amphetamine concentration of 0.19 milligram per liter, a THC concentration of 0.0036 milligram per liter, and a THC carboxylic acid concentration of 0.025 milligram per liter. At trial, Dr. James Kuhlman, a DFS expert in the field of forensic toxicology, testified that, applying retrograde extrapolation, a BAC of 0.069 at 4:53 p.m., when

the officer collected the blood sample, with the final drink consumed at 12:30 p.m., translated into a BAC range of 0.08 to 0.096% at 3:48 p.m., the time the officer first saw the defendant driving.

§ 46.2-646(E), which took effect after the stop in this case, on March 1, 2021, provides that "[n]o law-enforcement officer shall stop a motor vehicle due to an expired registration sticker prior to the first day of the fourth month after the original expiration date." The subsection further states, "No evidence discovered or obtained as the result of a stop in violation of this subsection, including evidence discovered or obtained with the operator's consent, shall be admissible in any trial, hearing, or other proceeding."

The defendant moved to suppress the evidence claiming that the search and seizure of his vehicle violated Code § 46.2-646(E). The trial court denied the motion.

Held: Affirmed. The Court first ruled that the exclusionary provision of § 46.2-646(E) did not entitle the defendant to the suppression of the evidence obtained and discovered as a result of the stop of his vehicle in 2019 because the subsection, by its express terms, did not apply retroactively to the time of the stop. The Court then agreed that, considering all of these facts and circumstances, a reasonable finder of fact could conclude that the defendant had consumed enough alcohol, or a combination of drugs and alcohol to "affect his manner, disposition, speech, muscular movement, general appearance or behavior."

As in *Montgomery* and *Street*, as well as the *Goodwin* case from last week, the Court noted that, even if the stop of the car based upon an expired registration would be unlawful under the current § 46.2-646(E), that provision did not take effect until 2021. Thus, the Court explained, when the officer stopped the defendant in 2019, the evidence discovered or obtained was not "the result of a stop in violation of th[e] subsection" "because one cannot violate a statute or break a rule that does not exist. The Court repeated that the seizure prohibition in § 46.2-646(E) "is a substantive change in the law and cannot be applied retroactively to render" the stop of the car illegal, because "the evidentiary prong of the statute, though procedural, is only triggered by a . . . seizure that violated the substantive portion of the statute."

The Court then ruled that a rational finder of fact could have found beyond a reasonable doubt that the defendant was operating his vehicle while under the influence of alcohol or a combination of alcohol and drugs. While the defendant's BAC of 0.069 at 4:53 p.m. did not give rise to a presumption that he was under the influence of alcohol, the Court agreed that the trial court was entitled to consider the BAC along with other competent evidence under § 18.2-269(A)(2). The Court noted that the defendant's blood contained a measurable level of THC, which can diminish the ability to concentrate or focus and dissipates quickly in the body after smoking marijuana.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0027223.pdf

Street v. Commonwealth: August 2, 2022
75 Va. App. 298 (2022)

Newport News: Defendant appeals his conviction for Possession of a Firearm by Felon on Retroactivity of the Statute Prohibiting Searches Based on Odor.

Facts: The defendant, a convicted felon, carried a firearm in his car. An officer stopped the defendant's car due to a traffic violation and smelled the odor of marijuana. Due to the odor, he searched the car and discovered the firearm. After the search but prior to trial, the General Assembly enacted § § 4.1-1302 [previously 18.2-250.1(F) – *EJC*], which prohibits searches based solely on the odor of marijuana. The defendant moved to suppress, arguing that the statutory exclusionary rule, enacted after the search applied to exclude the evidence found in the search of his vehicle. The trial court denied the motion.

Held: Affirmed. As it had in the *Montgomery* case one week earlier, the Court observed that § 4.1-1302(A) does not expressly state that it is retroactive, and in fact it specifically provides for the exclusion only of evidence seized "pursuant to a violation of this subsection." Consequently, the Court concluded that the subsection could not be violated before it or its predecessor took effect in 2021, well after the 2019 search at issue in this case.

The Court, as it had in *Montgomery*, agreed that the statute's first prong creates a new right that, to trigger the statute, must have been violated. In other words, the first portion of the statute (the "right" prong) gives individuals a new right to be free from searches that are based solely on the odor of marijuana. The second portion (the "remedy" prong) grants the remedy of exclusion of evidence for a violation of that specific new right. In this case, the Court concluded that the search did not and could not violate the non-existent statute.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1355211.pdf

Green v. Commonwealth: June 14, 2022
75 Va. App. 69, 873 S.E.2d 96 (2022)
Gloucester: Defendant appeals the revocation of his probation on Application of Limits on Probation Revocation

Facts: Defendant violated his probation on offenses of Assault on Law Enforcement and Larceny. The defendant's suspended sentences were expressly conditioned on his successful completion of supervised probation. The defendant repeatedly violated probation. On June 21, 2021, the defendant appeared for his revocation hearing. The defendant requested a continuance, and the trial court continued the matter until July 13, 2021.

Meanwhile, in 2021, the General Assembly amended Code § 19.2-306. The amendments became effective on July 1, 2021. That statute now limits the period of active incarceration that a circuit court can impose after revoking a probationer's suspended sentence. However, at the July 2021 revocation hearing, the trial court concluded that it needed to apply "the law in effect at the time the probation violation was instituted," which was the law in effect before July 1, 2021.

Upon finding that the defendant had violated his probation on both convictions, the trial court revoked the entirety of his suspended sentences.

Held: Affirmed. The Court held that the trial court did not err in applying the penalty in existence at the time the defendant violated the terms of his probation and when his revocation proceeding began. The Court concluded that the amended statute does not govern revocation proceedings that were commenced before July 1, 2021, when the amended statute took effect.

The Court found that the newly enacted § 19.2-306.1 lacks any express manifestation of legislative intent for the statute to apply to revocation proceedings that began before this new statute became effective on July 1, 2021. The Court noted that the words "retroactive" or "retroactively" are nowhere to be found in the statute. The Court wrote: "The General Assembly could have explicitly stated that the amended statute applies to revocation proceedings commenced prior to that date, but it did not do so." Thus, the Court found that the trial court did not err in applying the penalty that existed at the time when the defendant violated his probation and at the time when the proceeding to revoke his suspended sentences began.

The Court explained that when statutory amendments become effective that would affect a pending matter and the amended statute does not provide that it applies retroactively, courts should apply the law that was in effect before the statutory amendments took effect unless the plain language of the amended statute shows a contrary intent. Furthermore, when a reenacted statute does not "contain an express provision that the statutory changes would be effective retroactively on a specified date," the Supreme Court has held that "[t]he absence of this required language from the bill compels a conclusion that the amendments to those sections are effective prospectively, not retroactively."

The Court expressed concern that, if the trial court's mere exercise of its discretion to grant a three-week continuance in this case resulted in changing the entire outcome of the defendant's revocation, that "would incentivize potential future mischief and gamesmanship among parties in future cases while departing from binding Supreme Court precedent."

Judge Chaney filed a lengthy dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0759211.pdf

Virginia Court of Appeals
Unpublished

Bolden v. Commonwealth: May 16, 2023

Lynchburg: Defendant appeals his conviction for Possession of a Firearm by Felon on Retroactivity of the Ban on Certain Traffic Stops.

Facts: In 2019, the defendant, a convicted felon, drove a car while in possession of a shotgun. An officer stopped the vehicle because its rear taillight failed to illuminate part of the license plate. In

November 2020, § 46.2-10131 was revised to state, effective March 1, 2021: "No law-enforcement officer shall stop a motor vehicle for a violation of this subsection."

The defendant filed a motion to suppress and a motion in limine, asserting that the 2020 amendments required the exclusion of the shotgun and any other evidence gathered from the 2019 traffic stop. The trial court denied the motions.

Held: Affirmed. The Court noted that it had considered similar statutes recently and decided that they did not apply retroactively. Accordingly, the Court concluded that the trial court did not err in denying the motion in limine. The Court repeated that, as in Hogle and Montgomery, one cannot violate a statute or break a rule that does not exist. Because the subsection was not in effect at the time of the search, the Court agreed that no law enforcement officer could have violated it.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0999223.pdf

Swinson v. Commonwealth: January 31, 2023

Augusta: Defendant appeals his conviction for Possession with Intent on Retroactivity of the Prohibition on Certain Traffic Stops.

Facts: In 2019, the defendant drove while he possessed Methamphetamine with the intent to distribute it. An officer observed the defendant's vehicle and observed defective equipment on the vehicle. He stopped the vehicle. As a result of the stop, the officer discovered the defendant's drugs.

The defendant moved in limine to exclude the evidence because he contended that police obtained it in violation of §46.2-1003(C), which took effect March 1, 2021, and prohibited traffic stops based merely on defective equipment. He contended that the changes to the defective equipment code section, § 46.2-1003(C), applied retroactively and rendered inadmissible the evidence the police seized in 2019. The trial court denied his motion.

Held: Affirmed. The Court found that the amendment of § 46.2-1003 do not apply retroactively, and therefore the stop and search in this case was permissible.

As in *Hogle, Montgomery*, and many other recent cases, the Court explained that § 46.2-1003(C) is not procedural as it is completely silent on the method of obtaining redress or the enforcement of the right it creates; instead, the Court found that the scope of the entire subsection is both substantive and procedural. Thus, the Court ruled that the seizure prohibition in § 46.2-1003(C) is a substantive change in the law and cannot be applied retroactively to render the stop of the defendant's car illegal, because the evidentiary prong of the statute, though procedural, is only triggered by a seizure that violated the substantive portion of the statute.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0351223.pdf

Loeper v. Commonwealth: January 24, 2023

Hanover: Defendant appeals his conviction for Drug Distribution on Retroactivity of the Bar on Certain Searches.

Facts: In June 2020, an officer searched the defendant's vehicle based on the odor of marijuana. Almost a year after the search, in March 2021, § 18.2-250.1(F) went into effect, which forbade searches based solely on the odor of marijuana and ordered the suppression of evidence found as a result of any such search. In 2021, § 18.2-250.1 was repealed and § 4.1-1302(A) went into effect, providing the same rule.

At trial, the defendant moved to suppress, arguing that § 4.1-1302(A) should apply retroactively, making inadmissible any evidence found pursuant to a search based solely on the odor of marijuana. The trial court overruled the defendant's motion.

Held: Affirmed. Because the search of the vehicle took place prior to the effective dates of either § 4.1-1302(A) or § 18.2-250.1(F), as in *Montgomery* and *Street*, the Court ruled that the exclusionary provisions of these statutes cannot apply to the search in the present case.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0585222.pdf

Compton v. Commonwealth: January 10, 2023

Chesapeake: Defendant appeals his conviction for Petit Larceny, 3rd Offense, arguing Retroactivity of the Repeal of that Statute.

Facts: In July, 2020, the defendant committed larceny after having two previous convictions for that offense. The Commonwealth indicted the defendant in March, 2021 for a violation of § 18.2-104. Effective July 1, 2021, the General Assembly repealed § 18.2-104.

At trial, the defendant argued that because § 18.2-104 was repealed, his offense was no longer felonious at the time of his conviction.

Held: Affirmed. The Court ruled that, pursuant to § 1-239, the trial court did not err in convicting and sentencing the defendant under § 18.2-104 for petit larceny, third offense. The Court noted, as it had in many other cases, that the repeal contained no language stating that it would apply retroactively to all prosecutions still pending under § 18.2-104.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0040221.pdf

Thomas v. Commonwealth: January 10, 2023

Henry: Defendant appeals her conviction for Drug Possession, arguing that the Safe Harbor Immunity is Retroactive.

Facts: In August, 2019, the defendant possessed drugs. After the defendant overdosed and became unconscious, someone called for rescue on her behalf. Police responded and located the defendant's drugs.

Prior to trial, the defendant filed motion to dismiss the indictment, arguing that the amendments to § 18.2-251.03, effective July 1, 2020, barred her prosecution and should have been applied retroactively. She argued that recently enacted amendments to the statute barred her prosecution because she was experiencing an overdose and another individual, in good faith, sought or obtained emergency medical attention for her. The defendant asserted that because the amendments were procedural in nature, not substantive, they applied even though the offense date pre-dated the amendments. The trial court rejected the defendant's motion.

Held: Affirmed. The Court noted that in 2019, the then-applicable affirmative defense afforded the defendant no relief because she did not report her overdose or seek emergency medical attention for herself. The Court then noted that, in *McCarthy*, the Court of Appeals had held that the 2020 amendments to § 18.2-251.03 did "not contain any explicit terms providing for its retroactivity." As the 2020 amendments to § 18.2-251.03 occurred nearly a year after the defendant committed the charged offense and months after she was indicted, the Court found that it was bound by *McCarthy*'s holding that those amendments do not apply retroactively.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0191223.pdf

Everette v. Commonwealth: December 29, 2022

Chesapeake: Defendant appeals his conviction for Driving as an Habitual Offender on Repeal of the Statute.

Facts: The defendant, who had been declared an habitual offender, crashed his vehicle. He lied to police and claimed that he had not been driving, but officers discovered his lie. The Commonwealth indicted the defendant on January 7, 2020. On March 31, 2021, the General Assembly repealed § 46.2-357 in its entirety, effective July 1, 2021.

At trial, the trial court rejected the defendant's argument that, because § 46.2-357 was repealed before his trial, the trial court could not convict him of that crime.

Held: Affirmed.

The Court noted that, although the common law rule of abatement forbade the continued prosecution of offenses defined by statutes which were repealed during the course of the prosecution, the General Assembly modified the common law rule in § 1-239. Under that code section, newly enacted substantive statutes do not apply retroactively except to the extent that they provide for retroactive application, or to the extent that they decrease the defendant's punishment and the defendant then agrees to the application of the new law.

In this case, the Court noted that there was no indication in the language of the repeal of the statute that the legislature intended the repeal itself to be applied retroactively. Additionally, the Court found that the statute is clearly substantive law.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0032221.pdf

Goodwin v. Commonwealth: November 9, 2022

Rockbridge: Defendant appeals his convictions for Obstruction and Disorderly Conduct on Retroactivity of the Prohibition on Stops for Marijuana Odor.

Facts: An officer stopped the defendant's car based solely on the smell of marijuana. During the stop, the defendant, who was the passenger in the car, disputed the stop, invoking the "new marijuana law," and directed the driver to not listen to the officer. The officer asked the driver and the defendant to step out of the car, but the defendant refused. Officers attempted to remove the defendant and place him in a patrol car.

The defendant resisted by pulling away, removing his handcuffs, knocking on the patrol car window, and refusing to identify himself. Although the officers found no marijuana in the stopped car, officers charged the defendant with obstruction of justice and disorderly conduct based on his conduct and statements after the stop.

Prior to trial, the defendant filed a motion in limine to exclude evidence of his conduct and statements during the traffic stop, arguing that § 4.1-1302, which prohibits searches based solely on the odor of marijuana and excludes evidence obtained from such searches, was procedural and therefore applied retroactively. The traffic stop that led to the convictions occurred on January 29, 2021, before Code § 4.1-1302 and Code § 18.2-250.1(F) took effect. The trial court denied the motion.

Held: Affirmed. The Court repeated that, under *Montgomery v. Commonwealth*, 75 Va. App. 182, 189-90 (2022) and Street v. Commonwealth, 75 Va. App. 298 (2022), § 4.1-1302 does not apply retroactively.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0312223.pdf

Montgomery v. Commonwealth: July 26, 2022
75 Va. App. 182 (2022)
Hampton: Defendant appeals his conviction for PWID Marijuana on Retroactivity of the Statute Prohibiting Searches Based on Odor.

Facts: In November 2018, the defendant possessed marijuana with the intent to distribute it. An officer stopped the defendant for a traffic violation. Due to the odor of marijuana, the officer searched the vehicle and found the defendant's marijuana. After the search but prior to trial, the General Assembly enacted § 18.2-250.1(F) [now § 4.1-1302 – *Ed*], which prohibits searches based solely on the odor of marijuana. The defendant moved to suppress, arguing that the statutory exclusionary rule, enacted after the search applied to exclude the evidence found in the search of his vehicle. The trial court denied the motion.

Held: Affirmed. The Court held that the legislative intent and effect of § 18.2-250.1(F) is a statutory expansion of the scope of the Fourth Amendment right to be free from unreasonable searches to include searches based exclusively on the odor of marijuana. The Court then held that, because there was no such prohibition at the time of the search, the trial court did not err in denying the defendant's motion to suppress the evidence.

The Court found that the new statute creates both a "duty" and "obligation" on the part of law enforcement to refrain from searches and seizures based solely upon the odor of marijuana for the benefit of everyone and a "right" to not have such evidence used against them. For the Court, the search and seizure prohibition created a statutory right to be free from a particular subset of searches for which the evidentiary rule in turn provided a remedy. As a result, the search prohibition of § 18.2-250.1(F) is a substantive change in the law and cannot be applied retroactively to render the search of the defendant's vehicle illegal, while the evidentiary prong of the statute, though procedural, is only triggered by a search or seizure that violated the substantive portion of the statute.

The Court examined § 1-239. The Court pointed out that no Virginia case has ever held that a procedural amendment to a rule or statute applies to attach different legal consequences to a procedure that took place before the amendment. "Even where an amendment to a law is procedural instead of substantive, courts will not impliedly alter the legal consequences of a procedure that has already taken place at the time of the statutory change."

The Court then noted that one cannot violate a statute or break a rule that does not exist. Because the statute was not in effect at the time of the search, no law enforcement officer could have violated it. The Court explained that applying a procedural rule retroactively to attach new legal consequences to a procedure—a search—that has already taken place cannot be done without express direction from the General Assembly absent from this statute.

Examining the statute, the Court concluded that the General Assembly plainly expressed its intent that the exclusionary remedy would be triggered only by a "violation" of the new ban on plain-smell searches. "Had the General Assembly intended otherwise, it could easily have said so."

Judge Lorish dissented, arguing that the Court's recent precedents on retroactivity were wrongly decided.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1095211.pdf

Smith v. Commonwealth: June 21, 2022

Spotsylvania: Defendant appeals the revocation of his probation on Application of Limits on Probation Revocation

Facts: The trial court convicted the defendant of Aggravated Sexual Battery of a child less than 13 years old and placed him on probation, which included special conditions regarding sexual offender supervision. The defendant violated those provisions. In May 2021, the trial court first issued a capias to show cause why the defendant's suspended sentence should not be revoked.

Meanwhile, in 2021, the General Assembly amended Code § 19.2-306. The amendments became effective on July 1, 2021. That statute now limits the period of active incarceration that a circuit court can impose after revoking a probationer's suspended sentence, including for a so-called "technical violation." The defendant's revocation hearing and sentencing took place on July 27, 2021. At his violation hearing, the defendant argued that he only violated a "technical condition" and that the new code section prohibited imposition of an active sentence. The trial court rejected his argument.

Held: The Court ruled that the revocation statutes that governed the defendant's sentencing were the ones in effect when the revocation action began in May 2021. As it had in *Green* the week prior, the Court noted that no provision in the amended § 19.2-306 or the bill achieving its amendment indicates the General Assembly intended the code section to operate retroactively. Therefore, the Court again concluded that the new statute did not apply to the defendant's case, per § 1-238.6, and the trial court had discretion to sentence the defendant up to the remaining time of his suspended sentence under the previous version of § 19.2-306.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0841212.pdf

Trial Issues

Virginia Court of Appeals
Published

McBride v. Commonwealth: October 4, 2022
75 Va. App. 556, 878 S.E.2d 44 (2022)
Fairfax: Defendant appeals his conviction for PWID, 3rd offense, on Permitting the Commonwealth to Reopen its Case.

Facts: The defendant possessed drugs with the intent to distribute, after having two previous convictions for that offense in Maryland. The Commonwealth litigated a pretrial motion to admit the prior convictions. At the motion to strike phase of the trial, the defendant argued that that none of the Commonwealth's testimonial or documentary evidence tied the defendant on trial to the person referenced in the Maryland documents through a birth date, social security number, DMV records, photos, fingerprints, or any other identifying information. The Court agreed and granted the motion to strike.

After the trial court granted the defendant's motion to strike, the Commonwealth objected. The Commonwealth explained that it had not submitted any evidence about the defendant's identity because of the trial court's ruling in the pre-trial motion in limine to admit those documents. The trial court allowed the Commonwealth to reopen its case and submit additional evidence, explaining "since it was a misunderstanding, I'm going to allow you to reopen to call one witness."

Based on that added evidence, the court reversed itself and ruled that the cumulative evidence was now sufficient and overruled the motion to strike.

Held: Reversed. The Court found that the trial court erred under Rule 3A:15(c) by not entering an order of acquittal after the court elected to grant the motion to strike based on the evidence presented in the Commonwealth's case-in-chief. Under Rule 3A:15 and prior caselaw, the Court explained that a trial judge has broad discretion over whether to grant a defendant's motion to strike. But once a court grants such a motion, ruling that the evidence presented was insufficient, the court may not then allow additional evidence to be presented and change its ruling based on that added evidence.

The Court rejected the Commonwealth's argument that the trial court's initial ruling was not final because it was not entered in writing. The Court repeated that, in the trial of a case, the court gives many orders and commands which are not reduced to writing and that such orders are lawful orders and directions of the court. Just as an oral judgment of guilt is final upon the pronouncement, the Court ruled that an oral judgment of acquittal is final when a court holds the evidence is insufficient to sustain a conviction.

The Court cited *Lewis*, a case where a defendant who was tried for two separate offenses of assault and battery during a bifurcated trial on the same day could be convicted under a repeat offender statute during the second trial because the conviction for the first offense, stated orally by the judge, was a final judgment that established a predicate offense during the second trial. Id. The Court also cited *Vandyke*, where it had ruled that a trial court that orally pronounces a defendant guilty loses the authority to later defer that disposition, even if it has not yet entered a written conviction order. The Court distinguished its recent ruling in *Hammer*, though, where it had ruled that a trial court could reverse a *nolle prosequi* order within 21 days of that ruling.

In a footnote, the Court addressed the Commonwealth's pretrial motion in limine regarding the admission of the prior convictions. In the footnote, the Court contended that a party cannot obtain a pretrial ruling about whether it has successfully proved an element of a claim or offense. Thus, the Court explained that, at trial, the Commonwealth needed to prove that it was the defendant who was

previously convicted of the various drug offenses in Maryland and that the convictions were for a substantially similar offense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1354214.pdf

Virginia Court of Appeals –
Unpublished

Martin v. Commonwealth: April 18, 2023

Scott: Defendant appeals his convictions for Murder and Use of a Firearm on Fifth Amendment *Miranda* grounds, Admission of Bad Acts, Denial of a Jury View, and Double Jeopardy grounds.

Facts: The defendant learned that his wife and the victim were having an extramarital affair. The defendant picked up the victim in Tennessee, transported him to Virginia, confronted him, and then killed him with a handgun. After the murder, the defendant returned to Tennessee and woke up his wife, brandishing a firearm and showing her a cell phone image of her deceased lover before saying "look what you made me do." He then confessed to the details of the murder and then told her he intended to finish his plan to kill her and himself. Next, the defendant zip-tied her hands and feet, although ultimately he did not kill her.

Police arrested the defendant, who invoked his *Miranda* rights. The defendant's parents then indicated that they wished to speak to him. A detective told the defendant's mother that he wished to speak to her son and that he gave her his contact information. The detective also testified that he might have told her that he would be able to talk to the Commonwealth's Attorney if the defendant cooperated. The defendant's father told the defendant that he should only speak to the police after he obtains a lawyer. After the defendant spoke to his mother, however, the defendant re-initiated contact with the police. Police re-read him his *Miranda* warnings and the defendant confessed, claiming that the shooting was accidental.

Prior to trial, the defendant moved to suppress his statements to police. He contended that law enforcement reinitiated interrogation after he asserted that he wished to speak to counsel when his mother became agents of the Commonwealth through their contact with the detective. Thus, any statement the detective made to the mother encourage him to speak with law enforcement constituted the Commonwealth improperly initiating contact with the defendant after he asserted his right to counsel under the Fifth Amendment. The trial court denied his motion.

At trial, the defendant admitted to killing the victim but claimed self-defense. The defendant objected to the Commonwealth admitting evidence of the defendant's kidnapping of his wife in Tennessee, but the trial court overruled his objection and admitted the evidence.

At trial, the defendant also asked the trial court to permit the jury to view the crime scene. The trial court denied the motion, instead admitting into evidence a video recording reflecting the entire length of the road including the area where the body was found and where the murder took place. The

trial court also admitted relevant maps in evidence. In addition, photographs of the crime scene taken at the time of the homicide were admitted. The trial court explained that three years had passed since the event occurred creating the possibility that the scene would appear differently than it had at the time of the homicide.

Lastly, the defendant objected to instructing the jury on both Aggravated Malicious Wounding and First-Degree Murder, contending that that violated his Double Jeopardy protection. The trial court overruled his objection, and instead instructed the jury that if they convicted the defendant of first-degree murder, they were not to consider the aggravated malicious wounding charge. The verdict form also reflected the court's direction to the jury.

[*Good job to Special Prosecutors Zack Stoots and Jessica Jackson, Russell County – EJC*].

Held: Affirmed.

Regarding the *Miranda* issue, the Court ruled that the facts here do not support the defendant's contention that (1) his parents became agents of the Commonwealth or (2) that the detective unconstitutionally reinitiated an interrogation after the right to counsel was asserted. The Court applied the two-part test from *Mills* and *Sabo* to evaluate whether a private individual acted as a government agent. The first prong of that test is

(1) whether the government knew of and acquiesced in the search, and

(2) whether the search was conducted for the purpose of furthering the private party's ends.

The Court cautioned that these two criteria or factors should not be viewed as an exclusive list of relevant factors. In this case, the Court concluded that the defendant initiated contact with the detective and voluntarily provided a statement to him which was consistent with the theory he advanced at trial—that the shooting was accidental.

Regarding the defendant's other crimes, the Court applied Virginia Rule of Evidence 2:404(b). The Court ruled that the defendant's kidnapping of his wife demonstrated a common plan or scheme. The Court found that the entire exchange between the defendant and his wife was highly probative of the defendant's motive, as well as his intent and plan to kill the victim. The Court also concluded that the circumstances of the kidnapping also demonstrate that kidnapping the wife was part of a common scheme or plan and are therefore relevant connected facts. The Court noted that the relevance of this evidence was heightened by the defendant's self-defense argument. Lastly, the Court found that the evidence is also more probative than prejudicial.

Regarding the denial of the jury view, the Court did not disturb the trial court's conclusion that the maps, video, and pictures in evidence were both sufficient and better reflected the crime scene on the date of the homicide.

Lastly, regarding the defendant's double jeopardy claim, the Court found that, since the jury followed the trial court's instruction, the defendant was not subject to multiple punishments for conviction on a single offense, and there was no error. In this case, the Court agreed that aggravated malicious wounding is a lesser-included offense of first-degree murder, and therefore a conviction on both indictments would violate the double jeopardy prohibition.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0757223.pdf

Jung v. Commonwealth: March 21, 2023

Fauquier: Defendant appeals his conviction for Murder on Exclusion of Previous Prosecutor's Decisions, Mentioning Hearsay in Opening, Admission of Photos, and Jury Instruction Issues.

Facts: In 2008, the defendant stabbed a Buddhist monk to death. Police identified the defendant as the killer and in 2010, police interviewed the defendant. He told police that when he discovered the victim's body, he decided to "run away" and immediately drove to New York. The defendant told police that he "must have killed" the victim, although he could not remember doing so. The Commonwealth charged the defendant with the murder in 2020.

The Commonwealth filed a pretrial motion in limine to bar the defense from eliciting testimony about whether the prosecution had been "previously declined or refused." The defendant argued he should be able to show that he was not "fleeing from prosecution because there hadn't been a prosecution that had been initiated." The Commonwealth granted the motion in part but allowed the defendant to "show that there was no outstanding warrant" between 2008 and 2020. The trial court emphasized that the parties were not permitted to discuss "whether the Commonwealth had agreed to prosecute or not prosecute or how many Commonwealth's attorneys were involved."

In its opening statement, the Commonwealth referred to expected testimony from a witness that the victim feared the defendant after the victim removed him as a temple director. The defendant objected that the statement would be hearsay. The trial court overruled the objection. During the witness' testimony, the defendant again objected based on hearsay, arguing that the witness could not testify about anything that the victim said. The trial court sustained the objection. The witness testified that the victim was "paranoid" after the defendant was removed as a director and wanted the witness to be present at the temple when the defendant was there. He did not repeat specific statements that the victim made to him.

At trial, the Commonwealth, over the defendant's objection, introduced six photographs of the defendant's former residence. The photos were taken in 2008 when the police searched the house, within weeks of the murder. They showed that the house was vacant. The defendant argued that the photos were not relevant. The trial court admitted the photographs into evidence.

At trial, the Commonwealth presented evidence that the defendant wrote a bad check, drank alcohol excessively, and gambled. During the jury instruction phase, the Commonwealth offered an instruction that the jury could "consider the character of [the defendant] when proven by the evidence, whether good or bad, along with the other facts and circumstances in the case in determining his guilt or innocence." The defendant objected to the instruction, but the trial court overruled the objection.

Held: Affirmed.

Regarding the decisions of the three prior prosecutors not to charge the defendant, the Court held that the trial court properly granted the Commonwealth's motion in limine. The Court agreed that the decisions made by prior prosecutors about the defendant's case, rooted in prosecutorial discretion, were not relevant to the jury's determination of guilt or innocence based on the evidence presented at

trial in 2021. The Court found that informing the jury that prior Commonwealth's Attorneys had elected not to prosecute the case would have impermissibly colored the jury's interpretation of the evidence. The Court agreed that the trial court correctly excluded "improper and confusing evidence." The Court noted that the trial court permitted proper information for the jury to consider that supported the defendant's factual point that the lengthy delay was not due to him absconding.

Regarding the Commonwealth's reference to hearsay in opening statement, the Court observed that, during the witness' testimony, he did not repeat what the victim had told him, but instead he said that the victim became "paranoid" after the defendant was removed as a director of the temple. The witness also stated that the victim asked him to be at the temple whenever the defendant was there. The Court concluded that his testimony supported the prosecutor's opening remark in sum and substance that the victim feared the defendant and it was relevant to explain the relationship between the two men. The Court also pointed out that the trial court specifically instructed the jury prior to opening statements that they are "what [the attorneys] expect the evidence to be" but are "not evidence and you must not consider [them] evidence."

Regarding the photos of the vacant house, the Court ruled that the challenged photographs were relevant to the defendant's consciousness of guilt. The photos were relevant to support the Commonwealth's theory that the defendant did not intend to return after fleeing to New York.

Lastly, regarding the jury instruction, the Court ruled that, although the character instruction was based on Virginia Criminal Model Jury Instruction 2.200 and was a correct statement of the law, the trial court abused its discretion in giving the instruction because it applies only when "the defendant has offered character evidence." The Court pointed out that the defendant did not testify or offer evidence of his good character, and consequently the instruction did not apply.

However, although the Court held that giving the instruction in this case was error, the Court then ruled that the error was harmless.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0529224.pdf

CRIMES & OFFENSES

Abduction

Virginia Court of Appeals
Published

Osman v. Commonwealth: October 25, 2022

Fairfax: Defendant appeals his convictions for Abduction, Assault, and Violation of a Protective Order on Admission of Prior Bad Acts, Speedy Trial, and Sufficiency grounds.

Facts: The defendant, in violation of a protective order, attacked the mother of his child in a parking lot, beating her and dragging her into a truck he had rented. Prior to the assault, the J/Dr Court had issued a protective order prohibiting the defendant from having contact with his child. The victim was carrying their 2-year-old child in her arms, and the defendant had rigged a child seat inside the truck with zip-ties to restrain the child. An off-duty federal security officer confronted the defendant, but the defendant threatened him with a handgun. Nevertheless, other witnesses summoned the police and the defendant fled. He abandoned his rental truck and hid in New York for several months until his capture and extradition.

After a preliminary hearing in 2019, the defendant requested numerous continuances until the Supreme Court of Virginia issued its first emergency order relating to the COVID-19 pandemic on March 16, 2020.

Prior to trial, the defendant argued a statutory speedy trial motion. After hearing argument on the speedy trial issue, the trial court adjourned the case to the next week for a bench trial. Four days after that decision, the defendant agreed to a joint continuance and then also made subsequent agreements to additional adjournments totaling another 312 days. At one point, the parties agreed to a trial date, but the Commonwealth later discovered that a witness was not available for that trial date and requested and obtained a continuance over the defendant's objection.

Despite objecting to the Commonwealth's continuance request on that date, the defendant did not file another motion to dismiss on speedy trial grounds until July of 2021, the day before trial. Prior to trial, the defendant moved to dismiss the charges for violation of his Constitutional right to speedy trial. At that point, the total delay from his arrest until trial was 965 days. He claimed that, prior to the delay, his parents had been "set to testify in his defense to refute" the victim's allegations, but did not provide any details of that testimony and how it would have impacted his defense. The trial court denied the defendant's motion to dismiss.

Prior to trial, the Commonwealth moved to admit several of the defendant's prior bad acts, including the physical and verbal abuse the victim experienced from the defendant during their marriage. The trial court granted the motion, over the defendant's objection. The trial court also issued a limiting instruction to the jury advising them that they could consider such testimony only for the permitted purposes of motive, intent, and prior relationship.

At trial, the defendant argued the abduction of the child was not a felony, but rather than a misdemeanor, under § 18.2-47(D), which makes a parent's abduction of their child punishable as a misdemeanor rather than a felony under certain circumstances.

Held: Affirmed in part; Reversed in part.

Regarding the prior bad acts, the Court ruled that the trial court did not abuse its discretion in admitting evidence of the defendant's prior bad acts. The Court agreed that the prior assaults against the victim had probative value to prove motive and intent and also a prior relationship in this particular case and that outweighed any prejudicial effect.

Regarding Speedy Trial, the Court rejected the defendant's Constitutional speedy trial challenge. The Court applied the four factors of the *Barker v. Wingo* test:

(1) the length of delay,

(2) the reasons for the delay,

(3) the defendant's assertion of his right, and

(4) prejudice to the defendant.

The Court first found that the delay of 965 days from the defendant's arrest until his trial were presumptively prejudicial under the first Barker factor, thus warranting consideration of the other three factors. The Court then noted that the majority of the delay—624 days—resulted from defendant's waivers of speedy trial, both explicitly and by operation of law. Conversely, only 341 days of delay are attributable to the Commonwealth, the vast majority of which is justified based on pandemic-related reasons or the ordinary administration of justice. The Court determined that 140 days were justified as pandemic-related delays.

The Court found that the Commonwealth acted negligently in selecting the June 28, 2021 trial date before confirming the availability of all necessary witnesses for that date. Nevertheless, the Court found no evidence in the record that the Commonwealth should be faulted for any period of delay other than the thirty days between which were the result of the Commonwealth's negligence in determining witness availability.

Regarding the defendant's claim of prejudice, the Court found that the defendant's "bare assertion" of prejudice was not sufficient on its own to establish that the defendant actually suffered any prejudice to his defense. The Court also explained that the defendant's continued acquiescence to adjournments limited the weight given to his assertion of his speedy trial right.

However, regarding the felony conviction for Abduction of the child, the Court reversed the conviction. The Court noted that the protective order in place was issued under § 16.1-253.2, which states that "a violation of a protective order issued under this statute "shall constitute contempt of court."" The Court further noted that § 16.1-253.2(A) explicitly states that "[i]n addition to any other penalty provided by law," a person who commits such violations "is guilty of a Class 1 misdemeanor."

The Court then examined subsections (C) and (D) of § 18.2-47 and found that those sections are mutually exclusive. In other words, a person who commits an abduction, as defined in subsection (A) of § 18.2-47, can only be charged with and convicted of a Class 5 felony—the default penalty provided by subsection (C) of § 18.2-47—if no other subsection providing a different penalty applies. Thus, where a parent's abduction of their child qualifies as a Class 1 misdemeanor under subsection (D) of § 18.2-47,

the same conduct cannot also constitute a Class 5 felony because the misdemeanor penalty replaces the statute's default felony penalty.

Accordingly, because the defendant's abduction of his child met the criteria of § 18.2-47(D)—as the defendant is a parent to the child and the abduction was punishable as contempt for violating the protective order —the Court ruled that the trial court erred in convicting the defendant of the felony abduction charge under § 18.2-47.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1416214.pdf

Virginia Court of Appeals
Unpublished

Garay-Amaya v. Commonwealth: March 28, 2023

Fairfax: Defendant appeals his convictions for Abduction and Object Sexual Penetration on the Incidental Detention Doctrine and sufficiency of the evidence.

Facts: The defendant sexually assaulted a seventeen-year-old victim. The defendant offered the victim a ride, but she became uncomfortable and afraid when the defendant gave her certain "looks" and flirted with her as he drove. Despite using the victim's exact address to navigate via his cell phone's GPS system, the defendant went down another route, stopped his van, and claimed to be lost. When the victim said that she wanted to leave and refused to kiss the defendant, he became "crazy." The defendant then grabbed the victim and locked the van door when she attempted to escape.

The defendant then sexually assaulted and strangled the victim. The victim testified that that the defendant touched her with "his fingers inside [her] vagina." She further characterized this contact as the defendant "putting his fingers in a little bit," and she denied having any doubt that the defendant was in her vagina "because [she] felt his hand."

At trial, the defendant argued that his detention did not constitute abduction due to the "Incidental Detention Doctrine." He also argued that the victim's "reference to her vagina, without more," was insufficient to establish the element of penetration under the indictment's additional, more specific "labia majora language."

Held: Affirmed.

Regarding the Abduction offense, the Court ruled that the defendant abducted the victim before strangling and sexually assaulting her and that his detention was not intrinsic to the strangulation and sexual assault.

The Court repeated that, under *Lawlor*, to determine whether an abduction is "intrinsic" to a defendant's commission of another crime of restraint, the test is "whether any detention exceeded the minimum necessary to complete the required elements of the other offense." In this case, the Court agreed that the evidence demonstrated that the defendant deceived the victim to induce her to

"remain" in his van so he could assault her. The Court found that the jury could have inferred that the defendant locked the door specifically to avoid the victim's escape, and the possible detection of his offense, as he attacked her.

Regarding the Object Sexual Penetration, the Court noted that § 18.2-67.2(A) "requires penetration of the victim's labia majora, which is the outermost part of the female genitalia." The Court repeated that penetration "need be only slight." The Court found that the victim's testimony alone was sufficient to prove penetration, and noted its similar 2019 ruling in *Alvarez Saucedo*, rejecting the defendant's analogy to the *Moore* case from 1997.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0417224.pdf

Williams v. Commonwealth: December 13, 2022

Newport News: Defendant appeals his conviction for Child Abduction on sufficiency of the evidence.

Facts: The defendant kicked in the door of the home where his child and child's mother resided, attacked the mother, held a gun to her, and struck her repeatedly. The defendant then abducted his four-year-old child from the mother, fired his gun several times, struck the child's head against the ground, held the gun to the mother's head again, and fled with the child.

The parties were not married, did not have a custody order, and had no formal arrangement regarding their children. At trial, the defendant argued that, as the child's biological father, he was legally justified in taking his daughter away from her mother's custody.

Held: Affirmed.

The Court found that, while "there shall be no presumption or inference of law in favor of either" parent regarding custody determinations, per § 20-124.2(B), the defendant did not establish that he's done enough to warrant parental rights equal to the mother's rights.

The Court repeated that, to convict the defendant of abduction, the Commonwealth was required to prove that the defendant took and transported the child by force or intimidation "with the intent to deprive her of her personal liberty or to withhold or conceal her from any person, authority or institution lawfully entitled to her charge." The Commonwealth also had to prove that the defendant acted without "legal justification or excuse."

The Court found that the *Taylor* case, where a father abducted his ten-month-old son, controlled in this case. In *Taylor*, the Virginia Supreme Court explained that "upon birth of an illegitimate child, the right of the natural mother to immediate custody is superior." The *Taylor* Court held that the father's "biological relationship" with the child did not give him "legal justification" to "forcibly take the child from the mother's custody." The Court wrote that "in most cases, parental rights require enduring relationships and do not spring full-blown from the biological connection between parent and child."

In this case, the Court concluded that the two months that the defendant lived with the mother and the children while sharing parenting responsibilities did not bestow upon him parental rights equal

to the mother's rights. "Any relational equity that the defendant built up with his children through his recent return to coparent was inadequate to establish equal parental rights with the mother under the circumstances presented in this case." The Court found that, to the extent that the defendant exercised a degree of parental authority over the child during that time, that authority was initiated and delegated by the mother. Thus, the authority that the mother gave the defendant to help her care for and raise the child during that short period did not legally empower him to take or transport the child in contravention of the mother's own parental rights. Accordingly, the defendant's status as the child's biological father did not legally justify his forcibly taking the child with the intent to withhold her from the mother.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0018221.pdf

Montgomery v. Commonwealth: September 6, 2022

Hampton: Defendant appeals his conviction for Abduction on the Incidental Detention Doctrine and the Verdict Form.

Facts: The defendant sexually assaulted a six-year-old child. During the assault, the defendant moved the victim from a bedroom to the chair in a living room, and then sexually abused her. The child later disclosed the assault and the child's family confronted the defendant, who confessed.

At trial, the defendant proffered a jury instruction that stated: "If the incidental force exerted against a victim of a sexual battery is the force necessary to commit the sexual battery, that force is not also sufficient to sustain a conviction of abduction with intent to defile." The defendant argued at trial that the abduction could not have occurred because any force he used was incidental to the aggravated sexual battery. The trial court rejected the defendant's argument and denied that instruction.

At trial, the defendant objected to the verdict form because it provided the "guilty" option before the "not guilty" option. He proffered a verdict form that reversed the order, but the trial court rejected the form.

The trial court convicted the defendant of aggravated sexual battery and abduction with intent to defile.

Held: Affirmed. The Court concluded that the defendant used force to detain the victim, separate and apart from the restraint used to commit aggravated sexual battery. By moving the victim from the bedroom to the living room, the Court found that the defendant used force beyond what was necessary to commit the aggravated sexual battery. The Court explained that, while restraint is inherent in any sexual battery, a perpetrator's transportation of a victim from one room to another requires distinct and additional force constituting an abduction.

Regarding the defendant's proffered instruction on "incidental detention," the Court ruled that it was not appropriate for the jury, as it was a question of law "to be determined by the court." The

Court explained that the only question before the jury was whether the case facts supported the elements of abduction with intent to defile.

Lastly, the Court explained that order of possible verdicts is not unduly suggestive and does not constitute a due process violation. The Court wrote: "One can hardly argue that placing the option to select guilty before not guilty was so "inherently prejudicial" that it unacceptably threatened Montgomery's right to a fair trial."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1283211.pdf

Raven v. Commonwealth: August 23, 2022

Norfolk: Defendant appeals his conviction for Abduction on sufficiency of the evidence.

Facts: After appearing at his estranged wife's residence, in violation of a protective order, the defendant repeatedly attacked her. When she escaped and tried to obtain help from a neighbor, he dragged her back to the house and continued the attack.

Initially, the defendant pointed a gun at her face and strangled her until she stopped screaming. He told her that he planned to kill her and then himself. He beat her repeatedly, but she was briefly able to escape during the attack. However, the defendant prevented her escape by dragging her from her neighbor's doorstep to resume assaulting her within the privacy of her home, after reassuring a concerned passerby that "everything [was] fine." The entire encounter within, and outside, the home lasted about an hour and was recorded on home surveillance cameras.

Held: Affirmed. The Court affirmed the trial court's judgment that this action was not incidental to the other offenses of malicious wounding, strangulation, and assaulting a person under a protective order.

The Court acknowledged that, if abduction is "intrinsic" to the defendant's commission of another crime of restraint, the defendant cannot be convicted of both crimes. Under *Lawlor*, to determine whether an abduction is "intrinsic" to a defendant's commission of another crime of restraint, the test is: "whether any detention exceeded the minimum necessary to complete the required elements of the other offense." In this case, the Court found that a fact finder could rationally conclude that the defendant forced the victim back into the house to avoid detection while further assaulting her. Accordingly, the Court affirmed the trial court's finding that the victim's asportation was independent of the various other offenses and therefore constituted an abduction.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1108211.pdf

Barber v. Commonwealth: June 14, 2022

Suffolk: Defendant appeals his conviction for Abduction on sufficiency of the evidence.

Facts: During an argument, the defendant viciously attacked the victim, beating her and telling her that she was going to die. During the attack, he robbed the victim and stole her credit cards. He then attacked her again, after the robbery and theft was complete.

At the beginning of the assault, the defendant threw the victim through a door, causing her to hit a microwave and wall and injure her head. The defendant then held the victim down on the floor while he "pounded away" at her face with his fists and strangled her until she blacked out. The defendant then placed the victim in a chair, sitting opposite her, and told her she was going to die. He threatened to stab her, tie her up with an extension cord, and leave her outside for deer to eat her, but did not actually tie her up.

After that first attack, the defendant robbed the victim of her personal property and credit cards. The defendant, however, continued to intimidate the victim and use force against her. He struck her with a hammer to force her to reveal her credit card PIN number. The victim finally was able to escape to a neighbor's house.

The victim's injuries included a major facial contusion, blurred vision, a hoarse voice, and a very minor contusion on her neck, and other such injuries. At the time of trial, the victim continued to have lingering muscle damage in her leg from blows with the hammer. She had recurring headaches and vision problems with her left eye.

The trial court convicted the defendant of abduction to obtain pecuniary benefit, robbery, and two counts of credit card theft.

Held: Affirmed. The Court found sufficient evidence that the defendant used force, and the threat of force, to detain the victim against her will both before, and after, the robbery offense was complete. Accordingly, the Court ruled that a reasonable finder of fact could conclude beyond a reasonable doubt that the defendant was guilty of abduction.

The Court first examined the beginning of the assault and concluded that the defendant used force to detain the victim on the floor for a period, depriving her of her personal liberty. The Court then examined the second assault, after the robbery and credit card theft, and concluded that the defendant detained the victim against her will with acts of force and intimidation that were separate from, and not merely incidental to, the robbery or credit card thefts.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0792211.pdf

Holmes v. Commonwealth: June 7, 2022

King William: Defendant appeals his conviction for Abduction on sufficiency of the evidence.

Facts: The defendant and his cousin planned a robbery of the victims. The defendant led the way up a driveway, offering the ruse that he needed to borrow jumper cables. When the victims agreed and got the cables, the cousin pulled out a gun and ordered both victims to the ground. The defendant immediately attacked one man while the defendant attacked the victim in this case. The defendant viciously kicked the man at multiple points throughout the attack.

When the victim tried to get up, the defendant and his cousin together forced the victim to the ground. They jointly beat and kicked him, inflicting severe and permanent injuries. The victim's face was "unrecognizable" after the attack, and he was blinded in one eye. Later, the other man the men attacked identified the defendant and the police found wallets belonging to the victim and the man in the defendant's backpack.

On appeal, the defendant argued that the abduction conviction should be reversed because the facts supporting it were not separate and distinct from those supporting the malicious wounding and robbery convictions.

Held: Affirmed. The Court reasoned that the defendant detained the victim on the ground by the threat of force. "At that point, neither a robbery nor malicious wounding had been committed against him. So the detention was not incidental to any of the later crimes against" the victim. Thus, the Court found that the defendant detained the victim against his will with acts of force and intimidation separate from, and not merely incidental to, the robbery and malicious wounding that followed. The Court noted that both instances of detention forced the victim to the ground and thus "exceeded the minimum necessary to complete" the later acts of robbery and aggravated malicious wounding.

For the Court, although the second detention resulted in the victim being knocked unconscious, that did not make the abduction part and parcel of the robbery and malicious wounding. The Court explained that "Just as 'rendering one's victim unconscious is not an essential, intrinsic element to complete the offense of rape',…, neither is it an essential, intrinsic element of robbery and malicious wounding. And even assuming for argument's sake that the second instance of detention presented a closer call than the first—given that the robbery and malicious wounding followed on its heels—the first instance of detention was alone sufficient to support the abduction conviction."

In a footnote, the Court noted that, although the defendant was not the one who detained the victim on the ground in the first instance, he was liable for his cousin's actions as a principal in the second degree.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0951212.pdf

Adult Abuse & Neglect

Virginia Court of Appeals
Published

Taylor v. Commonwealth: March 28, 2023

Chesterfield: Defendant appeals his convictions for Voluntary Manslaughter, Malicious Shooting, and Child Neglect on Denial of a Self-Defense Instruction and sufficiency of the evidence.

Facts: The defendant approached the victim in a mall food court and provoked a fight. When the victim quickly gained the upper hand, the defendant walked to his backpack and retrieved a firearm. The victim restarted the fight, and the defendant shot him twice, also hitting his own sister with a stray bullet. The defendant fled, ahead of his family, including his two-year-old son, later testifying that he did not know where his son was during the fight.

The victim was transported to the hospital and went into organ failure "almost immediately." The victim arrived at the ER close to death and, after a procedure to stop the bleeding, he had a roughly 1% chance of survival according to his treating physicians' testimony. The victim underwent at least 10 operations during his 11-day stay at the hospital, during which he never regained consciousness. The victim ultimately was removed from life support and died.

The defendant argued self-defense. At trial, the trial court gave an instruction which was virtually identical to Virginia Model Jury Instruction-Criminal Model Instruction No. 33.810 for self-defense "with fault." The defendant argued that, left on its own, that instruction placed an undefined burden of proof on the defendant, when instead the Commonwealth bore the burden of proof. The defendant proffered a supplemental instruction:

> "If you find from a consideration of all of the evidence in the case that the defendant's claim of self-defense creates a reasonable doubt that he committed the offense, then you shall find him not guilty."

The trial court rejected that instruction. However, the Court did give the instruction that stated "[t]here is no burden on the defendant to produce any evidence" and gave the instruction that stated: "If you have a reasonable doubt as to whether he is guilty at all, you shall find him not guilty."

At trial, the trial court rejected the defendant's argument that his three rapid-fire shots at the same person in the same instance were insufficient to sustain his convictions for three separate counts of malicious shooting within an occupied building in violation of § 18.2-279. The trial court also rejected the defendant's argument that his convictions for malicious shooting in an occupied building were subsumed by his conviction for voluntary manslaughter. The defendant also unsuccessfully argued that he did not cause the victim's death.

Lastly, the defendant argued that he was not guilty of child neglect under § 18.2-371.1(B) because the evidence failed to prove that he was "responsible for the care" of his son.

Held: Affirmed.

Regarding the defendant's proffered jury instruction, the Court agreed that it is error for a self-defense instruction to affirmatively require the accused to carry the burden of proof. On the other hand, though, the Court explained that it is not necessary to instruct the jury that the Commonwealth "must disprove beyond a reasonable doubt every fact constituting" a claim of self-defense. The Court repeated that if a court properly instructs the jury that "[t]here is no burden on the defendant to produce any

evidence," it is not error to refuse an "additional instruction on the burden of proving affirmative defenses."

Regarding the three convictions for Malicious Shooting, the Court examined the statute and concluded that the legislature intended § 18.2-279 to be "bullet specific." The Court likened the offense to § 18.2-154, where the Court had reached the same result in the *Stephens* case that each shot the defendant fired was a "separate, identifiable act." The Court noted that the gravamen of the offense is the risk of endangerment or death to another as a result of discharging a firearm. The Court also noted that another panel had reached the same conclusion in 2019 in the unpublished case *Tate v. Commonwealth*, affirming two counts of malicious shooting at an occupied dwelling when the defendant fired multiple bullets at two occupied motel rooms.

The Court rejected the argument that convictions for malicious shooting in an occupied building were subsumed by his conviction for voluntary manslaughter, finding that malicious shooting within a building was not a lesser-included offense of voluntary manslaughter.

The Court also concluded that the evidence was sufficient to show that the victim died from his gunshot wounds, noting that the defendant did not present any evidence of an intervening cause, let alone an intervening cause that would fall outside the "probable consequence of [his] own conduct."

Lastly, the Court agreed that the defendant was guilty of child neglect. The Court noted that the defendant shot a gun three times with his son nearby and "then ran out of the mall seemingly without regard for his son's whereabouts."

Judge Chaney filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0433222.pdf

Virginia Court of Appeals
Unpublished

Swinson v. Commonwealth: March 29, 2022

Augusta: Defendant appeals his conviction for Abuse and Neglect of an Incapacitated Adult on sufficiency of the evidence:

Facts: The defendant was the primary caretaker for the victim, his adult son, who had suffered a traumatic brain injury that left him mentally incapacitated and prone to seizures. The victim's seizures could exacerbate his brain injury, and, in the event of a prolonged seizure, he could suffer cardiac arrest.

One Saturday, a store clerk found the victim alone in the store, eating condiments and asking for food. The clerk noticed that the victim was wearing a Project Lifesaver wristband and called the police, who escorted the victim to the local station and contacted the APS, who took the victim to the hospital. It was not until Monday afternoon that the defendant reached out for the first time to find the victim.

Police spoke with the defendant. The defendant acknowledged that he was responsible for ensuring that the victim took his seizure medications and that, without them, the victim was

"susceptible" to seizures. The defendant was also prone to seizures. The defendant revealed that he had left the victim with a friend on Friday without any plan for when he was going to return. The defendant admitted that by Saturday, he could no longer contact the friend. He also revealed that he had learned that the victim had "wandered off" by Sunday evening. The defendant claimed that he did not notify authorities until Monday because he first wanted to find "evidence" that he had not been trespassing in violation of previous orders.

The trial court convicted the defendant of misdemeanor abuse and neglect of an incapacitated adult in violation of § 18.2-369. On appeal, the defendant contended that the court erred in finding sufficient evidence of a "knowing and willful failure to provide necessary care."

Held: Affirmed. The Court agreed that the trial court could reasonably conclude that the defendant willfully neglected the victim when he took no affirmative action for three days to locate his son or to confirm he had received the medications required to prevent life-threatening seizures.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0637213.pdf

Animal Cruelty

Virginia Court of Appeals
Published

Haefele v. Commonwealth: October 18, 2022
75 Va. App. 591, 878 S.E.2d 422 (2022)
and
Compton v. Commonwealth: October 18, 2022 (unpublished)

Spotsylvania: Defendants appeal their convictions for Maliciously Maiming the Livestock of Another and Conspiracy on sufficiency of the evidence.

Facts: The defendants, apparently on request of the property owner, viciously and cruelly beat and slashed several goats to death using primitive tools, including a spiked club and a machete. [*The details of the torture and killing of these animals are disturbing and will not be set forth in this summary – EJC*]. A neighbor filmed part of the killing, and one of the defendants filmed the entire incident themselves.

On video, the defendants laughed and joked about causing the goats' injuries and suffering throughout the attack—calling "strikes" and "home runs" as one defendant swung at the goats. While one defendant struck the goats, the other laughed, joked, and encouraged the other while filming the incident. The defendant who was filming the incident also gave feed to the other defendants to lure the goats to them and made suggestions about how to kill the animals.

At trial, the Commonwealth called two experts, one an expert in veterinary pathology and forensics, and the other an expert in livestock veterinary medicine. The experts testified that the goats suffered before they died, and that blunt force simply is not an acceptable method of killing goats because their skulls are too thick for such methods to kill the animal effectively and efficiently without inflicting more pain than necessary.

At trial, the defendants argued that the Commonwealth failed to prove that they acted without the property owner's consent.

Held: Affirmed.

The Court explained that the plain language of § 18.2-144 required the Commonwealth to prove:

(1) that the accused shot, stabbed, wounded, or otherwise caused bodily injury to livestock;

(2) that the accused acted maliciously;

(3) that the accused intended to maim, disfigure, disable or kill the livestock; and

(4) that the livestock belonged to another person.

The Court ruled that, given that the General Assembly chose not to include language limiting the application of § 18.2-144 to those cases where the accused acted against the will of the owner in this statute, it would presume that it did so intentionally. Consequently, the Court held that the plain language of § 18.2-144 criminalizes all malicious wounding of the livestock of another person—regardless of whether the owner of the livestock authorized the malicious act.

The Court also explained that, although owners of livestock certainly have the right to employ others in properly euthanizing or slaughtering their animals, the manner used by the defendants to bring about the goats' painful deaths in this case clearly demonstrates that they acted with malicious intent. In short, the defendants acted cruelly and brutally, inflicting great amounts of pain and injury on the goats by repeatedly striking them with multiple deadly weapons (e.g., the spiked club and the machete)—resulting in a prolonged, especially painful death.

Regarding the defendant who filmed and encouraged the other defendants, the Court agreed that the evidence demonstrated that he shared the criminal intent of the other defendants, and therefore acted as a principal in the second degree.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0508212.pdf
and
https://www.vacourts.gov/opinions/opncavwp/0502212.pdf

Virginia Court of Appeals
Unpublished

Reid v. Commonwealth: April 4, 2023

Augusta: Defendant appeals her conviction for Animal Cruelty on sufficiency of the evidence.

Facts: The defendant neglected her dog to the point of starvation and severe illness. Although the dog had been losing weight for months and was in pain and unable to walk due to a hind-leg injury, the defendant never sought veterinary care for the dog. Animal control ultimately seized the dog and it had to be euthanized.

At trial, the Commonwealth's veterinarian testified that it would have taken months for the dog to reach such an extreme state of emaciation and it would be "unusual" for a dog to reach this level of emaciation while eating four cans of food per day. Additionally, the defendant's neighbor, testified that she saw the dog outside alone almost every afternoon, never saw anyone give the dog food or water, and saw the dog trying to eat nuts off the ground the day animal control seized her. The veterinarian could not definitively conclude that the dog's extreme emaciation resulted from a lack of adequate food and water, However, photographs demonstrated that "virtually every bone" in the dog's body was showing.

The defendant contended that the Commonwealth failed to prove that she "willfully" inflicted inhumane injury on the dog and caused her serious bodily injury, because the veterinarian could not rule out other possible explanations, such as an inappetence or illness, for the dog's emaciated state.

Held: Affirmed. The Court agreed that the defendant's failure to seek veterinary care despite knowing of the dog's serious health issues for a substantial period evinces the defendant's reckless disregard for the dog's well-being. The Court concluded that a reasonable trier of fact could find, as the court did, that the defendant failed to provide adequate care to the dog and created a situation which made it not improbable that injury would be occasioned and knew the probable results of her acts, thereby willfully inflicting inhumane injury and pain on her and causing serious bodily injury.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0413223.pdf

Harner v. Commonwealth: June 28, 2022
And
Huffman v. Commonwealth: June 28, 2022

Rockbridge: Defendants appeal their convictions for Animal Cruelty on sufficiency of the evidence.

Facts: During a traffic stop, officers discovered the defendants' dog, hidden in trash in the vehicle. The dog had been partially paralyzed during a previous accident and was whining and in a state of decay so extreme that officers were "gagging" on the scene. [*The case sets forth the details, which I am not including in this description due to their graphic content, though they are referenced below – EJC*]. Police brought the dog to a veterinarian, who concluded that, due to the dog's advanced infection, he likely had no cognitive function left, and was probably not in a lot of pain, though he was "alert." Treatment was no longer an option, and the doctor euthanized the dog.

Held: Affirmed. The Court held that the evidence supported a conviction based on inaction or omission where that conduct: "(i) willfully inflicts inhumane injury . . . [upon] any dog or cat that is a companion animal . . . and (ii) as a direct result causes serious bodily injury to such dog or cat . . . . " in violation of § 3.2-6570(F).

The Court noted that § 3.2-6570(F) was amended in 2019 to allow a felony conviction, even if the animal survived its injuries. The Court examined the *Pelloni* case and applied that case and the new statutory language. In this case, based on the dog being covered in urine and feces, the strong stench the dog emitted, and the general squalor of his surroundings in the car, the Court agreed that a rational fact finder could conclude that the defendants had taken very few steps to keep the dog clean after he was paralyzed, though they knew the probable consequences of their acts.

The Court then determined that the conduct and omissions by the defendants in dealing with the animal constituted willful infliction of "inhumane injury." In this case, the Court found that the medical evidence and the photos of the conditions in the car were sufficient to permit a fact finder to conclude that the defendant left the dog in acidic pools of excrement long enough to cause massive burning and rotting of his flesh. Though the Court did not know the exact period in which the dog was forced to lie in his own waste, the Court agreed that the circumstantial evidence and veterinary testimony established that it was an "extended period of time"—long enough for the dog's skin to substantially decay. Thus, the Court agreed that conditions in the car were "appalling," "abhorrent," and "shocked the conscience."

The Court agreed that there are cases in which companion animals will receive "serious bodily injury" through means where no abusive or even wrongful intent is at issue, such as a surgical procedure. However, the Court concluded that that the term "inhumane" was employed to distinguish cases in which an animal suffers serious bodily injury, where the infliction itself was not "inhumane" or uncivilized.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0756213.pdf
and
https://www.vacourts.gov/opinions/opncavwp/0797213.pdf

Arson & Threats to Burn

Virginia Court of Appeals
Unpublished

Young v. Commonwealth: September 6, 2022

Patrick: Defendant appeals her conviction for Arson on sufficiency of the evidence.

Facts: After being lost for several days in the woods, the defendant broke into a cabin. She also set multiple fires in and around the cabin, causing nearly $14,000 in damage to the cabin and burning

two acres of pine land. She made a fire on the main floor of the cabin even though the cabin had a fireplace. Two of the fires were still burning when a neighbor arrived, after the defendant had fled. She later admitted to using matches and gathering materials to start a fire.

At trial, the defendant argued that the fire damage was accidental. She insisted that she did not act "maliciously" under § 18.2-77(A), denying that she acted out of ill will, and instead claimed that she "started a campfire for the stated purposes of warmth, light and to signal for help."

Held: Affirmed. The Court agreed that the evidence demonstrated that the defendant committed arson when she deliberately started multiple fires near and inside the victim's cabin.

The Court quoted Bacigal's treatise to explain that, to show that a fire was incendiary—deliberately set—the prosecution may offer evidence involving the "use of accelerants, multiple points of origin, or discounting of accidental causes." The Court went on to quote Bacigal's statement that "At common law, 'maliciously' included reckless as well as intentional burnings. Thus, if one is fully aware that his conduct creates a grave risk that a dwelling place will be burned, and proceeds with the conduct, and causes the result, he is punishable under" § 18.2-77.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1032213.pdf

Assaults

Virginia Court of Appeals
Published

Fary v. Commonwealth: April 18, 2023
En Banc, Aff'd Panel Ruling of August 23, 2023
King William: Defendant appeals his convictions for Attempted Malicious Wounding on sufficiency of the evidence.

Facts: The defendant, angry and upset after the victims' boat passed his boat, followed the victims for 15-25 minutes until they parked at a dock. After the victims parked, the seven of them remained on the boat. The defendant approached them in his boat, yelled and cursed at them, put his boat in gear, and slammed their boat with his own boat at a 90-degree angle. The impact knocked over one of the children on the victims' boat, and the defendant's own boat intruded into the victims' boat's passenger compartment, where a child hit his head on the defendant's boat. The defendant then backed down, cursed the victims again, restarted his engine, and rammed the victims again. Police responded and the defendant admitted to striking the victims' boat, but claimed it was an accident.

Held: Affirmed. In an 11-6 ruling, the Court distinguished this case from the 1995 *Haywood* case and the 1997 *Crawley* case, but also concluded that the Court's statements in *Haywood* and *Crawley* were inconsistent with settled law. The Court criticized those panel decisions for ruling that the

evidence "failed to exclude as a reasonable hypothesis the possibility" that the defendants in those cases did not have the requisite intent. Citing the Virginia Supreme Court's ruling in *Barney*, the Court explained that it is the fact finder, not the Court of Appeals, that determines whether a defendant's hypothesis is reasonable.

In a footnote, the Court further explained that the appellate courts of the Commonwealth have no such role in determining the existence of "reasonable doubt." The Court criticized the dissent for having "reweighed the evidence, reassigned the credibility of the witnesses, and otherwise engaged in the factfinding exercises that the above precedents hold are the sole responsibility of a trial jury or, as in this case, a trial judge, who was in a far better position to do so than our dissenting colleagues."

Judge Ortiz concurred in the judgement but did not agree with overruling the previous cases.

Judge Causey filed a dissent, joined by Judges Friedman, Chaney, Raphael, Lorish, and Callins, arguing that the evidence shows that the Commonwealth failed to prove that the defendant had the requisite specific intent to maim, disfigure, disable, or kill, and not merely the intent to scare the victims and damage their boat.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1079212.pdf

Taylor v. Commonwealth: March 28, 2023

Chesterfield: Defendant appeals his convictions for Voluntary Manslaughter, Malicious Shooting, and Child Neglect on Denial of a Self-Defense Instruction and sufficiency of the evidence.

Facts: The defendant approached the victim in a mall food court and provoked a fight. When the victim quickly gained the upper hand, the defendant walked to his backpack and retrieved a firearm. The victim restarted the fight, and the defendant shot him twice, also hitting his own sister with a stray bullet. The defendant fled, ahead of his family, including his two-year-old son, later testifying that he did not know where his son was during the fight.

The victim was transported to the hospital and went into organ failure "almost immediately." The victim arrived at the ER close to death and, after a procedure to stop the bleeding, he had a roughly 1% chance of survival according to his treating physicians' testimony. The victim underwent at least 10 operations during his 11-day stay at the hospital, during which he never regained consciousness. The victim ultimately was removed from life support and died.

The defendant argued self-defense. At trial, the trial court gave an instruction which was virtually identical to Virginia Model Jury Instruction-Criminal Model Instruction No. 33.810 for self-defense "with fault." The defendant argued that, left on its own, that instruction placed an undefined burden of proof on the defendant, when instead the Commonwealth bore the burden of proof. The defendant proffered a supplemental instruction:

> "If you find from a consideration of all of the evidence in the case that the defendant's claim of self-defense creates a reasonable doubt that he committed the offense, then you shall find him not guilty."

The trial court rejected that instruction. However, the Court did give the instruction that stated "[t]here is no burden on the defendant to produce any evidence" and gave the instruction that stated: "If you have a reasonable doubt as to whether he is guilty at all, you shall find him not guilty."

At trial, the trial court rejected the defendant's argument that his three rapid-fire shots at the same person in the same instance were insufficient to sustain his convictions for three separate counts of malicious shooting within an occupied building in violation of § 18.2-279. The trial court also rejected the defendant's argument that his convictions for malicious shooting in an occupied building were subsumed by his conviction for voluntary manslaughter. The defendant also unsuccessfully argued that he did not cause the victim's death.

Lastly, the defendant argued that he was not guilty of child neglect under § 18.2-371.1(B) because the evidence failed to prove that he was "responsible for the care" of his son.

Held: Affirmed.

Regarding the defendant's proffered jury instruction, the Court agreed that it is error for a self-defense instruction to affirmatively require the accused to carry the burden of proof. On the other hand, though, the Court explained that it is not necessary to instruct the jury that the Commonwealth "must disprove beyond a reasonable doubt every fact constituting" a claim of self-defense. The Court repeated that if a court properly instructs the jury that "[t]here is no burden on the defendant to produce any evidence," it is not error to refuse an "additional instruction on the burden of proving affirmative defenses."

Regarding the three convictions for Malicious Shooting, the Court examined the statute and concluded that the legislature intended § 18.2-279 to be "bullet specific." The Court likened the offense to § 18.2-154, where the Court had reached the same result in the *Stephens* case that each shot the defendant fired was a "separate, identifiable act." The Court noted that the gravamen of the offense is the risk of endangerment or death to another as a result of discharging a firearm. The Court also noted that another panel had reached the same conclusion in 2019 in the unpublished case *Tate v. Commonwealth*, affirming two counts of malicious shooting at an occupied dwelling when the defendant fired multiple bullets at two occupied motel rooms.

The Court rejected the argument that convictions for malicious shooting in an occupied building were subsumed by his conviction for voluntary manslaughter, finding that malicious shooting within a building was not a lesser-included offense of voluntary manslaughter.

The Court also concluded that the evidence was sufficient to show that the victim died from his gunshot wounds, noting that the defendant did not present any evidence of an intervening cause, let alone an intervening cause that would fall outside the "probable consequence of [his] own conduct."

Lastly, the Court agreed that the defendant was guilty of child neglect. The Court noted that the defendant shot a gun three times with his son nearby and "then ran out of the mall seemingly without regard for his son's whereabouts."

Judge Chaney filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0433222.pdf

Virginia Court of Appeals
Unpublished

Payne v. Commonwealth: November 1, 2022

Hampton: Defendant appeals his convictions for Shooting into an Occupied Vehicle on sufficiency of the evidence.

Facts: The defendant fired a handgun repeatedly at a fleeing vehicle as it drove through an intersection. A mother and two of her children were in one of the cars waiting at the traffic light and two of the defendant's bullets entered her car, shattering the front driver and passenger windows and covering her in glass. At trial, the defendant argued that the Commonwealth's evidence did not exclude the reasonable theory of innocence that his shooting was done in self-defense or unlawfully, but not maliciously.

Held: Affirmed. The Court agreed that the defendant intentionally and maliciously fired upon an occupied vehicle. In a footnote, the Court also explained that a rational factfinder could also find malice through the doctrine of transferred intent, which applies when the defendant completes his intended crime and, in doing so, injures an unintended victim. The Court explained that a rational factfinder could conclude that the defendant intentionally shot at an occupied vehicle. Even if the defendant did not intend to shoot into the victim's vehicle, the Court concluded that his malice in shooting at the original car transferred to his act of shooting into her vehicle.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1282211.pdf

Assault on Law Enforcement

Virginia Court of Appeals
Unpublished

Adams v. Commonwealth: January 31, 2023

Roanoke: Defendant appeals his conviction for Assault on Law Enforcement on Jury Instruction issues.

Facts: While investigating a call for shots fired and an assault on a citizen, officers attempted to detain the defendant. The defendant refused to identify himself, became "agitated," and walked back to his vehicle. He was "cursing" and "very animated," insisting that he was not involved and did not have to tell the police anything. After the defendant entered his vehicle, officers ordered him to step out of the vehicle from the back seat because he was being detained.

The officers opened the door and tried to pull the defendant out of the vehicle as the defendant resisted and pulled away. The defendant held on to the headrest in front of him as the officers continued trying to remove him from the vehicle. The defendant then lunged out of the vehicle, punched an officer in the eye, and then punched another officer in the eye. After a struggle, officers arrested the defendant. One officer's left orbital bone was fractured in four places as a result of the punch. He was diagnosed with a severe concussion and nerve damage in his left temple and continued to suffer from intermittent headaches and blurry vision. The other officer was diagnosed with a concussion and continued to suffer from mild vision change.

Prior to trial, the defendant moved suppress, arguing that the officers lacked reasonable articulable suspicion or probable cause to remove the defendant from the vehicle. The trial court denied the motion to suppress. At trial, the defendant requested a jury instruction on self-defense, which the trial court granted. The Commonwealth requested a jury instruction which stated: "An individual has no right to use force to resist an unlawful detention." The trial court granted the instruction over the defendant's objection.

Held: Affirmed. The Court found that the Commonwealth's instruction accurately recited the Supreme Court's holding in *Hill*.

The Court rejected the defendant's request for a "change in the law" in response to "systemic abuses in police practices." The Court also rejected the defendant's attempt to distinguish the detention of witnesses from the detention of criminal suspects, finding that this argument pertained to whether the detention was unlawful, not to whether the defendant had the right to use force to resist an unlawful detention.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0873223.pdf

Parker v. Commonwealth: December 13, 2022

Augusta: Defendant appeals her conviction for Assault and Battery on Law Enforcement on Denial of a Continuance and Jury Instruction issues.

Facts: Officers responded to a complaint of domestic assault. The defendant and the other party gave conflicting accounts of the altercation. Officers concluded that the defendant was the primary aggressor and arrested her. The defendant kicked a police officer who was arresting her. The grand jury indicted the defendant for "unlawfully and feloniously assault[ing]" the officer.

At trial, the Commonwealth moved to amend the indictment to allege that the defendant "did feloniously assault and batter" the officer (from mere assault). The trial court granted the motion over the defendant's objection, noting that § 19.2-231 authorizes a trial court to permit amendment of an indictment at any time before the jury returns a verdict. The defendant then moved for a continuance, contending that the amendment was a surprise. The trial court denied the motion, concluding that the amendment did not constitute a surprise within the meaning of § 19.2-231.

At the conclusion of the trial, the defendant proffered four jury instructions pertaining whether the officers had probable cause to arrest the defendant for committing assault and battery and whether the defendant was permitted to use reasonable force to resist the arrest. The trial court decided not to give the proffered instructions because it determined as a matter of law that the officers had probable cause to arrest the defendant, rendering the instructions irrelevant.

Held: Affirmed.

Regarding the denial of a continuance, the Court noted that the defendant did not show that the amendment operated as a surprise or that she was prejudiced by the denial of a continuance. The Court also complained that the defendant failed to show any prejudice from the trial court's denial of a continuance.

Regarding the jury instructions, the Court first repeated that the lawfulness of an arrest presents a mixed question of law and fact. However, where the facts are undisputed, the Court explained that only a question of law remains. The Court emphasized that it is "fundamental" that questions of law should be decided by the court rather than submitted to the jury. In this case, the Court found that the trial court correctly found as a matter of law that the officer had probable cause and statutory authorization to arrest the defendant for assault and battery of a family or household member.

The Court noted that § 19.2-81.3(A) authorizes a law enforcement officer to "arrest without a warrant" for an alleged assault and battery against a family or household member "regardless of whether such violation was committed in his presence." The Court reviewed the factors in § 19.2-81.3(B) and the facts of this case. Based on the undisputed facts, the Court found that the trial court was entitled to rule as a matter of law that the officer reasonably believed that the defendant committed assault and battery and was the predominant physical aggressor. Therefore, the trial court did not err by refusing the four proposed jury instructions.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0377223.pdf

Yancey v. Commonwealth: November 22, 2022

Norfolk: Defendant appeals his conviction for Assault and Battery of a Jail Employee on sufficiency of the evidence.

Facts: While incarcerated at a local jail, the defendant spit in a deputy recruit's face.

The defendant was housed in a secure portion of the facility and attended to by sheriff's deputies. On the day of the offense, the deputy recruit wore the plain black uniform standard for all deputy recruits as he escorted a nurse around the jail to supervise the distribution of medication. The defendant complained to the deputy recruit about his meal, and when the recruit responded to his cell and opened the door flap to the cell, the defendant spat on him.

At trial, the deputy recruit testified that his duties as deputy recruit included the "direct supervision" of and responsibility for the "health care and safety of the inmates" at the jail.

The trial court convicted the defendant of assault and battery against an employee of a local correctional facility, in violation of § 18.2-57(C).

Held: Affirmed. The Court ruled that the evidence sufficiently proved that the defendant committed an assault and battery on the deputy recruit, while knowing or having reason to know he was an employee of the jail directly responsible for the care, treatment, or supervision of the inmates.

The Court examined § 18.2-57(C)'s definition of "an employee of a local or regional correctional facility directly involved in the care, treatment, or supervision of inmates." Notwithstanding some limitations on the trainee's authority as a deputy recruit—such as being unable to move inmates in the jail section where appellant was housed without the assistance of two deputies—the Court found that the role he actually played at the jail satisfied the criteria of § 18.2-57(C).

The Court also noted that the fact that the deputy recruit was supervising a nurse, wearing the black deputy recruit uniform, and not himself handing out any medications, yielded the reasonable inference that the defendant would or should have known the deputy recruit was an employee of the jail. The Court also noted that the fact that the deputy recruit opened the door flap to the defendant's cell indicated that he was acting under the authority of the sheriff's office in a way that would have been obvious to the defendant.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0076221.pdf

Robinson v. Commonwealth: August 9, 2022

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

Facts: Officers responded to a call regarding an altercation between the defendant and another person. The defendant was argumentative and combative with the officers from the moment they arrived on the scene. As an officer investigated the incident by interviewing witnesses, the defendant repeatedly interrupted her, talked over the officer, and prevented her from speaking with people on the scene. The defendant refused to identify herself and cursed at the primary officer, further disrupting her investigation. A second officer had to move the defendant from the area so the primary officer could conduct her investigation, thus preventing the second officer from assisting with the interviews.

After struggling with the second officer, the defendant announced her specific intent to "assault" any officer who attempted to search her. When an officer approached to conduct the search, the defendant immediately kicked the officer. The defendant then resisted the officers' attempts to subdue her. Only after another officer arrived on the scene were the police able to conduct the search.

After officers arrested her, the defendant resisted the officers' attempts to stop her from kicking the police car window, and only after backup officers arrived and shackled her were the officers able to transport her to the police station.

Held: Affirmed. Regarding the Obstruction offense, the Court noted that the defendant forcefully resisted the officers' commands and prevented the officers from accomplishing their duties. Accordingly, the Court ruled that the evidence proved that the defendant obstructed the officers.

Regarding the assault on law enforcement, the Court agreed that the defendant's statements, behavior, and acts amply demonstrate that she acted with the requisite intent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1271213.pdf

Malicious Wounding

Virginia Court of Appeals
Unpublished

Kelly v. Commonwealth: August 2, 2022

Williamsburg/James City County: Defendant appeals his convictions for Aggravated Malicious Wounding on sufficiency of the evidence.

Facts: The defendant's father stabbed multiple people after the defendant told her father that some men had attempted to rape her that night and that one of them called her brother a "snitch." Afterwards, the defendant went straight to her father and conversed with him about what had taken place. With knowledge of her father's intent to assault the victim, the defendant drove her father to the victim's apartment building, informed her father which apartment was his, knocked on the door, pointed out the victim as the one who called her brother a snitch.

The father attacked the victim with a knife. The victim was left with multiple significant facial and other scars. Another man came to the defense of the victim, but the defendant also slashed the other, defending victim as well. The defendant then drove her father away from the crime scene and back to his motel room.

The defendant's father had a history of serious mental illness and violent conduct. He was diagnosed with schizoaffective disorder. At age fifteen, he had stabbed another student in an unprovoked attack, and he stabbed someone else when he was in prison. The same court had found the defendant's father not guilty by reason of insanity ("NGRI") in another case in 2017, but in 2020, the state released him from NGRI treatment at Eastern State Hospital. Just days before this incident, the defendant had attacked another man due to excessive paranoia.

After the attack, the victim told police that she knew that her father was going to attack the victims. She admitted to police investigators that she knew what her father was going to do, but not the extent of what he was going to do. She later claimed that she only went back to the apartment to claim her wallet.

Held: Affirmed. The Court held that the evidence supported the trial court's finding that the defendant brought her father to the victim's apartment for the criminal purpose of assaulting the victim. Because the assault on the victim resulted from the defendant's concert of action with her father, the Court agreed that the defendant was liable for the stabbings that resulted when her father used a knife in the commission of the assault. The second victim's defense of first victim and the subsequent stabbing of the second victim were incidental probable consequences of the assault. Therefore, the Court ruled that the defendant was also liable for the malicious wounding of the defender victim.

The Court rejected the defendant's argument that she lacked the specific intent to stab and wound the victims. The Court repeated that such lack of intent is a defense to a conviction as a principal in the second degree, unless "there was concert of action and the resulting crime, whether such crime was originally contemplated or not, is a natural and probable consequence of the intended wrongful act." The Court analogized this case to the *Brown* case, finding that the defendant was criminally liable for these stabbings for the same reason that the defendant in *Brown* was criminally liable for his brother's shootings of the victims.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0675211.pdf

Strangulation

Virginia Court of Appeals
Unpublished

Dews v. Commonwealth: May 2, 2023

Campbell: Defendant appeals his conviction for Strangulation on sufficiency of the evidence.

Facts: After attempting to rape the victim, the defendant placed his hands around her throat and tried to strangle her twice. The victim did not lose consciousness but testified that she felt dizzy, could not breathe very well, and that it felt like the defendant cut off her air passage. Afterwards, he told her that he hoped he didn't scare her "but it just turned him on." Her neck was red and just a little sore for the next day.

At trial, the defendant contended that the victim's red neck and sore throat were insufficiently serious to constitute a bodily injury.

Held: Affirmed. The Court ruled that the victim's testimony that her neck was red and sore the day after the incident was sufficient to support the trial court's conclusion that the victim suffered a bodily injury.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0577223.pdf

Threats in Writing

Virginia Court of Appeals
Unpublished

Ricks v. Commonwealth: September 13, 2022

Southampton: Defendant appeals his conviction for Making a Written Threat on sufficiency of the evidence.

Facts: The defendant sent threatening text messages to the victim, who was the mother of his child. In one threat, he stated that he would kill the victim. When she received the messages, the victim went directly to the police. At trial, the trial court made the following factual findings:

- The messages came from a handle that the defendant undisputedly used.
- The audio message received with one of the text messages used grammar and syntax similar to that used in the text messages.
- The victim identified the defendant's voice on the audio message and identified the defendant as the one who sent the audio message to her.
- The victim testified that the defendant apologized to her, saying, "I'm sorry, sometimes people get into my head," or words to that effect.

At trial, the defendant argued that the evidence failed to prove that he was the person who sent the threatening messages and that the messages placed the victim in reasonable apprehension of death or bodily harm. The trial court convicted the defendant of feloniously making a written threat to kill or do bodily injury to a person in violation of § 18.2-60(A).

Held: Affirmed. The Court agreed that a rational factfinder could find that the defendant sent the threatening text messages, notwithstanding the victim's testimony that she wasn't sure whether someone else sent the messages using the defendant's online account. The Court also found that the evidence supported the trial court's conclusion that the threatening messages placed the victim in reasonable apprehension of death or bodily harm.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0395211.pdf

Burglary

Virginia Court of Appeals
Unpublished

Briley v. Commonwealth: August 2, 2022

Chesapeake: Defendant appeals his convictions for Burglary and Larceny on sufficiency of the evidence of value.

Facts: The defendant stole video games and game systems from the victim's home and sold some of the stolen items to a local store. The defendant stole the items from one location, under the victim's bed, where the victim kept all the items together.

Police identified the defendant on video, and he confessed. At trial, the victim testified the value of the one game console was $299 and the other console was $200, if new, and "about 150, 100 bucks" used. As for the stolen games, she testified four games ranged from $59 to $69, and each of the twenty others ranged from $5 to $40. The store manager testified consistent with the victim's statement. [*Note: At the time, the felony larceny threshold was $500 – Ed.*].

At trial, the defendant objected that the trial court erroneously considered the value of the still-missing game system and its related games in determining the statutory threshold amount because the evidence failed to prove he was in possession of those items.

Held: Affirmed. The Court agreed that the evidence was sufficient to prove the value of the stolen items was over $500. The Court also agreed that, based on the defendant's sale of some of the stolen items, the trial court could lawfully "infer the stealing of the whole from the possession of part."

The Court repeated that when "property is taken at about the same time as that found in accused's possession," then "the possession of a part of the recently stolen property warrants the inference that accused stole all of it." "Such circumstances support an inference which leaves no room for reasonable doubt that the goods defendant possessed were the goods stolen."

Regarding value, the Court repeated that the Commonwealth may offer testimony of a lay person or an expert to prove value. The Court noted that the original purchase price of an item is admissible as evidence of its current value, and therefore it was within the province of the trial court to consider and determine the credibility of the victim's market-value testimony.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1151211.pdf

Brown v. Commonwealth: December 20, 2022

Virginia Beach: Defendant appeals his conviction for Common Law Armed Burglary and related charges on sufficiency of the evidence.

Facts: The defendant entered a home in the nighttime and shot the victim. The defendant had previously stayed with the victim. The victim suspected that the defendant had previously entered her home by climbing through her upstairs balcony. On one occasion, after the victim left her screened kitchen window open, she returned home to find the screen taken away from the window and mud on the countertop. Her backyard was gated and locked with a padlock.

On the night of the theft, the victim returned home to find the defendant in her bedroom. He put a gun to her head and fired, but she moved and was struck in the arm. The defendant fled before police arrived. The wound caused the victim permanent injury. Although the victim had not seen the defendant's face, police later recovered the firearm, which had been stolen, from the defendant and matched it to the firearm used in the attack.

At trial, the defendant noted that the evidence did not show where or how he entered the victim's residence. The victim had testified that she kept the gate to her backyard locked with a padlock, but she did not testify as to whether her doors and windows were shut when she left her residence on the night of the attack. There also was no testimony as to the state of repair of the windows, screens, or doors before the shooting. Thus, he argued, the evidence did not exclude the reasonable hypothesis that he entered through an open door or window and was not guilty of Common Law Armed Burglary.

The defendant also argued that no evidence established that the offense took place at night. However, at trial, the defendant's roommate testified that the defendant was with him all night, except when he went to sleep. The roommate testified that he went to bed "about 9:00, 10:00, somewhere around there." The prosecutor asked, "At night?", and the roommate responded: "Yeah."

[*Note: The trial court also convicted the defendant of aggravated malicious wounding, use of a firearm in the commission of a felony, possession of ammunition by a convicted felon, larceny of a firearm, maliciously discharging a firearm in an occupied dwelling, and possession of a firearm by a non-violent felon. The defendant appealed those convictions as well and the court of appeals affirmed those convictions.]*

Held: Reversed regarding Common Law Armed Burglary. The Court held that the Commonwealth's evidence was insufficient to convict § 18.2-89 but was sufficient to charge for the lesser-included offense of §§ 18.2-90 or 18.2-91, depending on the intent alleged.

The Court complained that the Commonwealth provided no evidence that the defendant used force to gain entry to the home. The Court wrote: "The inference that [the defendant] broke into the home is no more reasonable than the inference that he entered through an open window, perhaps the window above the kitchen counter which screen was previously removed or a second story window without a screen or one that was previously torn."

Regarding the time of the burglary, however, the Court found that the trial court could find that the defendant entered the victim's residence in the nighttime regardless of when he entered within the established period of 9:00 p.m. to 10:00 p.m.

The Court ruled that the Commonwealth proved the nighttime element of § 18.2-89 but failed to prove the breaking element. The Court found, though, that the Commonwealth sufficiently proved all elements necessary to convict the defendant of statutory armed burglary under §§ 18.2-90 or 18.2-91 since neither statute requires breaking when the accused makes entrance at night. The Court remanded the matter for trial on one of those lesser charges.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1223211.pdf

Carr v. Commonwealth: August 23, 2022

Suffolk: Defendant appeals his convictions for Attempted Capital Murder, Armed Burglary, and related offenses on sufficiency of the evidence.

Facts: The defendant planned to sneak into the victim's house at night to see if she was "cheating" on him. He borrowed his mother's car and parked it nearby for easy access to the backyard. He planned a break-in using gloves, garden shears, and a ladder that he took from the shed. He planned to use the ladder to climb to the second floor to spy on the victim, and he planned to use the garden shears to break through the window screen. He brought a digital device with him to record the events. The defendant then fell off the ladder and instead broke into the house through the back door. He then unplugged all but one of the security cameras, disarmed the alarm, and ripped the telephone cord from the wall. He braced the back door with a chair.

The defendant then savagely attacked his estranged wife for nearly an hour. At trial, the defendant argued that he acted only in the heat of passion. He contended that he became enraged when he spied the victim texting a picture of herself to someone else, losing control of his actions.

The defendant also argued that he was not guilty of armed-burglary and burglary-tools because he could not break into a home that he claims he shared with his wife. The parties had been separated for a year, and the victim had made it clear to the defendant that he was not welcome at the home, which was only titled in the victim's name. The defendant was living with his mother at the time of the attack. The victim had changed the locks and installed a security system to protect herself.

Held: Affirmed. The Court agreed that the evidence sufficed to allow the factfinder to conclude that the defendant's actions were planned and premeditated, not spontaneous or without conscious reflection. Regarding burglary, the Court agreed that the evidence showed that the defendant knew that he had no right to enter the victim's house.

The Court rejected the defendant's claim of "heat of passion," noting that the defendant's actions reflected "a considered plan" that required "both thought and calculation." The Court concluded that the deliberate nature of his actions undermined his argument that he acted only "on impulse without conscious reflection." The Court acknowledged that the defendant's actions appeared to have been motivated by anger, jealousy, and vengeance. The Court countered, however, that malice includes "every unlawful and [unjustified] motive," including "anger, hatred and revenge." The Court also pointed out that malice is also shown where the attack, as in this case, "was a completely unprovoked, cruel, and vicious assault, deliberately and maliciously carried out under terrifying conditions."

Regarding the burglary convictions, the Court acknowledged that, under *Justus*, "a person may not unlawfully break and enter a home in which she has the right to occupy." However, the Court explained that the fact that a defendant may have some sort of legal title in the property or license to use it does not establish his right to occupy it. In this case, the Court noted that the defendant had no legal or proprietary interest in the victim's home, which was titled exclusively in her name, and had to break into the home to get access. Thus, the Court agreed that the trial court had ample evidence to support its conclusion that the defendant had no right to occupy the home.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0773211.pdf

Child Abuse & Neglect

Virginia Court of Appeals
Unpublished

Saravia v. Commonwealth: January 31, 2023

Culpeper: Defendant appeals his conviction for Indecent Liberties on sufficiency of the evidence.

Facts: The defendant repeatedly sexually assaulted the 16-year-old child of his fiancée. The defendant lived in the household, maintained the property, and conducted repairs on the house. The defendant, his fiancée, and the children treated each other as family; they prepared and ate meals together and participated in family activities together. The defendant took the victim and her siblings shopping for necessities and gifts, and he tried to establish a close relationship with the children. The victim treated the defendant as a "new father figure" entering her life, and the two spent one-on-one time together.

At trial, the defendant argued that the evidence failed to prove he maintained a custodial or supervisory relationship under § 18.2-370.1. The trial court disagreed and found as a matter of fact that the defendant exercised the requisite care and control over the victim.

Held: Affirmed. The Court noted that, in interpreting § 18.2-370.1, the Virginia Courts have broadly construed the meaning of custody, going beyond legal custody, to include those with informal, temporary custody. In this case, the Court agreed that a reasonable factfinder could conclude from the facts that the defendant engaged in a voluntary course of conduct that created a supervisory or custodial relationship with the victim, even without the defendant's "explicit parental delegation of supervisory responsibility."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0318224.pdf

Unger v. Commonwealth: January 10, 2023

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

Facts: The defendant has a four-year-old son who is on the autism spectrum. Due to previous issues, the defendant must follow a safety plan set up by DSS regarding her child, who often had

absconded from the home. As part of the plan, the defendant had since put multiple locks on the doors and installed an alarm system. She also built a six-foot-tall fence around the property. Nevertheless, possibly because the defendant may have left a deadbolt unsecured, the child escaped the home early one morning.

At approximately 7 a.m., a neighbor located the child in a backyard and brought the child back to the defendant's home. The neighbor spent several minutes banging on the defendant's door until the defendant finally answered. The defendant revealed that she had been asleep. The defendant was angry and yelled at the neighbor but took her child back into the home. The neighbor estimated that from when she found the child to when he was returned to the defendant was at least 20 minutes.

The Commonwealth brought the charge in this case by direct indictment. Prior to trial, the defendant argued that the circuit court did not have jurisdiction over this matter pursuant to § 16.1-241. The defendant contended that, because this was a criminal case with a minor victim, it could not be brought by direct indictment to the circuit court because § 16.1-241 vests "exclusive original jurisdiction" in J&DR courts over matters involving "[a]ny parent . . . of a child . . . [w]ho has been abused or neglected." The trial court rejected this argument.

Held: Reversed. The Court ruled that the circuit court had jurisdiction to hear the defendant's case. However, the Court found that the evidence was insufficient to prove a willful act or omission, and therefore the Court held that the trial court erred in finding the defendant guilty of contributing to the delinquency of a minor.

The Court first rejected the defendant's argument regarding jurisdiction. The Court applied the Supreme Court's ruling in *Payne*, which held that, although § 16.1-241 vests in J&DR courts exclusive original jurisdiction to conduct preliminary hearings in certain cases, this jurisdiction does not extend to when a grand jury directly indicts a defendant. Instead, under *Payne,* where an adult accused is directly indicted by a grand jury, without having been previously arrested and charged, the jurisdiction of the circuit court is thereby invoked, and no preliminary hearing is required, even though the victim of the crime involved may be a juvenile.

The Court repeated that that the legislative purpose of § 16.1-241 is to afford juvenile defendants and juvenile victims the protection and expertise of the juvenile court during the preliminary, or certification, hearing stage of a criminal prosecution. Where there is a direct indictment, however, the Court explained that those preliminary stages are not at issue, and there are no protections or considerations that can be given a juvenile victim in a J&DR court that cannot be afforded in or commanded by a court of record following a grand jury's direct indictment of a defendant. In this case, the Court found no logical reason to conclude that the reasoning articulated in *Payne* does not apply with equal force to misdemeanor charges.

However, in this case, the Court found that the defendant's acts and omissions here did not satisfy the "willful" requirement. The Court repeated that under § 18.2-371.1, a parent's act or omission is "willful" only if an objectively reasonable person would understand that injury to the child is likely to result.

In this case, even given the child's propensity to abscond, the Court stated: "we cannot say that the law supports criminalizing a parent or guardian's failure to directly surveil their child every moment of a day… Here, viewed in the light most favorable to the Commonwealth, Unger was home, sleeping in

T.W.'s bed, when he snuck out. She possibly had failed to secure one of the house's door locks the night before. An objectively reasonable person would not say that this was a willful act or omission that created a "substantial risk" of harm to T.W., or that this amounted to an "unreasonable absence or the mental or physical incapacity" on the part of Unger."

In a footnote, the Court distinguished the standard for felony child neglect under § 18.2-371.1 from the standard in this case. The Court explained that, although felony child neglect also involves a "willful act or willful omission," it also must be "so gross, wanton and culpable as to show a reckless disregard for human life," which is not required for a misdemeanor.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0003222.pdf

Pollard v. Commonwealth: September 27, 2022

York: Defendant appeals his conviction for Felony Hit and Run and Felony Child Endangerment on sufficiency of the evidence.

Facts: The defendant, to avoid highway traffic, drove into a construction work zone at 70 miles per hour, struck construction gear, and struck a construction worker. The defendant had a four-year-old child, his nephew, in the vehicle. Witnesses heard the defendant's brakes and saw his brake lights as the worker tried to run and dive out of the way, but the defendant's truck hit the victim's legs, "spun him like a top," and threw him to the ground. The defendant did not stop, and instead fled the area. The worker suffered serious injuries.

Officers found the defendant, who smelled of alcohol. The defendant stated that he had made eye contact with the worker but did not think he struck him. The defendant's vehicle was spattered with the paint that the worker had been using.

At trial, the defendant argued that the evidence did not establish that he was aware of the crash. He also argued that the evidence was insufficient to establish that he was related to the child or responsible for the child in any way specified by § 18.2-371.1(B)(1).

Held: Affirmed.

Regarding the Hit and Run offense, the Court agreed that a rational factfinder could have concluded from the evidence that a reasonable person in these circumstances—specifically, a person aware of having just forcibly struck a construction worker with his SUV—also would have known that the collision injured the construction worker.

Regarding the Child Endangerment offense, the Court concluded that, as the driver of a vehicle in which a four-year-old child was a passenger, the defendant exercised care and control over that child, even in the presence of another adult. The Court explained that 18.2-371.1(B)(1) applies to any "person responsible for the care of a child under the age of 18," and this includes any person who drives a motor vehicle knowing that a child is in the vehicle. Thus, given the undisputed evidence that the defendant

knowingly drove a motor vehicle with a child passenger, the Court concluded that the evidence was sufficient to support a finding that the defendant was a "person responsible for the care of a child."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0753211.pdf

Rose v. Commonwealth: July 19, 2022

Dinwiddie: Defendant appeals her conviction for Felony Child Neglect on sufficiency of the evidence.

Facts: The defendant drove while intoxicated with four children, including a three-year-old, in the vehicle. None of the children had been secured with protective seat devices. The defendant told police that she had been chasing her father, who had been driving "really fast," and she had attempted to keep up with him. When she attempted to call her father from her cell phone, the defendant lost control of her vehicle as she approached a curve, striking several groups of trees and causing the vehicle to overturn twice. An officer who responded discovered a nine-year-old child lying in the roadway with a bloody "hole in his head," injured with "road rash" from sliding along the pavement after being ejected from the vehicle. Another child received similar injuries.

Held: Affirmed. The Court found that the defendant's driving "clearly was reckless" and that her conduct violated § 18.2-371.1(B).

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1114212.pdf

Child Solicitation and Child Exploitation Material

Virginia Court of Appeals
Unpublished

Eckerd v. Commonwealth: March 14, 2023

Augusta: Defendant appeals his convictions for Possession of Child Pornography on Denial of a *Franks* Hearing, Jury Instruction Issues, and Juror Misconduct.

Facts: The defendant possessed child exploitation images. His girlfriend discovered the images and enlisted a friend to examine the defendant's electronic devices. The friend discovered more images and the two reported it to the police. The victim specifically described that she "caught her boyfriend … looking at animated child pornography" and that she found an image on his phone "that was borderline

child pornography." An officer obtained a search warrant for the devices based on their reports. The warrant revealed multiple child exploitation images.

The defendant moved to suppress, seeking a *Franks* hearing to challenge the search warrant. The defendant alleged that the affidavit's use of the word "nude" to describe pictures of toddlers that the friend saw when he examined the defendant's external hard drive was false. The defendant argued that the word "nude" was false because the friend's written statement to the police did not include that word, and because the friend, during testimony at a preliminary hearing, described the toddlers as "clothed." The trial court denied him a *Franks* hearing.

At trial, over the defendant's objection, the trial court instructed the jury that an element of the offense of possession of child pornography (second offense) is "that this possession occurred subsequent or in addition to at least one other possession" The trial court also instructed the jury, over the defendant's objection, that "The second or subsequent possession need not occur on a separate date or time, but must involve a separate child pornography file."

At trial, the defendant contended that the jury should have been instructed about the alleged dates of the offenses in the jury's "finding instructions." The trial court refused.

After the jury rendered its guilty verdict, the trial court polled the jury twice — once for the first offense and once for the eleven second or subsequent offenses. After trial, the defendant moved to set aside the verdict. The defendant attached an internal sheriff's office email which stated:

> "[A juror] called this morning to report that he was very disturbed by a court process that he was involved in 9/30/21. He said that he felt threatened, and was threatened in the bathroom, and felt like he had to vote the way of the majority. He talked endlessly about the trial process and was upset that a 2-day trial had been turned into a one-day trial where the jury was forced to stay late in the evening. He complained that the judge only gave them one break the entire day."

The complaining juror did not name the other juror who supposedly threatened him. Despite the Sheriff's attempts to reach this juror, the juror never responded to the Sheriff's numerous efforts to contact him or ever spoke with the Sheriff regarding the alleged threat. The trial court denied the motion.

Held: Affirmed.

Regarding the *Franks* hearing, the Court held that the defendant was not entitled to a *Franks* hearing because, even without the word "nude," the statements of the witnesses demonstrated that probable cause existed to support the search warrant, and the affidavit correctly stated that the toddler that the friend saw in the image was positioned in a lewd sexual manner.

The Court repeated that if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing pursuant to *Franks* is required. In this case, the Court concluded that, given all the circumstances set forth in the affidavit, it was "reasonable to believe" that child exploitation material would be found on the defendant's devices. The Court explained that "the word "nude" was simply not necessary to the finding of probable cause, and therefore no *Franks* hearing was required."

Regarding the jury instruction on the second offense, the Court concluded that the instruction accurately defined the elements of possession of child pornography—and possession of child pornography, second or subsequent offense. In addition, the Court ruled that the jury instruction was appropriate here where twelve separate images of child pornography were found on the defendant's external hard drive.

Regarding the defendant's request to instruct the jury on the date of the offenses, the Court held that none of the jury instructions were required to contain the alleged date of the offense as listed in the indictments because in a felony case the Commonwealth may prove the commission of a crime charged on a date different from that alleged in the indictment and because time was not an element of the offenses. The Court ruled that the trial court properly instructed the jury that a violation of § 18.2-374.1:1 required proof beyond a reasonable doubt that the defendant "knowingly possessed child pornography"— and that each subsequent violation required proof that the defendant possessed a separate child pornography image. Consequently, given that time is not a material element of an offense under either § 18.2-374.1:1(A) or (B), and that the instruction properly covered the actual elements of the offenses, the Court ruled that the trial court did not err by refusing to include the dates of the charged offenses in the jury instructions.

Regarding the alleged threat by a juror, the Court held that it was not an abuse of discretion to deny the defendant's motion to set aside the jury's verdict, given that the defendant could present only minimal facts about a vague supposed threat from a juror to another juror while in a bathroom at the courthouse. The Court ruled that the trial court did not err, given that the jury verdict was clearly shown to be unanimous after being polled twice, given that the complaining juror never responded to the Sheriff's efforts to follow up with him on those vague allegations, and given that the record contained no real proffer of any details of what the juror claimed happened at the courthouse.

In a footnote, the Court pointed out that the trial court could not consider much of the defendant's claim because a juror is precluded from testifying as to any matter or statement occurring during the jury's deliberations. In addition, the Court pointed out that Virginia Rule of Evidence 2:606(b)(i) states that, during an inquiry into the validity of a verdict, "[t]he court may not receive a juror's affidavit or evidence of a juror's statement" on "any statement made or incident that occurred during the jury's deliberations." In this case, the Court found the juror's allegations in this case to be so vague that none of the exceptions to Rule 2:606(b) applied.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0218223.pdf

Contempt

Wilson v. Commonwealth: May 16, 2023

Chesapeake: Defendant appeals his conviction for Contempt on sufficiency of the evidence.

Facts: In 2018, the trial court ordered the defendant to enter an anger management course, as a result of his conviction for domestic assault and battery. After two years, the defendant failed to even

contact or attempt to start the class. The program had reached out to the defendant repeatedly and told him to contact his probation officer, but the defendant never responded.

The defendant testified that, in January 2020, he had inquired about registering for the domestic violence class, but he did not have the means to pay the fee at that time. Although he was employed by the end of February 2020, he never attended the class or any other domestic violence counseling. He had an appointment to appear in March, but never appeared.

The defendant argued that his failure to comply with a court order was neither willful nor unreasonable. The trial court rejected his argument and convicted him of contempt in violation of § 18.2-456.

Held: Affirmed. While the Court acknowledged that the element of intent must be present for a defendant to be found guilty of contempt, in this case, the Court ruled that the circumstantial evidence supported a rational finding that the defendant acted "without justifiable excuse" for failing to complete the domestic violence class.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0564221.pdf

DUI and Refusal

Virginia Court of Appeals
Unpublished

Brown v. Commonwealth: December 13, 2022

Hampton: Defendant appeals his convictions for DUI and Following Too Close on sufficiency of the evidence.

Facts: The defendant rear-ended another vehicle after having taken Ambien, melatonin, and amitriptyline. An officer responded and observed that the defendant appeared unsteady on his feet and very lethargic while looking for his license and registration information. Based on those observations, the officer administered several standard field sobriety tests ("SFSTs"). The defendant performed poorly on those tests and failed an HGN examination. The officer arrested the defendant and obtained a blood sample from him.

DFS examined the blood and found zolpidem (0.052 ± 0.010 mg/liter), amitriptyline (0.17 ± 0.04 mg/liter), and nortriptyline (0.23 ± 0.06 mg/liter). No alcohol or any other drugs were detected. No toxicologist or expert testified at trial, and the Commonwealth did not offer any other expert testimony as to the contents of the certificate.

At trial, the defendant testified that he took his eyes off the road "momentarily" because he was distracted by something on the side of the road. When he returned his gaze to the front, the defendant saw that the car in front of him had stopped, but he was too close to stop his own vehicle from hitting them.

Held: Reversed in Part, Affirmed in Part. The Court found the evidence insufficient as to the DUI charge, but not as to the offense of following too close.

The Court examined the language in § 18.2-266(iii), the subsection charged in this case, and contrasted it with the language in § 18.2-266(ii), which simply makes it "unlawful for any person to drive or operate a motor vehicle . . . while such person is under the influence of alcohol." Under subsection (ii), the Court noted that a defendant may be convicted based solely on the arresting officer's testimony about the accused's behavior and physical state, if sufficient to prove guilt beyond a reasonable doubt. The Court pointed out that the common signs of alcohol intoxication widely recognized by the general public and trial courts are not necessarily indicative of intoxication by other drugs. For example, the Court noted that circumstantial evidence sufficient to prove the defendant operated a motor vehicle while under the influence of alcohol—in violation of § 18.2-266(ii)—often consists of an officer's observations that the defendant was driving in an erratic or unlawful manner, had red, watery, and bloodshot eyes, was unsteady on their feet, had slurred speech, had the odor of an alcoholic beverage on their breath, and failed one or more SFSTs.

In contrast, the Court noted that subsection (iii) is purposefully written to require proof not only that the defendant was under the influence of drugs but also that those drugs actually impaired the defendant's ability to drive safely. Accordingly, the Court found that a conviction under subsection (iii) cannot rely on observations of a defendant's behavior without other evidence linking that behavior to the effects of a particular drug to a degree that impairs his ability to drive safely. Thus, where, as in this case, the drugs at issue do not give rise to a statutory presumption of causation, the Court explained that the Commonwealth cannot satisfy the causation requirement of § 18.2-266(iii) without proving a specific drug, or combination thereof, affected the driver to a degree that impaired his ability to drive safely.

In this case, the Court complained that the Commonwealth presented no evidence to support its proposition that the drugs in the defendant's blood caused his lethargy or unsteadiness. The Court also concluded that the defendant's mere failure to pass the HGN test provided no further proof as to whether he was impaired to the extent he could not drive safely, as neither defendant's admission of taking drugs nor the confirmatory results in the certificate proved that his nystagmus was in fact caused by the zolpidem, amitriptyline, or nortriptyline detected in his blood. The Court contrasted this case with cases like *Martini*, *Lambert, Wood*, *Shortt,* and *Riley,* where the Commonwealth adduced expert testimony.

The Court held that "a trial court cannot reverse engineer this causal link by claiming a defendant's car accident inherently creates a reasonable inference of impairment, even where the defendant's fault in causing the accident is undisputed. Although not immaterial to this inquiry, the trial court's determination here that appellant violated Code § 46.2-816 does not inherently give rise to a reasonable inference that appellant was following the Johnsons' vehicle too closely as a result of having taken zolpidem, amitriptyline, and nortriptyline." Thus, in the absence of a statutory presumption, expert testimony, or other explanatory evidence, the trial court could not reasonably infer that the defendant's ingestion of Ambien, melatonin, and amitriptyline impaired his ability to drive safely.

However, regarding the conviction for following too close, the Court ruled that the trial court could reasonably infer that a mere moment's distraction would not have caused the defendant to rear-end the victim's vehicle unless he had been following too closely.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1021211.pdf

Bryant v. Commonwealth: November 9, 2022

Stafford: Defendant appeals his conviction for Driving Under the Influence of Marijuana on sufficiency of the evidence.

Facts: The defendant drove his vehicle while under the influence of marijuana. An officer observed the defendant swerve across several lanes onto the shoulder and then back onto the road, and then continued weaving several times until the officer stopped him. Upon approaching the vehicle, the officer noticed an odor of marijuana emanating from the vehicle and thereafter discovered marijuana in the center console of the car.

As the defendant stepped out of the vehicle, he appeared lethargic, and his movements were slow. The defendant spoke and moved very slowly. The deputy conducted FSTs, including HGN, which revealed a lack of smooth pursuit in both eyes and a sustained nystagmus at the maximum deviation in the right eye. The defendant also performed poorly on the remaining standard FSTs.

The defendant repeatedly fell asleep in the back of the patrol car on the way to the sheriff's office, the magistrate, and the hospital. A certificate of analysis confirmed that he had .0051 milligram of THC per liter of his blood. At trial, DFS Toxicologist Jon Dalgleish, testifying as an expert, opined that such an amount would indicate recent ingestion of the drug. The toxicologist also testified that the amount of marijuana in the defendant's system could affect his short-term memory and his spatial awareness, negatively impacting his ability to safely maintain his lane of traffic and quite possibly causing him to fall asleep.

Held: Affirmed. The Court held that the totality of the evidence presented in this case was sufficient to support the jury's verdict finding that the defendant was driving under the influence of marijuana in violation of the statute.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0763224.pdf

Forness v. Commonwealth: June 28, 2022

Arlington: The defendant appeals his conviction for DUI, 2nd Offense, on admission of Field Sobriety Tests, a Prior Conviction, the Certificate of Analysis, and denial of a Jury Instruction.

Facts: The defendant drove a vehicle while intoxicated after having previously been convicted of that offense. Officers obtained a search warrant for the defendant's blood and sent the blood to the Department of Forensic Science, which determined that the defendant's BAC was .198.

Prior to trial, the defendant moved to dismiss the prosecution, alleging that videos from other officers on the scene had been destroyed. The defendant also moved to exclude the results of the blood test, arguing that the officers' only authority to conduct a blood draw came from Virginia's implied consent statute, not from obtaining a search warrant.

At trial, the defendant also moved to exclude evidence of his field sobriety tests, contending that evidence of a person's performance on a field sobriety test cannot serve as evidence of intoxication in determining his guilt. He also contended that the Commonwealth did not adequately establish a chain of custody for the certificate of analysis. Lastly, he argued that the Court should not allow the Commonwealth to admit his prior conviction during its case-in-chief.

The trial court rejected the defendant's proposed jury instruction, which stated: "The admission of the blood or breath test results in this case is not determinative of guilt" and that the jury must "make [its] determination from all the evidence presented."

Held: Affirmed.

Regarding the field-sobriety tests, the Court reasoned that a field sobriety test provides police officers with an opportunity to observe a driver's behavior, coordination, and movement. Therefore, the Court explained, officers may later testify about those observations as circumstantial evidence of the driver's level of physical and mental impairment, which directly translate to a driver's ability to operate a car safely. The Court also rejected the defendant's contention that FSTs are "scientific" evidence, subject to special rules, as baseless.

The Court then rejected the defendant's argument that the Commonwealth could not admit the results of blood obtained from a search warrant. The Court found that, because the police obtained a warrant, the implied consent statute was irrelevant to this case. The Court concluded that, although § 18.2-268.2 sets out the procedure for implied consent, many of the other adjacent statutory procedures governing blood draws apply to all offenses in Title 18.2, including DUI. Thus, even when the Commonwealth secures a warrant for a blood draw, it would still, for example, need a certificate of blood withdrawal and a statutorily qualified person to perform the blood draw.

The Court also repeated that the defendant's claims regarding authentication of the certificate of blood withdrawal (required by § 18.2-268.6) and the blood sample's chain of custody only went to the weight of the evidence, not its admissibility.

The Court rejected the defendant's argument that the Commonwealth could have destroyed video evidence of his arrest. The Court concluded that nothing in the record suggested that the videos he claimed that the Commonwealth had destroyed or hidden ever existed.

The Court also agreed that the Court properly admitted the defendant's prior conviction in its case-in-chief. The Court repeated that, as "with all elements of a crime, the burden is on the Commonwealth to prove the prior [DUI] conviction beyond a reasonable doubt."

Lastly, the Court found that the defendant's proposed jury instruction would have been duplicative of the other, standard instructions in this case.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1029214.pdf

Drugs

Virginia Court of Appeals
Published

Maust v. Commonwealth: May 30, 2023
Rev'd Panel Decision of August 9, 2022
Stafford: Defendant appeals her conviction for Distribution of Oxymorphone on sufficiency of the evidence.

Facts: Police monitored a controlled purchase of Oxymorphone from the defendant's residence. Prior to the purchase, police provided the informant with funds for the purchase. A detective searched the informant's person and vehicle for drugs and money to ensure that he was not bringing any drugs or other money to the residence. The detective equipped the informant with an on-person audio recording device and followed the informant's vehicle to and from the defendant's residence.

The audio recording recovered from the informant recorded the informant talking with an unidentified person who was in the car during the drive to and from the defendant's house. According to the audio recording, while the informant was in the house, at least two persons other than the defendant were also there. Throughout the recorded conversation, they discussed appliances that the defendant was selling. In addition to a female voice that the defendant identified as her tenant, a male voice was recorded exchanging greetings with the informant. The audio recording also indicated that the informant was away from the defendant for approximately two minutes while he was there.

After the purchase, the informant returned and provided the police with three pills, which DFS confirmed was Oxymorphone, a Schedule II controlled substance. Police later executed a search warrant, finding numerous pills, a pill press or pill crusher, and numerous prescription bottles for different narcotics, the majority of which were empty. They also found a large amount of cash, including their buy money, in the defendant's personal safe. The defendant admitted that she had been selling drugs. Regarding the informant, the defendant stated that he "comes to me when he runs out," and "sells more than I do."

Prior to trial, the informant died. At trial, the defendant denied selling drugs to the informant. She claimed that she obtained the money from the informant in exchange for other items she was selling at the time.

A Court of Appeals Panel reversed the conviction, ruling ruled that, absent a showing that the informant had no opportunity to obtain the controlled substance from someone other than the defendant, there was a fatal break in the chain of necessary circumstances. The Court concluded that the evidence failed to prove beyond a reasonable doubt that the defendant distributed the oxymorphone pills to the informant. The Court wrote that: "Because the chain of necessary circumstances to prove the alleged act of drug distribution to [the informant] was repeatedly broken

when [the informant] had opportunities to obtain pills from sources other than [the defendant], the corpus delicti and the criminal agency of the accused have not been proved to the exclusion of any other rational hypothesis and to a moral certainty."

Held: Conviction Affirmed, Panel Ruling Reversed.

The Court ruled that the evidence, including the officer's search of the informant before and after the controlled buy and his receipt of the pills from the informant; the audio recording reflecting the exchange of money between the informant and the defendant; the buy money found in the defendant's safe; the items indicative of drug distribution found in the defendant's home; and the defendant's inconsistent statements and statements indicating that she distributed drug, was sufficient. The Court explained that, under *Jones* and *Bennett*, lapses in police surveillance or the presence of other individuals during controlled buys do not render the evidence insufficient when the confidential informant fails to testify at trial.

Judges Chaney and Causey, who had written the panel opinion, dissented.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0505214.pdf
Original Court of Appeals Ruling At:
https://www.vacourts.gov/opinions/opncavwp/0505214.pdf

Lewis v. Commonwealth: November 29, 2022

Frederick: The defendant appeals his conviction and sentence for Possession with Intent to Distribute Methamphetamine.

Facts: The defendant carried a large amount of methamphetamine for distribution. Officers arrested him for an unrelated offense and conducted an inventory search of the defendant's vehicle, discovering thirty bags of methamphetamine, as well as a firearm. Officers sent the methamphetamine to DFS, who returned two certificates of analysis.

The first certificate stated that the contents of twenty of the thirty bags of "off-white crystalline substance" were "analyzed separately and each was found to contain Methamphetamine (Schedule II); total net weight of the twenty: 10.5087 +/- 0.0660 grams of substance. A purity determination was not performed." The second amended certificate added the clarification that "[t]he gross weight of the remainder was 7.2975 gram(s) including innermost packaging." At trial, the DFS analyst testified that she stopped after testing twenty of the bags because she got to the "ten-gram threshold" in the sentencing guidelines, and the gross weight of the remaining bags showed that she would not hit the next "twenty-gram threshold" even if she analyzed the remaining bags.

At the conclusion of trial, the defendant argued that the Commonwealth had failed to prove that he possessed either "ten grams or more of methamphetamine, its salts, isomers, or salts of its isomers" or "twenty grams or more of a mixture or substance containing a detectable amount of

methamphetamine, its salts, isomers, or salts of its isomers," and therefore § 18.2-248(C)(4)'s mandatory sentencing provision did not apply.

Held: Reversed. The Court agreed that the Commonwealth failed to prove the defendant possessed with the intent to distribute either ten grams of pure methamphetamine or twenty grams of a mixture or substance containing methamphetamine. The Court remanded the case for resentencing on the lesser-included offense.

The Court examined the language in § 18.2-248(C)(4), which distinguishes between "10 grams or more of methamphetamine, its salts, isomers, or salts of its isomers" and "20 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers." The Court concluded that the Commonwealth must prove a "pure" drug weight of ten grams or more of methamphetamine, its salts, isomers, or salts of its isomers under § 18.2-248(C)(4), or instead elect to prove twenty grams of a "mixture" containing any detectable amount of methamphetamine. In this case, the Court noted that the certificates of analysis both stated that the "off-white crystalline substance" was analyzed and "found to contain Methamphetamine" (not that the substance was methamphetamine) and also affirmed that "[a] purity determination was not performed."

The Court contrasted this case from the *Shackleford* case, which interpreted the § 18.2-248.01 importation section. Instead, the Court analogized this case to the U.S. Supreme Court's interpretation of identical language in 21 U.S.C. § 841 in *Chapman*.

In a footnote, the Court specifically declined to rule whether the Commonwealth could ever prove the purity of methamphetamine through evidence other than lab testing. In another footnote, the Court also favorably cited various federal cases in which judges have "denounced the logic behind assessing higher penalties for actual methamphetamine than methamphetamine mixture."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0225224.pdf

Distribution

Virginia Court of Appeals
Published

Vera v. Commonwealth: April 11, 2023

Northampton: Defendant appeals his conviction for PWID and Contributing on Denial of his Accommodation Defense and Admission of Prior Bad Acts.

Facts: The defendant provided GHB to two children at a party, causing both to lose consciousness and sending them to the hospital. At trial, both victims testified that they had never heard of GHB, did not request it from the defendant, and that he simply offered it to them at the party.

At trial, the defendant testified that he had no intention of sharing the GHB with the children because, at the time he decided to bring the GHB with him, he did not know he was going to see them that day. On cross-examination, over the defendant's objection, the Commonwealth confronted the defendant with an incident where he previously gave GHB to another child who also became sick after consumption. In addition, the Commonwealth introduced a handwritten letter, written by the defendant, admitting to the prior distribution and the adverse effect of GHB on the child.

At the conclusion of the trial, the defendant argued that he was only guilty of accommodation, contending that he neither received nor expected profit or consideration from the sharing of narcotics, and he further made no attempts to persuade, coerce, or otherwise induce the victims to join them in taking the narcotics. The trial court rejected the defense.

Held: Affirmed. The Court held that the defendant failed to meet his burden showing, by a preponderance of the evidence, that his distribution of GHB to two minor girls was done as an accommodation. In addition, the Court held that the defendant failed to show the trial court abused its broad discretion when it admitted evidence of his prior bad acts involving GHB.

Regarding the defendant's accommodation defense, the Court examined the plain meaning of the word "induce," as it also did in the *Harper* case from the same week. The Court found that the defendant "brought about" or "called forth" the use of GHB, finding that without his influence or prompting, neither child would have consumed GHB at the party. The Court wrote: "It is difficult to imagine how [the defendant] could have accommodated K.C. and E.S. for something they did not know existed." The Court ruled that the absence of coercion did not reduce the act to accommodation.

Regarding the defendant's prior bad acts, the Court applied Rule of Evidence 2:404(b). The Court found that the evidence of the prior distribution of GHB, and his recognition in the letter of the effect of the drug on the earlier recipient, could have been considered by the court as evidence of the defendant's knowledge of the substance and its potential harmful effects, as well as of the absence of mistake or accident, each of which were relevant facts pertaining to the offense charged and perhaps more relevant to the accommodation defense put forward. The Court agreed that the purpose for the admission of the evidence was other than to show mere propensity to commit the crime.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1328212.pdf

Cannaday v. Commonwealth: November 9, 2022

Henry: Defendant appeals his sentence for PWID Methamphetamine on Refusal to Apply a "Safety Valve" Reduction.

Facts: The defendant possessed over 100 grams of methamphetamine with intent to distribute in violation of § 18.2-248(H)(5). Police investigated the defendant and conducted several controlled buys at the defendant's home within days of each other. Before the end of that month, officers executed a search warrant which led to the discovery of four firearms within the defendant's residence. Police

found three of the firearms in the defendant's bedroom, where he also possessed over eleven grams of Methamphetamine. The defendant entered a plea of no contest to the offenses of possession of a controlled substance while in possession of a firearm and possession of over 100 grams of methamphetamine with intent to distribute.

Prior to sentencing, the defendant submitted an affidavit and argued that he met all five of the predicates enumerated in § 18.2-248(H)(5)'s "Safety Valve" provision, which entitled him to relief from the imposition of the mandatory minimum sentence. The trial court ruled that the defendant failed to satisfy predicate (ii) of the safety valve provision, that is: "the person did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense or induce another participant in the offense to do so."

Held: Affirmed. The Court affirmed the trial court's conclusion that the defendant failed to meet his burdens and therefore did not qualify for refuge under the safety valve provision of § 18.2-248(H)(5). As in *Stone*, the Court agreed that the trial court was entitled to draw from the facts an affirmative inference that the defendant's possession of the firearms was connected to his illegal drug operation.

The Court first explained that the same burdens of production and persuasion and the same standard of proof apply to the safety valve provision of § 18.2-248(H) as to subsection (C) of the statute, which the Virginia Supreme Court had construed in *Stone*. Thus, because the onus of production and persuasion sits with the defendant, when a defendant invokes the waiver by moving for relief under subsection (H)(5), a trial court must evaluate whether the defendant has satisfied the statute's predicates before imposing a sentence.

The Court then noted that, although not identical to a guilty plea, a plea of no contest operates as an admission of the truth of the charge and all facts supporting it, for the purpose of imposing judgment and sentencing in a case. The Court then explained that if a defendant is in possession of both a controlled substance and a firearm, while also having the intent to distribute a controlled substance, there is an adequate foundation for the inference that possession of the firearm is in connection with the drug-related offense.

In this case, the Court found that the defendant's two pleas, the discovery of body armor, multiple firearms, and substantial amounts of illegal drug product in his home, and the stipulation that multiple drug sales out of his home had occurred are all facts from which a reasonable factfinder could conclude that the defendant possessed firearms "in connection with" his illegal drug distribution.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0810213.pdf

Virginia Court of Appeals -
Unpublished

Garrick v. Commonwealth: May 30, 2023

Virginia Beach: Defendant appeals his conviction for Possession of a Firearm and Heroin on sufficiency of the evidence.

Facts: Police found the defendant asleep in a car, with the engine idling, at a convenience store parking lot. After a search of the car, the police discovered a handgun and a bag of heroin in the glove compartment. Police also found two receipts for maintenance of the car in the glove compartment. The receipts listed the defendant's name and were dated from the previous month. The defendant told the police that the car belonged to his mother. When asked if he was the main user of the vehicle, the defendant replied that he drove it "three out of seven" days of the week.

Held: Reversed. The Court held that the trial court erred in finding the evidence sufficient to establish that the defendant possessed the contraband discovered in the car. The Court argued that there was, at best, a month, and at worst, two months, in which any other person who drove the car could have placed the illegal items in the glove compartment. The Court contended that those facts raised a reasonable doubt as to whether someone else, unknown to the defendant, could have put the firearm and heroin in the glove compartment.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1415211.pdf

Vaughan v. Commonwealth: February 28, 2023

Chesterfield: Defendant appeals his sentence for Possession with Intent, Second Offense, on Denial of his "Safety Valve" Request.

Facts: The defendant possessed drugs with the intent to distribute them and sold them on two occasions to a police informant after having a previous conviction for that offense. Prior to sentencing, to earn the statutory "safety valve" that would relieve him of the mandatory minimum sentences in this case, the defendant gave several names of purported drug suppliers to the police.

The trial court found the defendant ineligible for the safety-valve provision of § 18.2-248(C)(a)-(e). The trial court found that the information the defendant provided was incomplete. The trial court found that "in no case [were] these names accompanied by any physical description, vehicle somebody drives, where the person generally is found or hangs out or how Mr. Vaughan communicates with them."

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion when it rejected the defendant's request for § 18.2-248(C)'s safety-valve provision regarding these offenses.

The Court repeated that the burden of production and persuasion in establishing the factual predicates that provide potential relief from the mandatory minimum sentence under § 18.2-248(C) falls on the defendant seeking to invoke the safety-valve provision. The Court agreed that a defendant may provide "all information and evidence the person has concerning the offense or offenses" up until the

time of sentencing and that the information disclosed need not be useful to law enforcement. The Court explained that, had the trial court found that the defendant's later disclosures were "all [the] information and evidence" available to him but denied him safety-valve relief for either of these reasons, "the defendant would be on stronger footing."

However, in this case, the Court concluded that the defendant failed to carry his burden under § 18.2-248(C)(e) to prove by a preponderance of the evidence that he "truthfully provided to the Commonwealth all information and evidence the person has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0777222.pdf

Maust v. Commonwealth: August 9, 2022

Stafford: Defendant appeals her conviction for Distribution of Oxymorphone on sufficiency of the evidence.

Facts: Police monitored a controlled purchase of Oxymorphone from the defendant's residence. Prior to the purchase, police provided the informant with funds for the purchase. A detective searched the informant's person and vehicle for drugs and money to ensure that he was not bringing any drugs or other money to the residence. The detective equipped the informant with an on-person audio recording device and followed the informant's vehicle to and from the defendant's residence.

The audio recording recovered from the informant recorded the informant talking with an unidentified person who was in the car during the drive to and from the defendant's house. According to the audio recording, while the informant was in the house, at least two persons other than the defendant were also there. Throughout the recorded conversation, they discussed appliances that the defendant was selling. In addition to a female voice that the defendant identified as her tenant, a male voice was recorded exchanging greetings with the informant. The audio recording also indicated that the informant was away from the defendant for approximately two minutes while he was there.

After the purchase, the informant returned and provided the police with the substance, which DFS confirmed was Oxymorphone, a Schedule II controlled substance. Police later executed a search warrant, finding numerous pills, a pill press or pill crusher, and numerous prescription bottles for different narcotics, the majority of which were empty. They also found a large amount of cash, including their buy money, in the defendant's personal safe. The defendant admitted that she had been selling drugs.

Prior to trial, the informant died. At trial, the defendant denied selling drugs to the informant. She claimed that she obtained the money from the informant in exchange for other items she was selling at the time.

Held: Reversed. The Court ruled that, absent a showing that the informant had no opportunity to obtain the controlled substance from someone other than the defendant, there was a fatal break in

the chain of necessary circumstances. The Court concluded that the evidence failed to prove beyond a reasonable doubt that the defendant distributed the oxymorphone pills to the informant. The Court wrote that: "Because the chain of necessary circumstances to prove the alleged act of drug distribution to [the informant] was repeatedly broken when [the informant] had opportunities to obtain pills from sources other than [the defendant], the corpus delicti and the criminal agency of the accused have not been proved to the exclusion of any other rational hypothesis and to a moral certainty."

The Court complained that there was no evidence that the police searched the defendant's unidentified companion. Therefore, the Court reasoned, there was no evidentiary basis for excluding the informant's own companion as the source of the pills recovered from the informant. In contrast with *Jones* and *Bennett*, the Court also complained that the evidence in this case failed to show that the informant could not have obtained the pills from a source other than the defendant at the place where the alleged drug transaction occurred. The Court also argued that the evidence did not show that the informant could not have covertly accessed some of the narcotic pills prescribed to the defendant or her tenant.

Lastly, the Court noted that the informant made no advance arrangements with the defendant to purchase drugs from her. Under the facts, the Court contended that the Commonwealth's evidence failed to exclude the reasonable hypothesis of innocence that the defendant met with the informant for the purpose of showing him various appliances and other items that she was selling in anticipation of her move to a smaller home.

Judge Malveaux filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0505214.pdf

Patel v. Commonwealth: July 12, 2022

Fredericksburg: Defendant appeals his convictions for Distribution of Drugs on Double Jeopardy and sufficiency grounds.

Facts: The defendant, while working as a pharmacist, unlawfully sold controlled drugs such as methadone and clonazepam to a police informant without a prescription on eight occasions. During the first few controlled purchases, the defendant asked the informant if he was "wearing a wire" and if he was cooperating with the police. Later, the defendant began to communicate only in writing during the purchases, again asking the informant if he was working with the police. When he sold the drugs, the defendant provided them in unlabeled containers, mixed in one container in violation regulations. The defendant also did not report the sales in the state PMP program, as required.

At trial, the Commonwealth attempted to play a redacted version of a video recording of the defendant's interview at the narcotics task force office. The prosecutor had redacted the recording to avoid revealing what the prosecutor considered irrelevant information about the DEA's involvement in the case. In objecting to the redacted version, defense counsel requested that the entire video be played for the court. The prosecutor responded, "I'll be more than happy to play the entire video. I was

just putting that out in fairness to the Defendant." After the entire video of the interview was played for the court, the prosecutor asked the detective if he knew of any other buys by the DEA. To the prosecutor's surprise, the detective revealed that the DEA had also done a controlled purchase from the defendant.

Defense counsel moved for a mistrial. The defendant complained that this was the first time he had heard about any separate controlled drug purchases conducted by the DEA and that the revelation of this information to the jury was incurably prejudicial to the defendant's affirmative defense of entrapment. In response, the prosecutor stated that he did not know what the detective's answer would be when he asked the question. The circuit court declared a mistrial.

The defendant then moved to dismiss the indictments on Double Jeopardy grounds, contending that the Commonwealth intentionally or recklessly created a mistrial. The trial court denied the motion.

Held: Affirmed. The Court held that the trial court's factual finding that the prosecutor did not intentionally provoke a mistrial was supported by the objective facts and circumstances of this case. The Court also found that the evidence was sufficient.

Regarding the defendant's Double Jeopardy claim, the Court concluded that even if the prosecutor's question to the detective about separate DEA controlled purchases was borne of frustration and amounted to harassment, bad faith, or even gross prosecutorial misconduct, this would still be insufficient—without more—to sustain the conclusion that the prosecutor intended to cause a mistrial to subvert double jeopardy protections.

The Court also noted that the trial court judge who oversaw the defendant's first trial was the same judge who decided the defendant's motion to dismiss for double jeopardy, a factor that that the Court has found significant in the past. The Court pointed to the *Bennefield* case, where it found that the same trial judge was better able to determine how the prosecution's case was progressing, and whether the prosecutor had any motivation or desire to cause a mistrial to gain a more favorable position at a new trial. The Court also noted as significant the fact that the prosecutor argued strenuously in opposition to defense counsel's motion for a mistrial, which suggested to the Court that the prosecutor did not intend to cause a mistrial.

Regarding sufficiency, the Court found that a jury could reasonably conclude the jury could have reasonably inferred that the defendant—a licensed pharmacist who should have known the proper procedures for filling prescriptions—sold the drugs to the defendant without a valid prescription. This inference was only further supported by the defendant's suspicious behavior during the controlled drug purchases, including his insistence that he and the informant communicate through written notes, and his failure to follow other statutory and regulatory requirements by selling drugs to the informant in unlabeled pill bottles and mixing different pills together in the same bottle.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0201212.pdf

Possession

Virginia Court of Appeals
Published

Morris v. Commonwealth: May 9, 2023 (En Banc)
Aff'd Panel Ruling of August 2, 2022
Henrico: Defendant appeals his conviction for Drug Possession on Statutory Immunity grounds.

Facts: The defendant drove to an emergency room, stopped in the road at the entrance and blocked the roadway. Police responded to ask him to move. The defendant told them that "he was there to get help," telling the officers that he had smoked crack cocaine. Officers summoned medical assistance.

While the defendant was being treated, he said that he visited the hospital because "he was thinking about suicide." When an officer asked, why suicide, the defendant responded, "drugs." The defendant said that he had used heroin, fentanyl, and cocaine, that he had smoked crack cocaine in his boss's car, and that he "came to the ER to get help for the suicidal thoughts and his drug problem." The defendant alerted the officers to a crack pipe in the vehicle, which they seized.

Prior to trial for drug-possession, the defendant moved to suppress the drug evidence and to dismiss under the medical-amnesty provision of § 18.2-251.03. The defendant argued that he was actively seeking medical care for himself when the police developed the evidence against him. However, the trial court denied the defendant's motions. The court saw no evidence that the defendant was "experiencing a life-threatening condition." The trial court stated, "just because" the drugs "affected his behavior [did] not mean we're in a life-threatening situation."

The Court of Appeals panel reversed the conviction. The Court ruled that drug-induced suicidal ideation qualifies as an "overdose" under the statute. The Court examined the question: "Suppose the defendant seeking emergency medical assistance subjectively believes he is suffering a drug overdose, but in fact he is not. Is the defendant entitled to amnesty, or must the trier of fact be satisfied that the defendant, objectively, is having an overdose?" The Court concluded from the statute's plain language that the General Assembly intended a subjective standard. The Court remanded the case for the trial court to conduct a new hearing on the defendant's motion to suppress and motion to dismiss that charge.

Held: Panel Reversed, Conviction Affirmed. The Court concluded that the defendant failed to meet the independent requirement in § 18.2-251.03(B)(2) that he "remain[] at the scene of the overdose or at any alternative location to which he . . . has been transported until a law-enforcement officer responds to the report of an overdose." [*The Court of Appeals panel had not addressed that issue – EJC]*

The Court concluded that the statute requires an individual experiencing an overdose to remain at the location where the "life-threatening condition" began, or at the location to which he has been transported by another. The Court pointed out that an interpretation that would permit individuals actively under the influence of controlled substances or alcohol to operate a motor vehicle could

endanger lives. The Court then reasoned that it need not determine the exact location to know that the scene of the purported overdose was necessarily a location where the defendant was before he decided to seek medical care, and thus somewhere other than where he stopped the car in the middle of the road next to the emergency room.

The Court rejected the defendant's argument that the "scene of the overdose" is fluid and continuous, following him everywhere that he went while experiencing suicidal thoughts. The Court explained that the problem with the defendant's interpretation was that it rendered superfluous most of § 18.2-251.03(B)(2). The Court contended that the only rational reading of the legislature's choice of the word "remain" is that the individual stay in place—either at the "scene" where the overdose occurred, or the "alternative location" to which the person has been transported. The Court noted that "remain" would be superfluous if the individual need not in fact "remain" anywhere. The Court also pointed out that the second half of the sentence discusses "any alternative location to which he . . . has been transported."

Judge Raphael, who had written the panel opinion that had initially reversed the conviction, concurred in the judgment, joined by Judge Ortiz, who had also voted to reverse the conviction at the panel hearing. Judge Raphael wrote separately to "address the issues that go unresolved here, which may arise in future litigation and which the General Assembly may wish to clarify." First, he pointed to the main question briefed by the parties during en-banc review: does an objective or subjective standard govern whether a person is "experiencing an overdose" within the meaning of § 18.2-251.03(B)(1)? He reasoned that three possible standards could apply: two of them were objective; one was subjective.

Judge Raphael then examined another question raised by this case: "who bears the burden of proof when determining whether the defendant is entitled to immunity." Lastly, Judge Raphael also noted that this ruling does not resolve "the extent to which drug-induced suicidal ideation qualifies as an "overdose" within the meaning of the statute."

Judge Callins also concurred in the judgment, explaining that she would hold that the defendant's proffer was insufficient to establish a causal nexus between his ingestion of a controlled substance and the overdose. Only Judge Chaney filed a dissent, complaining that the majority's interpretation "would eliminate immunity for those who either walk a few blocks to an emergency room or otherwise transport themselves to a hospital after a drug overdose."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1194212.pdf
Original Court of Appeals Ruling At:
https://www.vacourts.gov/opinions/opncavwp/1194212.pdf

Clayton v. Commonwealth: September 13, 2022

Danville: Defendant appeals his conviction for Possession of a Chemical Compound by a Prisoner on sufficiency of the evidence.

Facts: While incarcerated, the defendant possessed a synthetic cannabinoid. At trial, the defendant argued that the Commonwealth failed to prove he intentionally possessed the substance.

Held: Affirmed. The Court found that its ruling in *Herron,* which was that § 53.1-203(5) is a strict liability offense, controlled in this case and the Commonwealth was not required to prove that the defendant had knowing possession of the chemical compound. The Court explained that, because the express language of § 53.1-203(5) does not include an intent requirement, whether a prisoner possesses drugs while bringing them into the correctional facility or whether he possesses them while already in the correctional facility is irrelevant to the object of the statute.

Judge Raphael filed a concurring opinion, agreeing that *Herron* controlled, but contending that the Virginia Supreme Court should reconsider its ruling in *Esteban*, which is the case that led to the *Herron* ruling. Judge Raphael contended that, under the rule followed in most other American jurisdictions, when a criminal offense does not specify a state-of-mind requirement, courts will presume that the legislature did not intend strict liability if the statute codifies a crime analogous to a common-law offense, or if the legislature creates a new offense that imposes a serious punishment. In other jurisdictions, that presumption may be overcome if the legislature makes clear that it intends a strict-liability offense using language that satisfies the clear-statement requirement.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1246213.pdf

Morris v. Commonwealth: August 2, 2022

Henrico: Defendant appeals his conviction for Drug Possession on Statutory Immunity grounds.

Facts: The defendant drove to an emergency room, stopping in the road at the entrance and blocking the roadway. Police responded to ask him to move. The defendant told them that "he was there to get help," telling the officers that he had smoked crack cocaine. Officers summoned medical assistance.

While the defendant was being treated, he said that he visited the hospital because "he was thinking about suicide." When an officer asked, why suicide, the defendant responded, "drugs." The defendant said that he had used heroin, fentanyl, and cocaine, that he had smoked crack cocaine in his boss's car, and that he "came to the ER to get help for the suicidal thoughts and his drug problem." The defendant alerted the officers to a crack pipe in the vehicle, which they seized.

Prior to trial, the defendant moved to suppress the drug evidence and to dismiss the drug-possession charge under the medical-amnesty provision of § 18.2-251.03. The defendant argued that he was actively seeking medical care for himself when the police developed the evidence against him. However, the trial court denied the defendant's motions to suppress the drug evidence and to dismiss the drug-possession charge. The court saw "no evidence that [the defendant] was experiencing a life-threatening condition." The trial court stated, "just because" the drugs "affected his behavior [did] not mean we're in a life-threatening situation."

Held: Reversed. The Court examined the question: "Suppose the defendant seeking emergency medical assistance subjectively believes he is suffering a drug overdose, but in fact he is not. Is the defendant entitled to amnesty, or must the trier of fact be satisfied that the defendant, objectively, is having an overdose?" The Court concluded from the statute's plain language that the General Assembly intended a subjective standard. The Court remanded the case for the trial court to conduct a new hearing on the defendant's motion to suppress and motion to dismiss that charge.

The Court examined the language of § 18.2-251.03. In a footnote, the Court declined to rule on whether the Commonwealth or the defendant bore the burden of proof in this case. Instead, the Court assumed without deciding that the defendant bears the burden of proving entitlement to immunity under § 18.2-251.03 when seeking medical attention "in good faith" because "he is experiencing" a drug overdose.

The Court then ruled that drug-induced suicidal ideation qualifies as an "overdose" under the statute. The Court noted that the Code specifically defines "overdose" as "a life-threatening condition resulting from the consumption or use of a controlled substance, alcohol, or any combination of such substances." The Court acknowledged that this definition, in § 18.2-251.03(A), supersedes the term's ordinary meaning. Under that definition, the Court concluded that drug-induced suicidal ideation falls within the statutory definition. The Court explained that: "Encouraging a person with drug-induced suicidal ideation to seek emergency medical assistance falls within the "plain language" of the statute and serves its "clear purpose" of helping to "save a life.""

The Court ruled that it was error for the trial court to use an objective standard in applying § 18.2-251.03, requiring that the defendant demonstrate that he was, in fact, experiencing drug-induced suicidal ideation.

The Court made clear that, under the terms of the statute, a defendant apprehended in for a drug offense cannot immunize his illegal possession of drugs by claiming to be suicidal or insisting that he needs to go the emergency room. In a footnote, the Court also noted that it was not holding that every instance in which a defendant claims to be experiencing suicidal ideation necessarily constitutes a life-threatening condition. "Rather, the fact finder should determine based on the evidence whether the defendant who claims medical-amnesty immunity was seeking emergency medical attention in good faith because of a life-threatening drug- or alcohol-induced desire to kill himself."

Judge Russell filed a dissent, contending that the plain and ordinary meaning of the phrase "is experiencing an overdose" requires that a defendant actually experience an overdose.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1194212.pdf

Virginia Court of Appeals
Unpublished

Camaan v. Commonwealth: February 28, 2023

Frederick: Defendant appeals his convictions for Drug Possession on Fourth Amendment and sufficiency grounds.

Facts: While investigating a public-indecency complaint, officers spoke with the defendant n the parking lot of a convenience store. During that encounter, an officer noticed that the defendant was hiding something under his shoe. The defendant was standing in place, noticeably keeping his left shoe planted as he shifted his weight back and forth. The officer could see a piece of aluminum foil sticking out from beneath the defendant's shoe. The officer later testified that, through his training and experience, he knew that aluminum foil is often used with a straw to smoke narcotics.

The officer told the defendant to move his foot. The defendant did so, revealing aluminum foil with burnt residue and a straw. The officers arrested the defendant and searched his person, discovering a white powder in a cellophane wrapper in his wallet and pills in a pill bottle in his pocket.

Testing of the white powder revealed that it contained two controlled substances: Fentanyl and Etizolam. The pills tested positive for two other controlled substances. The defendant admitted that he was a drug addict, that he had tried to conceal the foil underfoot, that the foil contained "a drug," and that the items found in his pockets were all his. He admitted knowing that the white powder was fentanyl but denied knowing that it also contained etizolam, a drug he'd never heard of.

The defendant was convicted of three felony counts of possessing a Schedule I or II controlled substance, including Fentanyl and Etizolam, and one misdemeanor count of possessing a Schedule IV controlled substance.

Held: Affirmed in Part, Reversed in Part. The Court affirmed the trial court's decision denying the defendant's motion to suppress the evidence but reversed the conviction for possession of a Etizolam.

The Court first agreed that the defendant was seized when the officer told him to move his foot, not because the defendant was not free to leave, but because a reasonable person in the defendant's position would not have felt free to keep his foot planted. (In a footnote, the Court explained that its analysis evaluated whether the defendant's person was illegally seized, not whether the space under his foot was illegally searched.) Thus, to justify telling the defendant to move his foot, the officer needed reasonable, articulable suspicion that the defendant was engaged in, or was about to about to engage in, criminal activity.

In this case, the Court concluded that, although the officer did not at first see the straw or the burnt residue, the officer could form a reasonable belief that the defendant was engaged in criminal, drug-related activity and trying to hide the evidence. The Court thus concluded that the investigatory detention that occurred when the officer said "move your foot" was properly supported by reasonable suspicion.

The Court then concluded that finding burnt residue on an improvised device for smoking narcotics created probable cause to believe that the defendant was in possession of a controlled substance. The Court favorably cited cases from other jurisdictions that also have concluded that the discovery of drug residue on the defendant's person or on a narcotics pipe found in the defendant's possession provided probable cause to arrest the suspect for possession of a controlled substance. Thus, since the officer had probable cause to arrest the defendant for possession of narcotics, the subsequent search was a lawful search incident to arrest under the Fourth Amendment.

Regarding Possession of Etizolam, however, the Court found that the record lacked evidence to support a finding beyond a reasonable doubt that the defendant knew that the white powder was a mixture that contained Etizolam, as well as Fentanyl.

The Court examined the statute, previous cases, and the history of Virginia's possession statute to reach the conclusion that a conviction for possession under § 18.2-250 must be supported by proof of knowing possession. The Court likened this case to *Young* and found that the prosecution failed to exclude the reasonable hypothesis of innocence that the defendant believed that the white powder contained only one controlled substance—Fentanyl.

The Court reaffirmed the ruling in *Howard*, rejecting the argument from that case that if the Commonwealth could not prove that a defendant intended to possess more than one controlled substance in the mixture, then "both of his convictions must be reversed." The Court contended, though, that by requiring a mens rea showing for each count of possession, it was not making the first count of possession any harder to prove, only the subsequent counts. The Court pointed out in a footnote, for example, that if a defendant knowingly possessed a drug by its street name, the prosecution might present testimony that the street name is commonly understood to refer to a combination of controlled substances, such as speedball, a "mixture of cocaine and heroin."

Judge Athey dissented from the conclusion that the Commonwealth needed to prove that the defendant knew he possessed two separate controlled substances. Judge Chaney dissented from the denial of the motion to suppress.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0243224.pdf

Thomas v. Commonwealth: January 10, 2023

Henry: Defendant appeals her conviction for Drug Possession, arguing that the Safe Harbor Immunity is Retroactive.

Facts: In August 2019, the defendant possessed drugs. After the defendant overdosed and became unconscious, someone called for rescue on her behalf. Police responded and located the defendant's drugs.

Prior to trial, the defendant filed motion to dismiss the indictment, arguing that the amendments to § 18.2-251.03, effective July 1, 2020, barred her prosecution and should have been applied retroactively. She argued that recently enacted amendments to the statute barred her prosecution because she was experiencing an overdose and another individual, in good faith, sought or obtained emergency medical attention for her. The defendant asserted that because the amendments were procedural in nature, not substantive, they applied even though the offense date pre-dated the amendments. The trial court rejected the defendant's motion.

Held: Affirmed. The Court noted that in 2019, the then-applicable affirmative defense afforded the defendant no relief because she did not report her overdose or seek emergency medical attention

for herself. The Court then noted that, in *McCarthy*, the Court of Appeals had held that the 2020 amendments to § 18.2-251.03 did "not contain any explicit terms providing for its retroactivity." As the 2020 amendments to § 18.2-251.03 occurred nearly a year after the defendant committed the charged offense and months after she was indicted, the Court found that it was bound by *McCarthy*'s holding that those amendments do not apply retroactively.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0191223.pdf

Eluding

Virginia Court of Appeals
Unpublished

Wilson v. Commonwealth: February 21, 2023

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

Facts: The defendant eluded police in Henry County. Officers in Henry County alerted officers in Pittsylvania County and gave them a detailed description of the car. The Henry County pursuit terminated, and police units ceased their pursuit.

Later, a Pittsylvania officer noticed the defendant ten to fifteen miles away from the Henry County line, although there were no police vehicles in pursuit. The officer then observed the defendant run a stop sign. When the officer attempted a traffic stop, the defendant sped up and led officers on a lengthy and dangerous police chase at speeds exceeding 100 miles per hour, striking two police vehicles, and running one off the road and over an embankment.

The defendant pled guilty to felony eluding in Henry County. The defendant then argued that because he pled guilty to felony eluding in Henry County involving the same incident, the subsequent prosecution for felony eluding in Pittsylvania County violated his double jeopardy rights under the Fifth Amendment. The Pittsylvania trial court rejected the defendant's argument.

Held: Affirmed. The Court found that the act of eluding police in Pittsylvania County, though in temporal proximity, was not a continuation of his eluding in Henry County. Instead, the Court reasoned that the defendant's actions in Pittsylvania County involved a new formation and implementation of purpose after he ran a stop sign, failed to submit to a traffic stop, and then involved several different police victims in a new chase through Pittsylvania County. Thus, the evidence supported the trial court's finding that the defendant committed two separate and distinct acts of felony eluding; one in Henry County and one in Pittsylvania County.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0435223.pdf

Failure to Register as a Sex Offender

Hill v. Commonwealth: March 21, 2023

Richmond: Defendant appeals his conviction for Failure to Re-Register as a Sex Offender on sufficiency of the evidence.

Facts: In 1989, the defendant was convicted of aggravated sexual battery. As a result of that conviction, upon release from confinement, the defendant had to register as a sex offender. In 2009, the defendant was convicted of failing to reregister, second or subsequent offense. Per § 9.1-904(B), the defendant must reregister every thirty days.

In 2018, the defendant signed a re-registration form due on April 21, 2018, and dated it April 18, 2018, but the envelope was post-marked on April 23, 2018. It was received by the state police on April 25, 2018. In May 2018, the state police sent another form to the defendant at his mailing address. The May 2018 form instructed the defendant to return the registration "on or before May 21, 2018." The defendant's signature on the form was dated May 21, 2018, but the envelope was post-marked on May 29, 2018, and not received by the state police until May 30, 2018.

An officer tried to contact the defendant at the residential address listed on the defendant's registration forms or confirm that the defendant lived there but could not do so.

At trial, the defendant presented testimony that he was "chronically homeless" and was "living in inhumane places." The witness acknowledged that the defendant knew he had to register with the state police and confirmed that the defendant knew it was "incredibly important that he do that on time." The witness also confirmed that the defendant knew how to reregister in person at the police station that he could walk or ride his bicycle to get there, if necessary. The defendant argued that he did not "knowingly" fail to register because he was unaware that compliant registration required him to submit the form on time.

Held: Affirmed. The Court noted that § 18.2-472.1 requires proof that the defendant either failed to reregister or that he provided materially false information to the registry. The Court concluded that the evidence proved that the defendant knowingly failed to reregister within thirty days. The Court pointed out that the defendant signed the forms, knew he had to re-register, and had been registering with the state police every thirty days for almost ten years.

Judge Chaney filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0479222.pdf

False Pretense, Fraud, and Financial Exploitation

Virginia Court of Appeals
Published

Wallace v. Commonwealth: February 28, 2023

Chesapeake: Defendant appeals her convictions for Forgery, False Pretense, and Computer Fraud on sufficiency of the evidence.

Facts: The defendant deposited forged checks and uttered them using an ATM. The checks were made out from the victim's account to the defendant and had explanations in the memo line such as "work," "cleaning," and "remaining balance." After the bank discovered the forgery, police interviewed the defendant, who admitted that she did not know the person who wrote the checks. She refused to explain where she obtained the checks.

The trial court convicted the defendant of computer fraud, uttering forged checks, and larceny by false pretense. Over the defendant's objection, the trial court ruled that the defendant violated § 18.2-152.3 by using the ATM "without authority."

Held: Affirmed in Part, Reversed in Part. The Court found the evidence sufficient except for the offense of computer fraud. The Court found the evidence insufficient to prove that the defendant used the ATM "without authority." Regarding the forgery and false pretense convictions, the Court concluded that the trial court was entitled to conclude that the defendant knew the falsity of the checks.

Regarding the offense of computer fraud, the Court ruled that one who uses a computer for a fraudulent purpose does not automatically use it "without authority" under the computer fraud statute. The Court examined § 18.2-152.2 and -152.3 and found that a computer fraud conviction requires that the defendant either "has no right, agreement, or permission" to use the computer or computer network or uses it "in a manner knowingly exceeding such right, agreement, or permission." The Court concluded that, to prove that a defendant knowingly exceeded their authorization, the Commonwealth must first establish the scope of the right, agreement, or permission. "The manner, rather than purpose, of the use must be unauthorized."

The Court rejected the Commonwealth's argument that if a defendant uses a computer to deposit forged checks—or for unlawful purposes more generally—her use is per se without authority under the computer fraud statute, citing rulings from other jurisdictions. In this case, the Court argued that, as a bank customer, she had authority to use the ATM to deposit checks and withdraw cash. By depositing a forged check, she used the ATM for an unlawful purpose, but not in an unauthorized manner.

In a footnote, the Court stated that it was not deciding whether an ATM is a computer under § 18.2-152.3.

Judge Athey filed a dissent, stating that he would have affirmed the convictions for computer fraud pursuant to § 18.2-152.3.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1040211.pdf

Belcher v. Commonwealth: September 27, 2022
75 Va. App. 505, 878 S.E.2d 19 (2022)
Henry: Defendant appeals her conviction for Identity Fraud on admission of accounting evidence, sufficiency of the evidence, and sentencing in excess of the statute.

Facts: The defendant, a home healthcare provider, used the victim's credit card for her own benefit on numerous occasions. The victim's son discovered the offense by examining the charges and trying to find records about the charges. He fired the defendant. At trial, he testified that he knew the amount of grocery spending decreased after he fired the defendant because he had reviewed the credit card statements and grocery bills. The son explained that his testimony was based upon his review of the credit card statements and his own monitoring of the grocery expenses. The defendant objected to that testimony, but the trial court overruled the objection.

At trial, the defendant argued that because she had authorization to use the victim's credit card, she did not misrepresent her identity and, therefore, could not be guilty of identity fraud.

The jury convicted the defendant of seven misdemeanor counts and one felony count of identity fraud to obtain money, goods, or services, all in violation of § 18.2-186.3. The jury instructions incorrectly stated that the maximum punishment for felony identity fraud was 20 years. The defendant did not object to the instruction. The jury sentenced the defendant to "1 year" on each of the misdemeanor offenses and to 7 ½ years on the felony offense. The trial court, explaining that the jury likely did not understand the difference between twelve months and one year, interpreted each 1-year sentence as a twelve-month sentence.

Held: Affirmed in part, reversed in part. The Court affirmed the convictions but reversed the sentences and remanded the case for re-sentencing.

Regarding the defendant's claim that she had the victim's consent, the Court cited *Taylor v. Commonwealth* from 2020, where the Supreme Court rejected a similar argument. The Court explained that, although the defendant was authorized to use the victim's card, she was not authorized to make purchases for her own benefit.

The Court then ruled that the trial court did not err in admitting the son's testimony regarding the decrease in grocery bills following the defendant's departure. The Court also agreed that whether grocery expenditures went up or down was a fact within the son's personal knowledge and found that the Court properly admitted his testimony. In a footnote, the Court also pointed out that, even if the challenged evidence is viewed as lay opinion evidence under Virginia Rule of Evidence 2:701, it was still admissible on this record. The Court noted that the question of whether grocery bills decreased after the defendant was fired was plainly based on the son's personal observations and perceptions.

Regarding the felony offense, the Court agreed that the jury was erroneously instructed and, as a result, the defendant received a sentence outside the statutorily permitted range. Regarding the misdemeanor offenses, the Court explained that "twelve months is not simply another way of expressing one year, and the phrases do not mean the same thing." The Court reviewed the various ways in which those sentences are different.

The Court declared that, when a sentence is outside the statutorily prescribed range of punishment, a defendant is entitled to a new sentencing hearing. The Court repeated that "it is incumbent on the trial judge not to discharge the jury 'upon the return of an illegal verdict.'" In this case, however, the jury was discharged and released before the sentencing improprieties were examined and "fixed." Instead, the Court explained, a trial court should instruct the jury that its sentence was improper and sent them back to "further consider" their verdict. In this case, though, the trial court revised the improper verdicts itself after the jury was released, which the Court found was impermissible.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0945213.pdf

Virginia Court of Appeals
Unpublished

Sweet v. Commonwealth: March 28, 2023

Henry: Defendant appeals his convictions for Obtaining Money by False Pretense on the Single Larceny doctrine and sufficiency of the evidence.

Facts: The defendant cashed four checks drawn on a bank account that had been closed for over a year. The checks were all dated May 2019, more than two months after the account holder died, and appeared to be signed by the account holder. The defendant later acknowledged that he knew the victim was dead when he allegedly received the checks from a third party but said he "didn't think about" the fact that the checks had supposedly been signed by a dead man. The defendant proceeded to cash the checks on four separate dates within one week, alternating between two different credit union branches. The defendant cashed the checks soon after the victim's family found the victim's desk in disarray and the defendant's son walking through the house unannounced.

When the credit union's collections manager contacted the defendant about the returned checks and identified herself, the defendant initially hung up on her. He then called her back and told her someone named "Frank" had given him the checks in exchange for work. The defendant said he would investigate the matter of the returned checks and call back, but he neither contacted the manager again nor returned the credit union's money. Later, at trial, he denied telling the manager he had received the checks from "Frank" and insisted he had received them from "Rob."

At trial, the defendant argued that he was not guilty of separate offenses due to the "Single Larceny" doctrine, but the trial court rejected his argument.

Held: Affirmed. The Court held that the evidence was sufficient to prove that the defendant had the intent to defraud when he cashed four checks at his credit union. The Court also held that the single larceny doctrine did not apply to the facts of this case and that the defendant committed four separate acts of obtaining money by false pretenses.

Regarding the "Single Larceny" doctrine, the Court found that this case was similar to the facts of *Moore* rather than *Millard*; that is, the defendant engaged in a series of fraudulent transactions that were sporadic in both time and place, thus evidencing that he acted under a series of separate impulses. Accordingly, the Court rejected the defendant's argument that the trial court erred by failing to apply the single larceny doctrine to the facts of his case.

Regarding sufficiency, the Court agreed with the trial court that the defendant's testimony was "preposterous."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0462223.pdf

Rhodes v. Commonwealth: October 11, 2022

Roanoke: Defendant appeals his conviction for Practicing Chiropractic Medicine with a Suspended License and False Pretenses on sufficiency of the evidence and the "Advice of Counsel" defense.

Facts: The defendant practiced as a licensed Chiropractor until the Board of Medicine suspended his license in 2018. The order stated that the defendant's license was "SUSPENDED"; the order further explained that the suspension would be stayed "upon proof of [the defendant's] entry into a contract" with Virginia's Health Practitioner's Monitoring Program (HPMP). Despite his suspension, he continued to treat patients. When confronted, he first denied continuing to treat patients, but later admitted it.

At trial, the defendant contended that the wording of the Board of Medicine's order did not provide the defendant with adequate notice that he was required to await formal notification of the reinstatement of his license. The defendant claimed at trial that his attorney advised him that he could continue to treat patients following this order so long as he was attempting to enter into a contract with the HPMP. Neither his attorney nor any other evidence corroborated that defense. The trial court did not find the defendant to be "believable," also noting he obfuscated and failed to answer the Board truthfully in his testimony at times. The trial court specifically found that the defendant was "incredible," and his explanations "almost farcical."

Held: Affirmed. The Court found no error in the convictions for either Practicing without a License under § 54.1-2409.1(iii) or Larceny by False Pretense. The Court noted that, in addition to willfully practicing with a suspended license, the defendant also improperly received payments for treatment he provided without a valid license.

In a footnote, the Court observed that, in Virginia, there is no authority that has applied the "advice of counsel" defense in a criminal context; the defense "is most often exercised in Virginia in a civil matter involving a tort." The Court acknowledged that Federal courts have found that the defense can be permissible in a criminal context, where it is properly established by credible evidence. Because the trial court rejected the defendant's testimony, the Court found it unnecessary to reach the question of whether the defense applies to criminal matters in Virginia state courts.

In another footnote, the Court also noted that, to the extent that the defendant relied on the "good faith" defense regarding advice from a public body, his argument failed, as there was no evidence of reliance on any affirmative assurance from a public body.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1196213.pdf

Wood v. Commonwealth: June 7, 2022

Rappahannock: Defendant appeals his conviction for Construction Fraud on sufficiency of the evidence.

Facts: After leading the victim to believe that he was a licensed contractor, the defendant reached an agreement with the victim for him to build a sunroom at her home, although they did not sign the agreement until a month later. The victim gave the defendant a check for the $16,500 down payment, which he cashed. When the victim became suspicious because the project was at a standstill and asked about her money, the defendant chuckled and said the money was "long gone."

During the months that followed, the defendant made numerous false statements to the victim about performing the job, ordering materials for the project, and storing the non-existent building supplies that the victim's money had supposedly purchased. Although the defendant dug some holes at the victim's property and demolished the landing and steps, he performed no further work on the job and provided no excuse for his failure to complete the project.

After repeated demands for return of her money, the defendant gave the victim a check for the down payment amount, but it was returned unpaid because his bank account had been closed. The defendant did not respond to the victim's written demand for a refund, and he never repaid the victim any of her money.

Held: Affirmed. The Court found that, considering these facts and circumstances, a reasonable finder of fact could conclude beyond a reasonable doubt that the defendant possessed fraudulent intent when he accepted the victim's down payment and that he was guilty of construction fraud.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1089214.pdf

Firearms and Weapons Offenses

Virginia Supreme Court

Commonwealth v. Barney: March 16, 2023
Reversed Court of Appeals Ruling of November 3, 2021

Hampton: The defendant appeals his convictions for Use of a Firearm on jury instruction and sufficiency issues.

Facts: The defendant robbed a store. During the robbery, the defendant made statements and gestures to imply that she had a firearm. The defendant kept her hand in her pocket and handed the victim a note that stated "[T]his is a robbery, stay calm, [and] don't make a sound if you want to live." At trial, the victim testified that the bulge in the defendant's pocket did not look like a finger. She explained that she was "scared out of her mind," because she thought she was being robbed at "gunpoint." She explained that she believed that if the defendant "pulled that trigger," she "would be shot." On video, a shape in the defendant's pocket looked like a firearm. Police arrested the defendant the next day but did not recover a firearm.

At trial, the defendant requested an additional jury instruction as to the definition of a "firearm" under the statute, seeking to clarify the requirement that the Commonwealth must prove that the defendant had a firearm or an object with the appearance of a working firearm. The defendant offered ten possible supplemental jury instructions. For example, the defendant offered one alternate instruction: "The defendant's fingers or hands are not considered a firearm," and another: "It is not sufficient to convict if you believe that the defendant used an object to make the victim believe that she had a firearm." The trial court denied the additional instructions, only using the Model Jury Instruction, No. 18.702.

The Court of Appeals reversed, concluding that no rational, properly instructed jury could conclude beyond a reasonable doubt that the defendant used a firearm or an object physically resembling a working firearm.

Held: Court of Appeals Reversed, Conviction Reinstated. In a 4-3 ruling, the Court held that the Court of Appeals erred in holding that the trial court abused its discretion by not supplementing the agreed-upon jury instruction defining a firearm and in holding that the evidence was insufficient to sustain the jury's guilty verdict. The Court concluded that a rational jury could find that the defendant threatened to kill the victim during the robbery and used a concealed firearm as the threatened murder weapon.

The Court likened this case to *Powell*. In a footnote, the Court clarified that *Yarborough's* holding regarding the insufficiency of "a victim's subjective belief as to the presence of a firearm" is still good law in the Commonwealth. Here, however, the Court noted that the defendant threatened to kill the victim and made this threat while pointing at the victim what looked like the barrel of a handgun. "The murder weapon in her pocket — Barney's words and gestures obviously implied — was a handgun, not a finger."

Regarding the jury instruction, the Court held that the trial court did not abuse its discretion in refusing to issue a specific instruction explicitly saying that a finger is not a firearm because that was never a contested issue in the case.

Justice Mann filed a dissent, joined by Justices Goodwyn and Mimms

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1211126.pdf

Original Court of Appeals Ruling At:
https://www.vacourts.gov/opinions/opncavwp/1057201.pdf

Morgan v. Commonwealth: December 29, 2022
Rev'd Ct. of App. Ruling of October 5, 2021
Virginia Beach: Defendant appeals his conviction for Carrying a Concealed Weapon While Intoxicated on sufficiency of the evidence.

Facts: The defendant drove a "police interceptor" model Crown Victoria equipped with red, white, and blue emergency lights, flashed the vehicle's red and white emergency lights, and tailgated other motorists. The defendant exceeded the speed limit, straddled the center line, and activated strobing lights as he approached close behind other motorists. Immediately following those actions, one of the motorists the defendant tailgated responded as though they were submitting to lawful police authority when they drastically slowed down their vehicle. Detectives who were driving nearby noticed the defendant's behavior and after determining he was not a police officer, stopped him.

After arresting the defendant, the police discovered that the defendant's vehicle contained various police paraphernalia and equipment. Further investigation showed that the defendant was intoxicated and had a firearm in a zipped backpack on the front passenger seat while operating the vehicle.

At trial, regarding the offense of carrying a concealed handgun while intoxicated, the defendant argued that when the General Assembly used the word "permitted," it did not intend to encompass concealed weapons permit holders. Second, he contended that because the firearm was kept in a zipped backpack while he was driving a motor vehicle, § 18.2-308(C)(8)'s affirmative defense to unlawful possession of a concealed weapon applied and meant his firearm was not "concealed." Third, he argued that even though the backpack containing the firearm was in the front passenger seat of the vehicle, the firearm was not "about his person" because he could not access it without first opening the backpack and taking it out of its holster.

The trial court convicted the defendant of DUI, falsely pretending to be a police officer, and of carrying a concealed firearm while intoxicated in violation of § 18.2-308.012. The Court of Appeals affirmed his convictions.

Held: Reversed, as to conviction for carrying a concealed firearm while intoxicated. [*Note: the Virginia Supreme Court did not address the conviction for impersonation of a police officer – EJC*]. The Court held that "carry" within the meaning of § 18.2-308.012 is limited to physically carrying the handgun on one's person "such that it moves when he moves."

The Court contrasted the language in § 18.2-308.012 from the language in 18.2-308(A), interpreted by *Schaff*, which found that 'carry about his person' applies to any hidden firearm within arm's reach of the person — whether or not the person physically carried the firearm. The Court concluded that, by omitting the phrase "about his person" in § 18.2-308.012, "the General Assembly appears to have intended to narrow the scope of the statute to apply only when physically carrying a handgun on one's person."

In this case, the Court noted that the defendant had a valid concealed weapons permit and did not physically carry the handgun on his person, but rather, the handgun was holstered and contained within a small, zipped backpack on the front passenger seat of his vehicle. Under these facts, the Court ruled that the defendant did not "carry" the handgun as contemplated by § 18.2-308.012, and his conviction was in error.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1211033.pdf
Original Court of Appeals Ruling At:
https://www.vacourts.gov/opinions/opncavwp/1139201.pdf

Virginia Court of Appeals -
Unpublished

Garrick v. Commonwealth: May 30, 2023

Virginia Beach: Defendant appeals his conviction for Possession of a Firearm and Heroin on sufficiency of the evidence.

Facts: Police found the defendant asleep in a car, with the engine idling, at a convenience store parking lot. After a search of the car, the police discovered a handgun and a bag of heroin in the glove compartment. Police also found two receipts for maintenance of the car in the glove compartment. The receipts listed the defendant's name and were dated from the previous month. The defendant told the police that the car belonged to his mother. When asked if he was the main user of the vehicle, the defendant replied that he drove it "three out of seven" days of the week.

Held: Reversed. The Court held that the trial court erred in finding the evidence sufficient to establish that the defendant possessed the contraband discovered in the car. The Court argued that there was, at best, a month, and at worst, two months, in which any other person who drove the car could have placed the illegal items in the glove compartment. The Court contended that those facts raised a reasonable doubt as to whether someone else, unknown to the defendant, could have put the firearm and heroin in the glove compartment.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1415211.pdf

Loftis v. Commonwealth: May 2, 2023

Danville: Defendant appeals his convictions for Armed Burglary, Battery, and related offenses on Denial of a Mistrial, Exclusion of Impeachment Evidence, and sufficiency of the evidence.

Facts: The defendant broke into a home and held a gun to the victim's head, threatening to kill her. At trial, the victim testified that it was a "real gun" and stated both that she had seen it before because she had been friends with the defendant and that she knew the difference between a "toy gun" and a "real gun."

After the trial court impaneled the jury, the defendant moved for a mistrial. Defense counsel advised the trial court that before it came to order and while the venire panel was present in the courtroom, counsel discussed the defendant's "mask availability" with the courtroom deputies. According to counsel, during this conversation the deputies "quite audibly" questioned "who ha[d] keys." Although defense counsel did not know what was heard or inferred from this discussion of keys, counsel believed that the venire panel may have inferred that the defendant was in custody. Defense counsel moved for a mistrial, but the trial court denied the motion.

On cross-examination, the defendant asked the victim if she was "under the influence of any substances right now"; she answered, "No." When asked "[h]ow long" it had been since she "used," the victim responded that she had "been clean for at least a month."

The defendant then sought to question the victim regarding her arrest five days before trial on a capias for failure to appear at an earlier proceeding in this case. Defense counsel asserted that when the victim was arrested, she was found in possession of five syringes and "other material" which had "been sent to the lab" for analysis. Defense counsel sought to question the victim about the syringes to explore whether she might have a motive to fabricate, related to any criminal charges she might face. The defense also asserted that the victim's possession of the syringes was inconsistent with her assertion that she had been "clean" for at least a month before trial. The trial court sustained the Commonwealth's objection to that line of questioning.

Held: Affirmed.

Regarding the motion for a mistrial, the Court ruled that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial. The Court noted that the record did not indicate that any member of the venire panel heard the deputies' conversation or, if they did hear it, understood it. The Court pointed out that during the voir dire, defense counsel did not ask the venire panel whether anyone heard the conversation; nor did defense counsel request that the trial court issue a curative jury instruction. Given that the defendant's assertion of any prejudice—let alone indelible prejudice—was wholly speculative, the Court found that he failed to show that there was a manifest necessity to discharge the jury.

Regarding the cross-examination of the victim, the Court ruled that the trial court did not abuse its discretion by sustaining the Commonwealth's objection to the cross-examination. The Court concluded that the victim's possession of syringes did not necessarily show that she had recently used drugs. Moreover, the Court found that any probative value was minimal considering that defense counsel had already extracted multiple, significant admissions from the victim: she was under the influence of illegal drugs on the night in question, several portions of her preliminary hearing testimony were inaccurate, she had been convicted of shoplifting and felony drug possession, and she previously stated that she "didn't remember anything" because she was "messed up."

The Court also pointed out that the jury saw the victim testify in handcuffs and a jail jumpsuit and heard her refer to herself as the defendant's "codefendant." The Court reasoned that cross-examination about the syringes as suspected drug paraphernalia would have more likely invited the jury's speculation about a collateral matter than added any probative value to its credibility determinations. The Court further observed that whether the victim will be charged for a crime connected with her possession of syringes was a matter of pure speculation and mere possession was not sufficient to justify the proposed impeachment.

In a footnote, the Court also explained that the defendant had confused the concept of inconsistent statements with contradiction of the victim's statements on a collateral matter. The Court found that in seeking to contradict the victim's statements, the defendant's proposed cross-examination was collateral to the main issue, and thus, properly excluded.

The Court also ruled that the evidence was sufficient that the defendant possessed a firearm based on the defendant's implied assertion that the weapon was a gun and the victim's description of the defendant's weapon. The Court repeated that whether a firearm meets the requisite definition is a question of fact that may be proven by circumstantial evidence. The Court noted that the victim's ability to identify the defendant's pistol was subject to cross-examination, and that the determination of how much weight to give to her identification of the object as the defendant's pistol was a matter for the trier of fact.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0105223.pdf

Sturdivant v. Commonwealth: September 20, 2022

Williamsburg: Defendant appeals his conviction for Possession of a Firearm by Felon on Jury Instruction and Competency issues.

Facts: The defendant, who has a violent felony conviction, possessed a firearm. The day before the jury trial, defense counsel moved for competency and sanity evaluations. Counsel based the motion on a conversation he had with the Commonwealth's Attorney and the defendant's mother in which she told counsel that she believed that the defendant did not "comprehend what's going on." Defense counsel also pointed to the defendant's purported confusion at his arraignment about whether to have a jury trial or a bench trial. Defense counsel requested that the court order a competency evaluation to ensure that the defendant "understands what's going on."

The trial court reviewed its records and noted that the defendant had appeared in a separate case in 2017 and had an extensive presentence investigation during an earlier proceeding, and neither suggested any issue with competency. The trial court examined the defendant's behavior in this case and ruled that there was no "probable cause to believe that he lacks substantial capacity at this point to even proceed with an evaluation."

At trial, the defendant argued that the jury should have been instructed that they had to find that the defendant's prior felony conviction was "violent" to convict the defendant. The defendant

argued that a jury must "to determine all the factual elements of the offense" in a jury trial and that whether his conviction as "violent" was a question of fact requiring jury determination. The trial court overruled the defendant's objection.

Held: Affirmed.

Regarding the competency issue, the Court ruled that the trial court did not abuse its discretion by denying the defendant's request for a competency evaluation. The Court acknowledged that courts have found that counsel's detailed proffer about a client's mental state may be sufficient to satisfy the probable cause standard. However, the Court cautioned that counsel's "general impression" of a client's incompetence or testimony about limited instances of a client's irrational behavior alone does not establish sufficient doubt. The Court also cautioned that "neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence."

In this case, the Court found that the defendant's mother's statements indicated only that the defendant may have intellectual impairments that required additional time and attention from counsel to explain unfamiliar legal concepts and procedures. The Court found that the statements did not establish that the defendant had a "mental deficiency" that would "interfere with his present capacity to participate in and understand proceedings" given adequate communication with counsel. The court wrote "Thus, they and counsel's otherwise unsubstantiated concerns, which were unconfirmed by personal observation" were insufficient to establish probable cause that the defendant lacked substantial capacity to understand the proceedings against him or to assist his attorney in his own defense.

Regarding the jury instruction issue, the Court found that the trial court properly instructed the jury and that there was proof presented at trial as to the nature of the violent felony offense. The Court quoted *Rawls* and repeated that while proof of the defendant's prior felony conviction is an essential element of the substantive offense under § 18.2-308.2(A), the nature of that prior felony conviction is not. In this case, the Court explained that the phrase "violent felony" used in § 18.2-308.2(A) is a legal term and the issue therefore presents a question of law. The Court repeated that a question of law "is not a proper question for submission to the jury."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1214211.pdf

Bell v. Commonwealth: September 13, 2022

Hopewell: Defendant appeals his convictions for Possession of and Reckless Handling of a Firearm on sufficiency of the evidence.

Facts: The defendant threatened someone with a handgun. The witness saw the defendant outside her home and overheard him arguing with another person about a gun. The witness observed a purple and black handgun in the defendant's hand, which she had seen the defendant possessing before. The witness stated that the defendant initially pointed the item at the other person but when

she confronted the defendant, he pointed the item at her and told her, "bitch, stand out my way." The defendant then ran around a building. Moments later, the victim heard three to four gunshots, which she recognized to be gunshots.

At trial, the defendant argued that the Commonwealth failed to prove he had a real, operational firearm, rather than a replica, a pneumatic weapon, a spring-loaded weapon, or an item that may appear to be a handgun.

Held: Affirmed. The Court reaffirmed that, under § 18.2-308.2 and the 2015 *Jones* case, to sustain a conviction the Commonwealth was required to prove that either: (1) the item in the defendant's hand was, in fact, a firearm, or (2) that the defendant's conduct, together with a victim's identification of the item as a gun, is an implied assertion that the item was a firearm. In this case, the Court found that the trial court properly credited the witness' testimony and permissibly concluded that the defendant's threat and conduct of pointing the item at the witness was an implied assertion that the item he held was a firearm.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1272212.pdf

Gang Participation

Virginia Court of Appeals
Unpublished

Reyes Reyes v. Commonwealth: June 21, 2022

Fairfax: Defendant appeals his convictions for Murder, Street Gang Participation, and related charges on Jury Instruction, Admission of Social Media Evidence, Denial of Hearsay Testimony, and sufficiency grounds.

Facts: The defendant and another man beat a child to death. The defendant was member of MS-13 and had a high enough rank to give orders. The other men involved in the killing, were gang-affiliated; one was a lower-ranking gang member told to bury the body. At trial, that man testified that he acquiesced because the defendant was a higher-ranking gang member, and he was fearful that the defendant could retaliate if he did not comply.

Police later spoke with a witness to the incident. When police told her that the victim was dead and that they had located his grave, the witness allegedly stated "good." The defendant sought to admit that statement at trial, as an "excited utterance," but the trial court denied the defendant's request.

At trial, the witness stated that when the defendant and the other man beat the victim to death, they called him a "rival gang member" and discussed "revenge" for a prior stabbing of another person. The defendant also told the witness she was "in the gang now" after they killed the victim. At trial, a detective provided expert testimony that one goal of MS-13 is to commit violent acts to scare the

community. At trial, the defendant himself admitted that the three men armed themselves and intended to beat the victim.

At trial, the Commonwealth introduced evidence from subpoena returns of the defendant's Facebook and Instagram account. A detective testified that he discovered information related to social media accounts possibly maintained by the defendant, and based on that information, he acquired a search warrant that yielded the information in the exhibits. The detective also testified that during the defendant's interview, the defendant identified multiple photos and posts from the two social media accounts and confirmed that the accounts belonged to him and that he was the person in the photos. The defendant objected that, that because the accounts were not registered in his name, the Commonwealth did not properly authenticate the exhibits. The defendant later testified that the accounts belonged to him.

The trial court denied the following instruction from the defendant: "if you find the defendant guilty of first-degree felony murder in the commission of an abduction, then you must find him not guilty of the offense of abduction."

Held: Affirmed.

Regarding the social media evidence, the Court noted that Rule 2:901 applies to social media evidence. The Court agreed that the trial court properly determined that the Commonwealth proved, by a preponderance of the evidence, that the social media accounts were authenticated and admissible.

Regarding the witness's statement "Good" regarding the dead victim, the Court noted that the statement was elicited in the context of an extensive interview which, according to her own testimony, took place weeks after the witness watched the defendant kill the victim, so information that he was dead was not a surprise to her. The Court found that the witness' statement here was not an "instinctive reaction to a horrifying event."

Regarding the jury instruction, the Court repeated that, under *Spain*, "the purpose of references to felonies in the murder statutes is gradation and not prohibition of punishment for the underlying felonies." Therefore, multiple convictions in a single trial for murder committed during a felony and the underlying felony do not violate the constitutional protections against double jeopardy. Because the defendant's proposed instruction was an incorrect statement of law, the Court ruled that the trial court did not err in denying it.

Lastly, the Court found the evidence sufficient to convict the defendant.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0525214.pdf

Hit & Run

Virginia Court of Appeals
Published

Aley v. Commonwealth: June 14, 2022

75 Va. App. 54, 873 S.E.2d 89 (2022)
Stafford: Defendant appeals his conviction for Hit & Run on sufficiency of the evidence.

Facts: The defendant drove recklessly at high speed on a windy, dark road. A police officer attempted to catch up to him but could not even begin a pursuit due to the defendant's high speed. Later, officers located the defendant again and attempted a traffic stop, activating their patrol car's emergency lights, but not its siren. The officers accelerated up to a hundred miles an hour, but the defendant again pulled away and escaped.

Soon thereafter, however, the defendant failed to negotiate a curve due to his high speed and crashed, flipping his vehicle repeatedly. Both the defendant and his passenger were injured in the crash. The defendant insisted that they flee the scene to escape the police. The passenger repeatedly asked the defendant to take her to the hospital in the hours following the crash. The defendant repeatedly, and often angrily, refused. The defendant also yelled at the passenger when she tried to call a friend who was trained paramedic, for assistance right after the crash.

When police located the passenger, her face was "red" and "swollen," and "it looked like a boxer had punched her in the face." The victim also had visible, red "seatbelt marks" cutting diagonally across her body from right to left. She also had other injuries that included cuts, scrapes, swelling and bruising all over her body. Her left eye was swollen, and the left side of her jaw "hurt very much," such that she could not chew or eat for at least a week.

At trial, the defendant argued that there was insufficient evidence that he reasonably knew or should have known that the passenger suffered any injury from the accident, because the passenger never told the defendant that she was injured, and her wounds were not apparent.

Held: Affirmed. The Court noted that § 46.2-894 provides that the duty to render reasonable assistance, including obtaining medical attention, exists not only "if it is apparent that medical treatment is necessary" but also if it "is requested by the injured person." As the statute uses the disjunctive "or," the Court found that means that either condition may satisfy that element of the offense. In this case, the Court ruled that it was sufficient that the passenger clearly and repeatedly requested that the defendant take her to receive medical attention and that the defendant refused to do so.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0693214.pdf

Virginia Court of Appeals
Unpublished

Pollard v. Commonwealth: September 27, 2022

York: Defendant appeals his conviction for Felony Hit and Run and Felony Child Endangerment on sufficiency of the evidence.

Facts: The defendant, to avoid highway traffic, drove into a construction work zone at 70 miles per hour, struck construction gear, and struck a construction worker. The defendant had a four-year-old child, his nephew, in the vehicle. Witnesses heard the defendant's brakes and saw his brake lights as the worker tried to run and dive out of the way, but the defendant's truck hit the victim's legs, "spun him like a top," and threw him to the ground. The defendant did not stop, and instead fled the area. The worker suffered serious injuries.

Officers found the defendant, who smelled of alcohol. The defendant stated that he had made eye contact with the worker but did not think he struck him. The defendant's vehicle was spattered with the paint that the worker had been using.

At trial, the defendant argued that the evidence did not establish that he was aware of the crash. He also argued that the evidence was insufficient to establish that he was related to the child or responsible for the child in any way specified by § 18.2-371.1(B)(1).

Held: Affirmed.

Regarding the Hit and Run offense, the Court agreed that a rational factfinder could have concluded from the evidence that a reasonable person in these circumstances—specifically, a person aware of having just forcibly struck a construction worker with his SUV—also would have known that the collision injured the construction worker.

Regarding the Child Endangerment offense, the Court concluded that, as the driver of a vehicle in which a four-year-old child was a passenger, the defendant exercised care and control over that child, even in the presence of another adult. The Court explained that 18.2-371.1(B)(1) applies to any "person responsible for the care of a child under the age of 18," and this includes any person who drives a motor vehicle knowing that a child is in the vehicle. Thus, given the undisputed evidence that the defendant knowingly drove a motor vehicle with a child passenger, the Court concluded that the evidence was sufficient to support a finding that the defendant was a "person responsible for the care of a child."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0753211.pdf

Homicide

Virginia Court of Appeals
Published

Taylor v. Commonwealth: March 28, 2023

Chesterfield: Defendant appeals his convictions for Voluntary Manslaughter, Malicious Shooting, and Child Neglect on Denial of a Self-Defense Instruction and sufficiency of the evidence.

Facts: The defendant approached the victim in a mall food court and provoked a fight. When the victim quickly gained the upper hand, the defendant walked to his backpack and retrieved a firearm. The victim restarted the fight, and the defendant shot him twice, also hitting his own sister with a stray bullet. The defendant fled, ahead of his family, including his two-year-old son, later testifying that he did not know where his son was during the fight.

The victim was transported to the hospital and went into organ failure "almost immediately." The victim arrived at the ER close to death and, after a procedure to stop the bleeding, he had a roughly 1% chance of survival according to his treating physicians' testimony. The victim underwent at least 10 operations during his 11-day stay at the hospital, during which he never regained consciousness. The victim ultimately was removed from life support and died.

The defendant argued self-defense. At trial, the trial court gave an instruction which was virtually identical to Virginia Model Jury Instruction-Criminal Model Instruction No. 33.810 for self-defense "with fault." The defendant argued that, left on its own, that instruction placed an undefined burden of proof on the defendant, when instead the Commonwealth bore the burden of proof. The defendant proffered a supplemental instruction:

> "If you find from a consideration of all of the evidence in the case that the defendant's claim of self-defense creates a reasonable doubt that he committed the offense, then you shall find him not guilty."

The trial court rejected that instruction. However, the Court did give the instruction that stated "[t]here is no burden on the defendant to produce any evidence" and gave the instruction that stated: "If you have a reasonable doubt as to whether he is guilty at all, you shall find him not guilty."

At trial, the trial court rejected the defendant's argument that his three rapid-fire shots at the same person in the same instance were insufficient to sustain his convictions for three separate counts of malicious shooting within an occupied building in violation of § 18.2-279. The trial court also rejected the defendant's argument that his convictions for malicious shooting in an occupied building were subsumed by his conviction for voluntary manslaughter. The defendant also unsuccessfully argued that he did not cause the victim's death.

Lastly, the defendant argued that he was not guilty of child neglect under § 18.2-371.1(B) because the evidence failed to prove that he was "responsible for the care" of his son.

Held: Affirmed.

Regarding the defendant's proffered jury instruction, the Court agreed that it is error for a self-defense instruction to affirmatively require the accused to carry the burden of proof. On the other hand, though, the Court explained that it is not necessary to instruct the jury that the Commonwealth "must disprove beyond a reasonable doubt every fact constituting" a claim of self-defense. The Court repeated that if a court properly instructs the jury that "[t]here is no burden on the defendant to produce any evidence," it is not error to refuse an "additional instruction on the burden of proving affirmative defenses."

Regarding the three convictions for Malicious Shooting, the Court examined the statute and concluded that the legislature intended § 18.2-279 to be "bullet specific." The Court likened the offense to § 18.2-154, where the Court had reached the same result in the *Stephens* case that each shot the defendant fired was a "separate, identifiable act." The Court noted that the gravamen of the offense is

the risk of endangerment or death to another as a result of discharging a firearm. The Court also noted that another panel had reached the same conclusion in 2019 in the unpublished case *Tate v. Commonwealth*, affirming two counts of malicious shooting at an occupied dwelling when the defendant fired multiple bullets at two occupied motel rooms.

The Court rejected the argument that convictions for malicious shooting in an occupied building were subsumed by his conviction for voluntary manslaughter, finding that malicious shooting within a building was not a lesser-included offense of voluntary manslaughter.

The Court also concluded that the evidence was sufficient to show that the victim died from his gunshot wounds, noting that the defendant did not present any evidence of an intervening cause, let alone an intervening cause that would fall outside the "probable consequence of [his] own conduct."

Lastly, the Court agreed that the defendant was guilty of child neglect. The Court noted that the defendant shot a gun three times with his son nearby and "then ran out of the mall seemingly without regard for his son's whereabouts."

Judge Chaney filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0433222.pdf

Virginia Court of Appeals
Unpublished

Snead v. Commonwealth: March 7, 2023

Pittsylvania: Defendant appeals his conviction for DUI Manslaughter on Admission of Hospital Records, Admission of Expert Testimony, and Sufficiency of the Evidence.

Facts: The defendant drove while intoxicated, failed to recognize a curve in the road, continued straight, struck two road signs, careened down an embankment, and crashed into a tree, killing his passenger. The defendant arrived at the emergency room, where staff collected a blood test. The defendant's "serum" BAC" was .20 %.

At trial, Dr. Trista Wright, a forensic toxicologist, testified that when she converted the defendant's "serum" blood alcohol test results to "whole blood" alcohol results, the "whole blood" BAC was between 0.16 and 0.18 at the time of testing. She also opined that the defendant's "whole blood" BAC at the time of the accident was 0.2. She testified that a 0.2 BAC level would negatively impact the defendant's ability to drive by interfering with "the critical judgment . . . and . . . the motor skills . . . needed to react to different stimuli[,] . . . stay into [sic] the lanes or react to the speed and the distance between objects." Dr. Wright also noted that, "at night, visual acuity m[ight] become an issue."

At trial, the defendant objected to admitting the blood alcohol results contained in his hospital records because he argued that there was insufficient evidence presented on the chain of custody of the blood test and therefore the evidence was unreliable. The trial court overruled his objection.

The defendant also argued Dr. Wright's opinion was too speculative to be admissible because the blood test results were unreliable due to the lack of chain of custody evidence. At trial, the defendant the defendant attempted to impeach the expert's opinion on that basis when he questioned both she and the custodian of the hospital records about their lack of knowledge on chain of custody issues. The trial court overruled the objection.

Regarding the sufficiency of the evidence, the defendant argued that his BAC test could have been compromised by the drugs administered to him after the accident, although he presented no evidence of that. The defendant also argued that the evidence was insufficient to demonstrate his intoxication caused the crash and insufficient to demonstrate that he had demonstrated criminal negligence.

Held: Affirmed.

The Court first addressed the admission of the hospital records. The Court ruled that the trial court did not abuse its discretion by admitting the blood test results and hospital records without further chain of custody foundation. The Court cited the 4th Circuit's ruling in *Thomas v. Hogan* that "there is good reason to treat a hospital record entry as trustworthy." The Court explained that "hospital records are deserving of a presumption of accuracy even more than other types of business entries." The Court cited *Stevens v. Commonwealth*, 46 Va. App. 234, 246 (2005), where the defendant had similarly argued that, though the rule against hearsay did not bar admission of a hospital toxicology report, the Commonwealth had laid insufficient foundation for its admission.

The Court then addressed the defendant's chain of custody objection and ruled that the blood tests upon which Dr. Wright's opinion rested were properly admitted into evidence. The Court found that the defendant's chain of custody concerns went to the weight of the expert's opinion, not its admissibility. The Court noted that the defendant produced no evidence suggesting that the analysis of the BAC in his blood samples was flawed or that any drugs he received altered his BAC readings. The Court found that the expert's opinion was based on assumptions that were either supported by the evidence or uncontested.

The Court then concluded that, based on the defendant's BAC test results and the expert's opinion that the BAC was 0.2 when the accident occurred, the evidence supported the trier of fact's rational conclusion that the defendant was intoxicated at the time of the crash. Regarding the defendant's claim that his BAC test could have been compromised by the drugs administered to him after the accident, the Court complained that the defendant cited no evidence supporting that theory.

Regarding causation, the Court examined the facts in detail. The Court found that the tire tracks in the snow demonstrated that the defendant made no attempt to correct his path or brake after leaving the road, despite the presence of a road sign marking the curve. Based on the extensive damage to the front of the car and the straight path from the road to the tree, the Court ruled that the evidence supported the trial court's finding that the defendant drove directly into the tree at a high rate of speed. The Court also noted that the expert testified that a BAC of 0.2 would interfere with a driver's "judgment" and reaction time as well as his ability to judge speed and his ability to stay in his lane of travel. Accordingly, the Court concluded that the record was sufficient to prove beyond a reasonable doubt that, as a result of driving under the influence of alcohol, the defendant caused his passenger's death.

Lastly, the Court examined the evidence of criminal negligence. The Court noted that it had already held that driving with a BAC of more than 0.25, standing alone, constitutes "a willful act" sufficiently "gross, wanton, and culpable" to prove a violation of § 18.2-36.1(B). In this case, though, the Court did not decide whether driving with a BAC of 0.2 was sufficient, standing alone, to establish the "gross, wanton, and culpable" conduct required to prove aggravated involuntary manslaughter. Instead, in this case, the Court ruled the BAC evidence proved that the defendant's level of intoxication was two and one-half times the legal limit, and therefore the defendant was substantially impaired by alcohol. The Court also found that the evidence supported the trial court's finding that, as a result of the level of intoxication, the defendant did not conform his driving to the weather and road conditions.

The Court wrote: "The evidence proved that, while he was extremely intoxicated, Snead chose to drive a curvy, dangerous road when the road and visibility conditions were poor. He failed to heed the road signs marking the curve, and instead, drove straight off the road at a high rate of speed directly into a tree. Viewed as a whole and in combination, the circumstances here were sufficient to support the reasonable conclusion that Snead was criminally negligent when he chose to transport Adams down a treacherous stretch of road when the road conditions were deteriorating, all while his intellectual and motor skills were substantially impaired by alcohol."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0044223.pdf

Jefferson v. Commonwealth: December 13, 2022

Danville: Defendant appeals his convictions for Felony Child Abuse and Felony Murder on sufficiency of the evidence.

Facts: The defendant shook his three-month-old child to death. After the child became unresponsive, but before his child died, the defendant brought his child to the emergency room. There, he lied about the cause of the child's injuries, claiming that the child fell from a baby bouncer. The child died three days later. Police interviewed the defendant, who confessed to having shaken the baby until his neck snapped.

At trial, the medical examiner opined that the injuries would be caused by significant blunt force to the head, such as a car crash. A Commonwealth's expert testified that "a responsible caregiver who's appropriately caring for a baby would know immediately if they had caused this degree of injury to a child.

At trial, the defendant argued that there was an insufficient "time, place, and causal connection" between his felonious act—child abuse and neglect in violation of § 18.2-371.1—and the child's death, to support his felony murder conviction.

Held: Affirmed. The Court found that the evidence was sufficient to find proof of felony child abuse and neglect, in violation of § 18.2-371.1 and felony murder, in violation of § 18.2-33. The Court explained that the temporal connection was not severed simply because the child did not die

immediately, and the Court noted that the defendant had not asserted any superseding act to sever the causal connection.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1052213.pdf

Moultrie v. Commonwealth: November 22, 2022

Petersburg: Defendant appeals his conviction for First-Degree Murder on sufficiency of the evidence.

Facts: The defendant threatened the victim at work, and then attacked her at her home, leading to his arrest. The victim told a friend only hours before the murder that, if anything were to happen to her, the defendant would be responsible, After being released on bond, the defendant referred to the victim as "[t]hat stupid bitch," returned to the house shortly after he was released on bond, broke into her home, started an argument with her, and engaged in a lengthy struggle, before stabbing her in the upper chest, resulting in a fatal wound to her heart. Rather than calling for help or providing any assistance to the victim, the defendant dragged her down the stairs by her hair and left her bleeding on the floor. He then fled.

Held: Affirmed. The Court noted the history of violence between the defendant and the victim and the circumstances of the murder itself. The Court concluded that the evidence presented at trial clearly supported the trial court's finding that this was a willful, deliberate, and premeditated killing.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0457222.pdf

Sims v. Commonwealth: October 4, 2022

Richmond: The defendant appeals his conviction for First-Degree Murder on sufficiency of the evidence.

Facts: The defendant and his confederates, while driving in a car, shot and killed the victim. The occupants of the vehicle all fired guns at the victim. The occupants fired at least fifteen times, hitting the victim six times, and killing him. While the defendant fired that gun multiple times in the victim's direction, at trial, there was no evidence that the defendant fired any of the shots that killed the victim.

Police located the defendant's car and recovered a firearm from the spot in the car where the defendant had been sitting. DNA consistent with the defendant DNA profile was found on the firearm and the defendant admitted that he had a black gun with an extended magazine, matching the firearm's description. An officer found four .40 caliber casings that DFS determined were discharged by that firearm.

At trial, the defendant argued that he was guilty only of attempted murder.

Held: Affirmed. The Court ruled that the evidence was sufficient to establish that the defendant acted in concert with the other shooters and was guilty as a principal in the second degree.

The Court noted ample evidence connecting the defendant to the firearm found inside the seat in front of where the defendant was sitting. Because the victim's death was a "probable consequence" of such action, the Court ruled that the defendant was equally answerable for the crime as the other shooters.

The Court also repeated that establishing that a defendant acted in concert of action with others establishes criminal liability upon a legal theory of transfer of intent. Accordingly, if any of the shooters had the specific intent to kill the victim, the Court explained that that intent was also imputed to the defendant. In this case, the Court ruled that, in the absence of provocation, the attacker's barrage was sufficient to create an inference that the defendant acted with premeditation. Because there was no evidence of provocation, the Court explained that a reasonable fact finder could conclude that the defendant acted with premeditation and the specific intent to kill when he fired a firearm at the victim at least four times alongside at least two other shooters, resulting in the victim's death.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0807212.pdf

Ellis v. Commonwealth: September 20, 2022

Fauquier: Defendant appeals his conviction for Murder, Robbery, and Use of a Firearm on *Brady* Discovery and sufficiency grounds.

Facts: The defendant shot and killed the victim while attempting to rob the victim. The defendant and two other men planned to rob the victim, drove to the victim's house, and when they arrived, the defendant took a gun with him when he exited the car. The defendant pointed a gun at the victim and told the victim to give him drugs or money. The defendant then shot the victim. When he returned, he told a witness that "if he hadn't have fought back [I] wouldn't have had to pop him."

Post-trial, the defendant asked the trial court to overturn the verdict on the grounds that certain interviews possibly existed and were not disclosed to him. These interviews include interviews between a witness and a detective; the Commonwealth and the victim's mother; and the Commonwealth and the victim's father. He argued that the interviews could have been used to impeach/cross-examine these witnesses. The defendant admitted, though, that he was unsure whether such interviews existed.

Held: Affirmed.

Regarding the *Brady* claim, the Court held that there was no *Brady* violation. The Court noted that the defendant did not show how these interviews would be favorable to him or shown how this evidence would have changed the result of the trial. Thus, the Court concluded that the defendant did not prove the third requirement for a *Brady* violation: Materiality, that is, that there was a reasonable

probability that, had the evidence been disclosed, the result of the proceeding would have been different.

The Court pointed out that the interviews were not "known to the government," as the defendant admitted that he was unsure whether these interviews even exist. The Court explained that "*Brady* is not a rule of discovery, and the Commonwealth has no obligation to turn over interviews of which it has no knowledge. Additionally, the general definition of a *Brady* violation does not require the Commonwealth to have all physical evidence collected and analyzed for potentially exculpatory DNA evidence, nor does appellant cite any authority for such a requirement."

Regarding sufficiency, the Court also concluded that the evidence was sufficient to convict the defendant of first-degree murder, conspiracy to commit robbery, and use or display of a firearm in committing a felony.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1390204.pdf

Smallwood v. Commonwealth: June 7, 2022

Henrico: Defendant appeals his convictions for Voluntary Manslaughter and related charges on sufficiency of the evidence.

Facts: The defendant shot the victim repeatedly, twice from behind, killing him. Three guns and two knives were found at the crime scene.

The defendant claimed that the killing was in self-defense. At trial, the defendant testified about a physical altercation with the victim earlier that night at a convenience store, in which the defendant stated he had drawn his gun to protect himself. The defendant described the victim as "rough" and "crazy," and talked about other instances when the victim had acted violently toward the defendant. For instance, the defendant claimed that the victim in 2018 punched the defendant in the jaw four or five times. In 2019, the defendant stated that the victim claimed he would kill people who crossed him. The victim also allegedly threatened the defendant by saying, "I'll shoot your ass" and by brandishing a gun while laughing.

The defendant was charged with second-degree murder, but the jury convicted him of voluntary manslaughter. After trial, the defendant argued that that, because he "was the only person in that room who could provide direct evidence as to why the shooting occurred," his testimony was arbitrarily disregarded, and the law of self-defense required his acquittal.

Held: Affirmed. The Court found that a rational jury could acquit the defendant of second-degree murder but convict him of manslaughter based on the evidence of the defendant's "volatile and unpredictable friendship" with the victim—a relationship that involved threats and brandishing of guns. The Court concluded that the jury could have accepted that the defendant had an unreasonable fear of danger that caused him in the heat of passion to use deadly force against the victim.

The Court rejected the defendant's argument, finding that the rule that he advocated—that the jury must accept a defendant's self-defense claim when the defendant is the only witness to the killing—would "create a perverse incentive for perpetrators to kill any witnesses to the crime."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1053212.pdf

Indecent Exposure

Virginia Court of Appeals
Published

Johnson v. Commonwealth: September 20, 2022
75 Va. App. 475, 877 S.E.2d 533 (2022)
Augusta: Defendant appeals his conviction for Engaging in an Obscene Sexual Display on sufficiency of the evidence.

Facts: While incarcerated in the restrictive housing unit in jail, the defendant called a prison librarian over to the window of his cell. He then backed away a few paces and drew her attention to himself while he exposed his penis and masturbated. His cell was a private cell and had a door that was almost entirely opaque, with only one single window providing a view into the cell. At trial, the defendant argued that he could not be convicted under the language of § 18.2-387.1 because the conduct did not occur "in any public place where others are present."

Held: Affirmed. The Court found that its 2013 ruling in *Barnes v. Commonwealth* controlled in this case. *Barnes* held that whether a prison cell is a "public place" turns on whether the inmate has "a reasonable expectation of privacy." The Court explained that any criticism of *Barnes*, "no matter how valid," and even if the Court agreed, would not authorize the Court to ignore its controlling force here.

The Court examined the difference in language between the indecent-exposure statute, § 18.2-387, and the obscene-sexual-display statute in this case. Under § 18.2-387, a person commits "indecent exposure" by exposing himself "in any public place, or in any place where others are present." The Court noted that the two places are named in the disjunctive. The Court then noted that, under § 18.2-387.1, a person commits an obscene sexual display by masturbating "in any public place where others are present." The Court observed that "the two places named in the indecent-exposure statute have been fused into a single place in the obscene-sexual-display statute."

In this case, the Court applied *Barnes* and concluded that the defendant had no reasonable expectation of privacy when he invited the librarian to watch his obscene sexual display. Because the defendant invited the librarian to look through his cell-door window, the defendant had no "reasonable expectation of privacy" in his cell. Thus, the Court ruled that the defendant's cell qualified as a "public place where others are present" under § 18.2-387.1.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1122213.pdf

Larceny

Virginia Court of Appeals
Unpublished

Briley v. Commonwealth: August 2, 2022

Chesapeake: Defendant appeals his convictions for Burglary and Larceny on sufficiency of the evidence of value.

Facts: The defendant stole video games and game systems from the victim's home and sold some of the stolen items to a local store. The defendant stole the items from one location, under the victim's bed, where the victim kept all the items together.

Police identified the defendant on video, and he confessed. At trial, the victim testified the value of the one game console was $299 and the other console was $200, if new, and "about 150, 100 bucks" used. As for the stolen games, she testified four games ranged from $59 to $69, and each of the twenty others ranged from $5 to $40. The store manager testified consistent with the victim's statement. [*Note: At the time, the felony larceny threshold was $500 – Ed.*].

At trial, the defendant objected that the trial court erroneously considered the value of the still-missing game system and its related games in determining the statutory threshold amount because the evidence failed to prove he was in possession of those items.

Held: Affirmed. The Court agreed that the evidence was sufficient to prove the value of the stolen items was over $500. The Court also agreed that, based on the defendant's sale of some of the stolen items, the trial court could lawfully "infer the stealing of the whole from the possession of part."

The Court repeated that when "property is taken at about the same time as that found in accused's possession," then "the possession of a part of the recently stolen property warrants the inference that accused stole all of it." "Such circumstances support an inference which leaves no room for reasonable doubt that the goods defendant possessed were the goods stolen."

Regarding value, the Court repeated that the Commonwealth may offer testimony of a lay person or an expert to prove value. The Court noted that the original purchase price of an item is admissible as evidence of its current value, and therefore it was within the province of the trial court to consider and determine the credibility of the victim's market-value testimony.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1151211.pdf

Wingfield v. Commonwealth: June 12, 2022

Stafford: Defendant appeals his convictions for Grand Larceny with Intent to Sell and related charges on admission of Other Bad Acts and Sufficiency grounds.

Facts: The defendant and his confederates entered a cellphone store and stole phones from their displays, fleeing from the stores with the items. Video and photographic evidence captured the offense. About twenty minutes later, the defendant and his confederates entered another AT&T store in Spotsylvania County and stole phones in the same manner. Both crimes involved three individuals wearing the same clothes and having the same modus operandi of going into the store, grabbing as many cell phones from the display case as quickly as possible, and fleeing the store immediately after ripping the cell phones from their displays. A witness later identified the defendant as one of the perpetrators.

Prior to trial, the defendant moved to exclude any evidence of his other thefts from other jurisdictions. The defendant also had charges in Warren County and in Henrico County, and the trial court granted the motion in limine for "the unadjudicated bad acts" in those locations. However, the trial court denied his motion regarding the offense in Spotsylvania.

Held: Affirmed. Regarding admission of the other offense in the neighboring county, the Court agreed that the other offense bore a sufficient mark of similarity to make it admissible at trial.

Regarding sufficiency, the Court noted that five cell phones valued at about $3,800 were stolen from the AT&T store in this case. The Court wrote, "Given that the sheer number of cell phones stolen was plainly more than needed for [the defendant's] own personal use (or that of the other perpetrator), the jury could have reasonably inferred that [the defendant] intended to sell the cell phones for profit."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0892214.pdf

Obstruction of Justice & Resisting Arrest

Virginia Court of Appeals
Published

Lucas v. Commonwealth: August 9, 2022
75 Va. App. 334, 876 S.E.2d 220 (2022)
Chesapeake: Defendant appeals his conviction for Obstruction of Justice on sufficiency of the evidence.

Facts: During a traffic stop, officers discovered illegal drugs in the defendant's vehicle. When officers attempted to put the defendant in handcuffs, he pulled his hand away from the officer. The officer ordered the defendant to put his hands behind his back, but the defendant pushed off the officer

and fled across the street. As he ran, the defendant, a convicted felon, dropped a firearm. Officers chased him and recaptured him after a struggle.

Held: Affirmed. The Court held that the evidence was sufficient to support the trial court's conclusions that the defendant obstructed justice.

The Court reaffirmed that, under *Ruckman,* a conviction for obstruction of justice cannot be sustained merely on evidence that a person failed to cooperate fully with an officer or when the person's conduct merely rendered the officer's task more difficult but did not impede or prevent the officer from performing that task. Consequently, under *Jordan,* a suspect's flight, alone, does not constitute obstruction of a law-enforcement officer.

In this case, the Court found that the defendant's application of force against the officer removed his actions from the realm of "mere flight" and provided sufficient evidence to support the conviction for obstruction of justice. The Court further concluded that the defendant's conduct did more than make the discharge of the officers' duties more difficult; they in fact impeded the officer's ability to detain him and caused the officers to engage in a scuffle with him in the street.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0997211.pdf

Virginia Court of Appeals
Unpublished

Robinson v. Commonwealth: August 9, 2022

Lynchburg: Defendant appeals her convictions for Obstruction of Justice and Assault on Law Enforcement on sufficiency of the evidence:

Facts: Officers responded to a call regarding an altercation between the defendant and another person. The defendant was argumentative and combative with the officers from the moment they arrived on the scene. As an officer investigated the incident by interviewing witnesses, the defendant repeatedly interrupted her, talked over the officer, and prevented her from speaking with people on the scene. The defendant refused to identify herself and cursed at the primary officer, further disrupting her investigation. A second officer had to move the defendant from the area so the primary officer could conduct her investigation, thus preventing the second officer from assisting with the interviews.

After struggling with the second officer, the defendant announced her specific intent to "assault" any officer who attempted to search her. When an officer approached to conduct the search, the defendant immediately kicked the officer. The defendant then resisted the officers' attempts to subdue her. Only after another officer arrived on the scene were the police able to conduct the search.

After officers arrested her, the defendant resisted the officers' attempts to stop her from kicking the police car window, and only after backup officers arrived and shackled her were the officers able to transport her to the police station.

Held: Affirmed. Regarding the Obstruction offense, the Court noted that the defendant forcefully resisted the officers' commands and prevented the officers from accomplishing their duties. Accordingly, the Court ruled that the evidence proved that the defendant obstructed the officers.

Regarding the assault on law enforcement, the Court agreed that the defendant's statements, behavior, and acts amply demonstrate that she acted with the requisite intent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1271213.pdf

Probation Violation

Virginia Supreme Court

Hill v. Commonwealth: August 11, 2022
Aff'd Ct. of Appeals Ruling of May 18, 2021
876 S.E.2d 173 (2022)
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.

On appeal, the Court of Appeals 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.

Held: Affirmed.

The Court agreed with the Court of Appeals that a revocation order that extends a period of probation necessarily extends the period of sentence suspension. The Court affirmed that the power of revocation can be exercised to address misconduct that occurred within either the period of probation or the period of suspension. In the Court's analysis, § 19.2-306(A) does not limit the power of revocation to misconduct occurring only during an expressly specified period of suspension. To the contrary, the Court concluded that the statute presupposes that an implied suspension always accompanies an expressly declared period of probation.

The Court contended that "Probation without the possibility of consequences for a violation would be a pointless and misleading exercise of judicial power." The Court explained that the issue at a revocation proceeding is not what sentence to impose upon the defendant for his prior criminal conviction, but rather whether the circuit court should invoke § 19.2-306(A)'s authority to "revoke" a suspension for any reasonable cause occurring "within the probationary period, or within the period of suspension fixed by the court."

In a footnote, the Court acknowledged that the General Assembly amended §19.2-306 in 2021 and in 2022. The Court found that these amendments did not substantively alter subsection (A) or otherwise affect the issues in this case.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1210569.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0562204.pdf

Virginia Court of Appeals
Published

Thomas v. Commonwealth: May 9, 2023

Henrico: Defendant appeals his sentence for Probation Violation on Exceeding the Statutory Limits for "Technical" Violations.

Facts: In 2014, the defendant was convicted of aggravated sexual battery, carnal knowledge of a minor, and three counts of indecent liberties. He was sentenced to a total of fifty years of incarceration with forty-one years and eight months suspended. The court's order conditioned the suspended sentence, in relevant part, on the defendant's good behavior and compliance with supervised probation.

In December 2021, the defendant met with his probation officer and signed a document listing the conditions of his probation. One condition was that he would "follow the Probation and Parole Officer's Instructions" and "be truthful, cooperative, and report as instructed." He further signed a document titled "Sex Offender Special Instructions," including that he not "purchase, consume, or possess alcohol, marijuana, and/or illegal substances." At the direction of his probation officer, the

defendant then entered a community residential program, for which he signed yet another document noting rules that also clearly stated he could not use alcohol or marijuana.

Later that month, the defendant tested positive for marijuana use on three different occasions. On the last occasion, he also tested positive for alcohol. Due to his drug and alcohol use and "poor attitude," he was terminated from the community residential program and the trial court revoked his probation. The trial court found that the defendant had violated a "special condition" of his probation and suspended sentence. The court rejected the defendant's argument that the uses of alcohol and marijuana were technical violations under § 19.2-306.1(A). The trial court revoked the suspended sentence and resuspended all but ninety days.

Held: Affirmed in Part, Reversed in Part, Remanded. The Court held that the trial court did not err by classifying the defendant's alcohol violation as non-technical and ordering the defendant to serve a portion of his previously suspended sentence. However, the Court also concluded that the marijuana violation did not permit the imposition of suspended time. Consequently, the Court remanded the case for the trial court to consider anew how much active time, if any, to impose for the probation violation.

The Court examined the recent limitations in the probation violation statute. The Court first noted that there are "technical" violations, listed in § 19.2-306.1(A). The Court then acknowledged that there are "non-technical" violations, which include conviction of a criminal offense that was committed after the date of the suspension, and violation of another condition other than a technical violation or a good conduct violation that did not result in a criminal conviction. In a footnote, the Court noted that it had held in *Diaz-Urritia* that, so long as there is another condition that has been violated other than the good conduct condition, then the sentencing court is simply not constrained by the statute because the basis of the violation is another condition, not a good conduct violation.

The Court then examined another category of violation— violations of conditions or instructions referred to as "special," which are not specifically mentioned in the statutory scheme. For example, the Court pointed out, special conditions formulated by the DOC are often imposed on a probationer convicted of a particular category of offenses, such as sex or gang-related offenses. In this case, the Court held first that the trial court erred by concluding that mere classification of the relevant conditions of probation as "special" was dispositive. The Court found that, to be "technical," the language need not be identical, as long as the probationer's proscribed "underlying" conduct "matches" the listed technical violation in the statute. In a footnote, the Court also rejected the Commonwealth's argument that the "another condition" language in § 19.2-306.1(B) is broad enough to encompass the sex offender special instructions and automatically exclude them from the list of technical violations in subsection (A).

Regarding the defendant's alcohol use, the Court ruled that the defendant's violation of the alcohol special condition was not a technical one under § 19.2-306.1(A)(vi), and the trial court was free to order the defendant to serve all or part of his previously suspended sentence. The Court noted that the sex offender special instructions he signed provided in pertinent part that he could not consume any alcohol. The Court then observed that § 19.2-306.1(A)(vi), by contrast, defines using alcohol as a technical violation only "to the extent that it disrupts or interferes with" the probationer's "employment or orderly conduct." Therefore, the Court ruled that the defendant's "violation conduct" of consuming alcohol under the sex offender special instructions, without any requirement of associated misbehavior or adverse impact on employment, does not "match" the alcohol-related conduct listed as a technical

violation. As a result, the Court ruled that the defendant's violation of his probation based on his alcohol consumption was not a technical violation under § 19.2-306.1(A)(vi).

However, the Court also found that the defendant's violation of the special instruction that he not consume or possess marijuana and/or illegal substances was also a violation of the requirement of § 19.2-306.1(A)(vii) that he "refrain from the use" or "possession" of "controlled substances." Consequently, the Court ruled that the drug-related portion of the defendant's violation of § 19.2-306.1(A) was a technical violation and did not support the imposition of any of his previously suspended sentence.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0477222.pdf

Diaz-Urrutia v. Commonwealth: April 4, 2023

Stafford: Defendant appeals the revocation of his probation, arguing his violation was a Technical Violation.

Facts: While on probation for rape and abduction, the defendant contacted the victim in violation of a specific order from the court to not have contact with the victim. The defendant argued that his violation of a no-contact condition of his suspended sentence was a good conduct violation that did not result in a criminal conviction and that, accordingly, § 19.2-306.1 prohibited the circuit court from imposing any period of active incarceration. The trial court disagreed and revoked two years of his suspended sentence.

Held: Affirmed. The Court held that the basis of a revocation of a suspended sentence is a good conduct violation only if the sole basis for the revocation is the defendant's violation of the condition that he remain of good behavior. In this case, because the trial court was permitted to revoke and impose any amount of the balance of his suspended sentence for the defendant's violation of "another condition" other than a technical violation or good conduct violation that did not result in a new criminal conviction, the trial court did not err in imposing two years of active incarceration for the violation of the no-contact condition of his suspended sentence.

The Court noted that § 19.2-306.1 is silent as to what the court's revocation and sentencing options are if the defendant has violated a condition that is a "good conduct violation that did not result in a criminal conviction." Whatever restrictions, if any, § 19.2-306.1 imposes on a sentencing court's authority to revoke a suspended sentence for a good conduct violation, the Court noted that those restrictions are only triggered when "the basis of a violation of the terms and conditions of a suspended sentence" is a good conduct violation. § 19.2-306.1(B).

The Court clarified that good conduct violations, however, are different than technical violations. While the phrase "good conduct" is not defined by the Code in reference to a specific list of enumerated conduct, the Court noted that "good behavior" is a long standing and well understood term of art commonly used as a condition of the suspension of sentences.

The Court also pointed out that the General Assembly chose not to use "good behavior" in § 19.2-306.1 as that phrase has been long understood, opting instead for "good conduct." The Court reasoned that, unlike technical violations, whether a defendant's conduct amounts to a good behavior violation is not determined by reference to an enumerated list of required or prohibited conduct, but rather by the sentencing court's determination that the defendant has engaged in some generic and not otherwise specified "substantial misconduct."

In harmonizing the statutory changes with the Supreme Court's decision in *Marshall*, the Court concluded that the good behavior/good conduct condition is a generic condition implicit in, and applicable to all suspended sentences such that "substantial misconduct" risks the revocation of their suspended sentence if the sole condition that covers the defendant's conduct is the generic condition that the defendant be of good behavior. In other words, if a sentencing court has fashioned a condition of a suspended sentence that specifically covers the defendant's conduct that prompted the revocation proceeding, then that condition is—by definition—not a good conduct violation. Such conduct would instead be a violation of "another condition," e.g. a special condition.

The Court laid out a four-step process in which a trial court must engage to classify the basis of the revocation proceeding before determining what sentence it may impose. First, the court must determine whether "the violation conduct matches the conduct [specifically] listed in Code § 19.2-306.1(A)." If so, then the defendant has committed a technical violation and the sentencing limitations found in § 19.2-306.1(A) apply, regardless of whether the sentencing court included that conduct as "another condition" of the defendant's suspended sentence. If the violation conduct does not match the conduct listed in § 19.2-306.1(A), the court must then determine whether "another condition," other than the generic good behavior condition of the defendant's suspended sentence covers the conduct. If so, then the court's sentencing authority is not restricted by § 19.2-306.1.

If the defendant's sentencing order contained no other condition matching the violation conduct, then the court must determine whether the conduct resulted in a new criminal conviction. If so, then the court's sentencing authority is not restricted by § 19.2-306.1. Finally, if none of the above apply, then the court must determine whether the defendant has engaged in substantial misconduct amounting to a good conduct violation.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0502224.pdf

Nottingham v. Commonwealth: March 21, 2023

Northampton: Defendant appeals the Revocation of Probation regarding Sentence for a Technical Violation.

Facts: The defendant was convicted of breaking and entering and felony destruction of property. In 2011, appellant was found in violation of his probation for failing to follow his probation officer's instructions. In 2012, he was found in violation of his probation for again failing to follow his probation officer's instructions and for marijuana use.

In 2020, the defendant violated his probation by failing to report new arrests for firearm offenses and a speeding citation, possessing a controlled substance, failing to follow his probation officer's instructions, failing a drug screen, and traveling out of state without permission. At his probation violation hearing, the defendant argued that none of his earlier probation violations could be included in the tally of his "technical violations" under § 19.2-306.1 because "technical violations" did not exist until § 19.2-306.1 was enacted in 2021 and therefore the 2020 violations were his first "technical violations."

The trial court found that the defendant's violation was a third or subsequent technical violation and revoked the balance of the defendant's suspended sentences.

Held: Affirmed. The Court ruled that the defendant appeared before the trial court in 2021 on his "third or subsequent technical violation" under § 19.2-306.1(C). After finding that the defendant committed a "third or subsequent technical violation," the Court agreed that the trial court could impose whatever sentence might have been originally imposed.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1006211.pdf

Delaune v. Commonwealth: January 10, 2023

Virginia Beach: Defendant appeals her sentence for Probation Violation alleging violation of the New Probation Violation Limits

Facts: The defendant violated probation for various drug offenses by absconding and using drugs. The trial court had placed the defendant on probation and, on top of general language placing the defendant on supervised probation and requiring her to comply with all the rules, terms and requirements set by the probation officer, the sentencing court's order contained an additional condition: "The defendant shall be drug free."

At the probation violation hearing, the defendant argued that the maximum sentence the court could impose under the new § 19.2-306.1(C) was 14 days. The trial court disagreed, concluding that the mandate to "be drug free" was a special, not technical, condition of her probation and suspended sentences. As a result, the court revoked the remaining four years of the defendant's suspended sentences and re-suspended all but 60 days.

Held: Reversed. The Court ruled that a probationer's violation of a condition requiring her to "be drug free" is a "technical violation" as defined by § 19.2-306.1(A)(vii) to include "a violation based on the probationer's failure to . . . refrain from the use, possession, or distribution of controlled substances or related paraphernalia." Because the defendant was also found to be absconding from probation, the Court ruled that § 19.2-306.1 only authorized the trial court to sentence the defendant to as many as 14 days of incarceration for this violation.

The Court reasoned that, because the General Assembly specifically defined "technical violation" to include any "violation based on" specified conduct, the statute focuses on the underlying violation conduct itself, not the particular language or label a trial court may have used in imposing a condition of probation. Thus, when a violation conduct matches the conduct listed in § 19.2-306.1(A), it is, by definition, a "technical violation."

In this case, the Court found that the defendant's failure to remain "drug free" was a failure to "refrain from the use, possession, or distribution of controlled substances." The Court observed that § 19.2-306.1 defines that to be a "technical violation" of probation. Therefore, the Court ruled, the trial court was required to group together the defendant's violation for using controlled substances with her violation for absconding from probation. Because the violation for absconding from probation is automatically treated a as "second technical violation," the maximum sentence the court could impose was 14 days of active incarceration.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0328221.pdf

Henthorn v. Commonwealth: November 22, 2022

Waynesboro: Defendant appeals the revocation of his probation on the grounds that it was a Technical Violation.

Facts: The defendant pled guilty to a misdemeanor offense of giving a false identity to a law enforcement officer. The trial court sentenced him to serve 180 days in jail, all suspended, and placed him on probation for a period of twelve months. The defendant never reported to probation.

At his violation hearing, the defendant argued that his failure to report to probation was a first technical violation under § 19.2-306.1(A)(iii), which makes failure to "report within three days of release from incarceration" a technical violation. The trial court rejected his argument and revoked 180 days of his suspended sentence, and resuspended 100 days, leaving an active sentence of eighty days.

[*Note: The Commonwealth did not argue that the defendant's behavior constituted a violation of § 19.2-306.1(A)(x), which would have allowed a sentence of up to 14 days for a first technical violation. - EJC]*

Held: Reversed. The Court held that a violation of § 19.2-306.1(A)(iii) does not require that a probationer must have eventually reported to probation, and therefore concluded that the defendant's behavior fell under Code § 19.2-306.1(A)(iii) and constituted a first technical violation. Accordingly, the Court held that the trial court erred in sentencing the defendant to an active period of incarceration pursuant to Code § 19.2-306.1(C).

The Court concluded that the failure to "report within three days of release from incarceration" specified by § 19.2-306.1(A)(iii) means exactly that, with no other limitation. Therefore, because nothing in the plain language of the statute indicates that a probationer must eventually report for their behavior to constitute a technical violation under § 19.2-306.1(A)(iii), rejected the Commonwealth's

argument that § 19.2-306.1(A)(iii) does not apply here where the defendant never reported to probation.

In a footnote, the Court noted that, implicit in its holding was that § 19.2-306.1(A)(iii) applies equally to felonies as well as to misdemeanors.

In another footnote, the Court stated that it expressed no opinion on the Commonwealth's argument that interpreting the statute to impose a lesser penalty for failing to report to probation at all, which it contended is a more serious offense than reporting to probation and then absconding, defies common sense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0163223.pdf

Heart v. Commonwealth: September 13, 2022
75 Va. App. 453, 877 S.E.2d 522 (2022)
Portsmouth: Defendant appeals his Probation Revocation on whether his violation was a Subsequent "Technical" Violation

Facts: While on probation for PWID Cocaine, the defendant violated probation. The Court revoked and resuspended his sentence. The defendant violated probation again, and the Court again revoked and resuspended his sentence. The defendant then failed to report as directed and failed to maintain contact with his probation officer, violating probation a third time.

At the third violation hearing, no violation reports were introduced into the record for these prior revocations, and nothing from the orders themselves mentions the nature of the violations. The trial court treated the third violation as a third "technical" violation and imposed a six-month sentence.

Held: Reversed. The Court held that, as a matter of first impression, that the plain language of the text of § 19.2-306.1 requires evidence of two prior technical violations before a defendant may be sentenced for a third technical violation.

The Court examined § 19.2-306.1 to determine whether its penalty provisions for a "third or subsequent technical violation" apply when a defendant commits a third violation—technical in nature—after two earlier non-technical violations. The Court concluded that "third or subsequent technical violation" requires three or more "technical violations" before the related penalty provision may apply. Because the trial court reached the opposite conclusion—that a third or subsequent violation, if technical, triggers the enhanced penalty provision regardless of the nature of the earlier violations—the Court reversed and remanded the case for resentencing.

The Court examined the statute in detail. The Court looked first to paragraph B, noting that the statute directs a court to determine the "basis of a violation" and categorize it as a conviction for a new criminal offense, a technical violation, a good conduct violation that did not result in a criminal conviction, or a violation of "another condition." If the violation is neither technical nor a good conduct violation not resulting in a criminal conviction, the Court reasoned that a court can impose or resuspend any of the period previously suspended. But when a violation is technical, the Court found that courts

have no sentencing authority under this paragraph—no matter how many total violations have been committed during the scope of a probationer's sentence.

The Court concluded that if a court determines that the basis of the violation was technical, paragraph C provides the only sentencing authority. In this case, because the Commonwealth produced no evidence that the defendant had three technical violations, the Court ruled that the lower court's six-month sentence fell outside the lawful boundaries of § 19.2-306.1(C).

The Court dodged the question of whether the existence of two prior technical violations is an "element of the offense" or is a "mere sentencing enhancement."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1120211.pdf

Virginia Court of Appeals
Unpublished
Browne v. Commonwealth: April 11, 2023

Page: Defendant appeals his Probation Revocation on violation of the Limits on Probation Revocations.

Facts: In early 2021, the defendant violated probation on his 2019 conviction for Assault on Law Enforcement. The trial court returned the defendant to probation and included a special condition that the defendant pay court costs. His probation was set to expire in 2024.

In 2021, the defendant violated probation again. The violations included (i) failure to maintain regular employment; (ii) failure to report to the probation officer three times; (iii) testing positive for controlled substances; and (iv) failure to comply with the order to pay his court costs, making no payments since his last court date. The trial court found the defendant in violation and sentenced him to serve more than a year of his original sentence.

Held: Reversed. The Court held that the trial court erred in imposing a sentence of active incarceration that exceeded the statutory maximum sentence under §19.2-306.1(C). The Court further held that a revocation sentence imposed in excess of the statutory maximum sentence under § 19.2-306.1(C) exceeds the court's sentencing power and is void ab initio.

The Court held that the defendant's failure to enroll in drug counseling as instructed was a technical violation of probation under § 19.2-306.1(A) because clause (v) defines "technical violation" to include a probationer's failure to "follow the instructions of the probation officer" and the violation was based on the defendant's failure to follow the officer's instruction to enroll in drug counseling. The Court noted that the sentencing order did not unconditionally require the defendant to enroll in drug counseling as a condition of his probation and suspended sentence. Rather, the circuit court's order "to comply with any . . . counseling as recommended by the probation officer" required the defendant to enroll in drug counseling only if instructed to do so by his probation officer.

Regarding the failure to pay court costs, the Court acknowledged that a failure to pay court costs within the three-year period of probation would otherwise be a non-technical violation of

probation because such violation would be based on the failure to comply with a court ordered condition of probation that is not defined as a technical violation under § 19.2-306.1(A)(i)-(x). However, in this case, the Court noted that at the time of the revocation hearing, the expiration date of the defendant's probationary period was over two years away. Thus, the Court found that the defendant did not violate the court-ordered condition to pay the costs of the revocation proceeding before his probationary period expired. Instead, the defendant merely violated the payment schedule set by his probation officer; in other words, he failed to follow his probation officer's instructions, which the Court found was a technical violation under § 19.2-306.1(A)(v).

In a footnote, the Court explicitly declined to decide whether a trial court's prior findings of both technical and non-technical violations of probation at the same revocation hearing count as a prior technical violation for purposes of sentencing under § 19.2-306.1(C).

Judge Athey filed a concurrence, writing separately to argue that the violation here was the second, not first, technical violation. He also wrote separately to illustrate the narrow application of § 19.2-306.1 to revocations where participation in a drug treatment program or payment of court costs, fines, and restitution are clearly special conditions imposed by the trial court which then delegates the task of monitoring compliance to the probation office or some other entity. In his opinion, Judge Athey illustrated how any number of slight factual variations would have removed this case from the scope of § 19.2-306.1.

Judge Raphael filed a simple statement that he concurred in the judgment.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1373214.pdf

Hannah v. Commonwealth: April 4, 2023

Chesapeake: Defendant appeals the revocation of his probation on Jurisdiction alleging violation of the Limits on Probation Revocations.

Facts: In 2017, the trial court sentenced the defendant to twelve months in jail with eight months suspended and an indefinite two-year-minimum period of probation for misdemeanor false ID to law enforcement. In May 2022, the court found the defendant in violation of his probation for using illegal or unauthorized drugs. The defendant argued that the court should not revoke the suspended sentence because his probation should have already expired. The defendant argued that under § 19.2-303.1, once the defendant had served one year of probation, the trial court lost jurisdiction over the misdemeanor conviction, thus rendering its revocation and resuspension of that sentence a nullity.

The trial court rejected the defendant's argument. After revoking the defendant's misdemeanor sentence, the trial court resuspended the sentence and reimposed the same terms and conditions of the original sentence, including the two-year-minimum indefinite probationary period.

Held: Affirmed. The Court found that the defendant did not sufficiently object and articulate his grounds for appeal at the trial court level. The Court therefore only addressed whether the trial court

had subject matter jurisdiction to hear the probation violation, rather than the direct merits of the defendant's arguments.

The Court explained that §§ 19.2-303 through -306.1 govern the procedures for the trial court's exercise of authority over suspended sentences, probation, and revocation proceedings in individual cases. The Court reasoned that those statutes do not grant a trial court categorical judicial power over criminal cases or their attendant proceedings, and thus, cannot reasonably be read to strip a trial court of subject matter jurisdiction if the court violates those procedures. Consequently, the Court concluded that the 2021 amendments to those statutes merely place new limitations on a trial court's exercise of its "active" jurisdiction but do not strip it of subject matter jurisdiction over revocation proceedings generally.

The Court then explained that, by dictating how, rather than whether, a trial court may exercise its authority to suspend sentences, revoke sentences, and impose probation, the statutes at issue constitute expressions of the court's "active" jurisdiction.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0700221.pdf

Lane v. Commonwealth: February 28, 2023

Chesapeake: Defendant appeals the revocation of his probation on violation of the New Probation Violation statute.

Facts: The defendant was convicted of Hit and Run, Drug Possession, and Habitual Offender, and then violated probation on those offenses. The trial court revoked and resuspended his sentence. In 2019, the defendant violated probation again by absconding and incurring new charges. The trial court found him in violation in March 2020 and continued the matter for sentencing. At the final hearing in December 2021, the trial court revoked the defendant's probation and resuspended a portion of that sentence, imposing an indeterminate period of supervised probation.

The defendant objected that this period violated the new terms enacted in 2021 in § 19.2-303, which limit probation terms to five years. The trial court rejected that argument.

Held: Affirmed. The Court first held that the trial court did not err because the amended version of § 19.2-303 did not apply in this case, which took place before the new statute had taken effect. The Court further held that the defendant's reliance on § 1-239 was misplaced because § 19.2-303 is not merely a procedural statute. Code § 1-239 provides that new acts of legislation generally do not repeal a former law, but the procedural aspects of a case "shall conform, so far as practicable, to the laws in force at the time of such proceedings." Ultimately, the Court held that the trial court did not abuse its discretion in finding that the defendant had violated conditions of his probation, revoking his suspended sentence, and reimposing two years of incarceration with an indeterminate period of supervised probation.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0455221.pdf

Miller v. Commonwealth: February 7, 2023

Staunton: Defendant appeals her sentence for Probation Violation alleging violation of the New Probation Violation Limits.

Facts: The defendant, on probation for Robbery, committed a new offense of Possession of a Weapon as a Felon. The trial court revoked and resuspended her sentence and placed her back on probation. A condition of this probation was to "refrain from the use of any illegal drug, marijuana, poppy seeds, CBD oil, and/or hemp" and to "submit to random and observed drug screens."

The day after her revocation hearing, the defendant violated her probation again by testing positive for fentanyl. The trial court ruled that the defendant violated a special condition of her probation when she failed a drug test and imposed 364 days of active incarceration.

Held: Reversed. The Court found that the trial court erred when it ruled that the defendant had violated a special condition of her probation and when it imposed a term of 364 days of active incarceration on this case.

The trial court reviewed § 19.2-306.1 and its recent ruling in the *Delaune* case. In this case, the Court observed that the defendant's previous revocation was based on new criminal convictions and was therefore not a technical violation under § 19.2-306.1(A). Thus, the Court concluded that the present violation for drug use was the defendant's first technical violation on this case, despite the additional requirements imposed upon her by the circuit court. The Court found that despite the additional conditions in the order, the defendant's drug use constituted only a technical violation on that charge because her violative behavior fell within a delineated technical violation under § 19.2-306.1. Therefore, the Court explained, the trial court could not impose a term of active incarceration for the defendant's first technical violation.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1192223.pdf

Lucas v. Commonwealth: January 10, 2023

Page: Defendant appeals his sentence for Probation Violation alleging violation of the New Probation Violation Limits

Facts: The defendant violated probation for various fraud offenses. His violations included failing to report in person or by phone, failing to follow the probation officer's instructions and to "be truthful,

cooperative, and report as instructed," changing his residence without permission, and making no payments toward court costs.

The trial court found that the defendant had violated special, non-technical conditions of probation by not paying his court costs and imposed two years of active time to serve. On the "Final Decision/Disposition" form required for the court to provide reasons for departing from the guidelines, the trial court wrote:

> "Defendant has been violated again for failing to stay in contact with P.O. He is a registered sex offender and IT IS VITAL that the P.O. know where he is and who he is with at all times as a basic minimum expectation of supervised probation to ensure public safety. This represents [a] pattern of failing to report, stay in contact, etc[.,] with P.O. and the last revocation period of 18 months did not deter the behavior. Deviation warranted."

The defendant objected that the trial court was not following the limitations in § 19.2-306.1, but the trial court rejected the defendant's argument.

Held: Affirmed. The Court agreed that the defendant violated a special condition of his probation by failing to pay court costs. The Court therefore ruled that the trial court did not abuse its discretion in imposing an active two-year sentence for that violation because this sentence comported with the applicable statute governing revocation. The Court found that the fact that the trial court also did not write on the form that the defendant's failure to pay his court costs was a reason for departure was not reversible error.

The Court further concluded that the court did not abuse its discretion in imposing the two-year sentence for violation of the special condition. The Court explained that "Rewriting the reasons for departure from the guidelines to include failure to pay court costs would not change the outcome of the case. Thus, any error was harmless."

Judge Callins filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1140214.pdf

Harris v. Commonwealth: November 1, 2022

Prince William: Defendant appeals the Revocation of his Probation on Failure to Accommodate his Disabilities.

Facts: The defendant was convicted of Abduction and Attempted Forcible Sodomy and placed on probation. The defendant violated probation, but the trial court did not revoke any of his previously suspended sentences in the first violation. The defendant violated probation again, and the second time, the trial court resuspended all but one year of that sentence and returned the defendant to probation.

While on probation for the third time, the defendant obtained his old smartphone within hours of being released despite being prohibited from using a smartphone without monitoring software and used that phone to access Facebook, contact a female friend, and accessed pornography in violation of

probation. While on probation, the defendant made repeated statements of his desire to go back to jail "where he was treated better than in the community," and "was clear that he would go back to jail and violate his conditions again after he got out," "continuing the cycle until he died." When he received his written probation plan, the defendant threw it in the trash before leaving the probation building.

The defendant was removed from a homeless shelter after fighting with another resident, was subsequently removed from a hotel for threatening the hotel manager, had stopped taking mental health medication he had been prescribed, and had not attempted to use employment or residential services at the shelter. The defendant continued to access the Internet using a phone and verbally abused his probation officer.

At his probation violation hearing, the defendant presented evidence that he was born with fetal alcohol syndrome to a fourteen-year-old, homeless, single mother, had an IQ of 66, and was diagnosed with attention deficit hyperactive disorder, intermittent explosive disorder, mood disorder with psychotic features and hallucinations, bipolar disorder, Asperger's syndrome, organic brain syndrome, tic disorder, and several speech impediments. The defendant argued these disorders made it "incredibly difficult" for him to be successful on probation. The defendant contended that, under *Word v. Commonwealth*, 41 Va. App. 496 (2003), the trial court could not punish him for violating conditions that were impossible for him to meet due to his intellectual disabilities.

The trial court concluded that it could not rely on probation to manage the risk he posed to the community and that incarceration was therefore necessary. The trial court revoked the defendant's probation.

Held: Affirmed. The Court complained that the defendant failed to specify what conditions of his probation were "impossible" for him to meet. The Court concluded that the trial court considered the possibility of disability accommodations but found that the defendant had not provided specific needs that differed from what probation had already tried. The Court found no error in the conclusion that continuing probation, even with some yet-to-be-specified accommodations, would not mitigate the risk that the defendant posed to the community.

In a lengthy concurrence, Judge Raphael noted that the assignment of error in this case did not encompass whether the trial court's revocation of the defendant's suspended sentence complies with the requirements of the Americans with Disabilities Act of 1990. However, his concurrence sought to identify, at length, the "issues that should be addressed in an appropriate case to determine whether and how the ADA applies to a trial court's decision to revoke an offender's probation or suspended sentence based on conduct attributable to the offender's asserted disability."

Judge Raphael noted that in 1998, the US Supreme Court held in *Yesky* that § 12132 of the ADA "unmistakably includes State prisons and prisoners within its coverage." He also noted that DOJ issued guidance in 2017 stating, in the criminal-justice context, that public entities covered by title II include courts when "setting bail or conditions of release," when "sentencing," and when "determining whether to revoke probation."

Judge Raphael then wrote: "Although the procedural posture of this case precludes the Court from reaching the ADA questions, these questions are difficult and important. They include:

• whether the ADA applies in a criminal proceeding when a trial court imposes conditions on (or revokes) a suspended sentence or probation for an offender whose disability may prevent him from satisfying those conditions without reasonable accommodations;

• whether an offender who claims that the terms of probation or a suspended sentence do not reasonably accommodate his disability must raise that claim at sentencing (when those terms are established), rather than for the first time in a revocation proceeding;

• whether the offender or the Commonwealth bears the burden of identifying a reasonable accommodation, or whether that burden is shared; and

• whether special considerations apply when evaluating ADA claims in the criminal-sentencing context."

Judge Raphael did not express a view on those questions. Instead, he wrote: "the necessary facts must be developed—and the legal arguments presented first to the trial court—to enable these questions to be addressed on a complete record."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1126214.pdf

Warlick v. Commonwealth: October 25, 2022

Chesapeake: Defendant appeals the revocation of his probation on Sixth Amendment Hearsay grounds.

Facts: While on probation for Forgery, the defendant had his probation transferred to North Carolina. There, he absconded from supervision and incurred new forgery, fraud, and larceny convictions between 2014 and 2016. North Carolina notified the Commonwealth via a "Major Violation Report" (MVR), which included an Interstate Commission for Adult Supervision "Offender Violation Report" ("ICOTS" report). The Commonwealth moved to revoke the defendant's probation.

At the time of the defendant's revocation hearing, neither the defendant's probation officer nor her supervisor remained employed at the probation and parole office. A replacement officer testified that she was assigned the defendant's probation supervision case and attempted to contact the North Carolina probation officers who were involved with him in 2014 but was unsuccessful.

The defendant objected to the MVR and the ICOTS report from 2014 because they contained hearsay. To verify the MVR and the attached ICOTS report, the officer stated that she accessed the ICOTS report through an internal computer system that only probation officers could use. The trial court also noted that the MVR and ICOTS report were corroborated by and consistent with information contained within other admitted documents: the VCIN report, the MVR addendum, and the North Carolina Public Safety offender form. All documents contained the same identifying information, like Warlick's name, social security number, date of birth, FBI and DOC numbers, and home address. The information in the MVR—alleging that the defendant absconded—was supported by the fact that the court issued a capias in 2014 and the capias was not served until 2021. In addition, the charges in the ICOTS report were corroborated by charges in the VCIN report. The trial court overruled the defendant's objection.

Held: Affirmed.

The Court repeated that, under *Henderson*, there are two tests for determining whether the denial of the right to confrontation through the introduction of hearsay evidence will comport with constitutional due process to support a finding of good cause: the "reliability test" and the "balancing test." In this case, the Court ruled that the record supported the trial court's conclusion that the MVR and ICOTS report satisfied the reliability test to establish good cause for admission.

The Court pointed out that the defendant failed to offer contradictory evidence, a key indica of reliability. Also, the Court noted that the MVR and ICOTS report were corroborated by and consistent with information contained within other admitted documents. The Court concluded that the facts had sufficient indicia of reliability to establish that the MVR and ICOTS report were trustworthy and, thus, finding good cause to admit them over the defendant's objection.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1378212.pdf

Chevalier v. Commonwealth: August 23, 2022

Chesapeake: Defendant appeals the Revocation of his Probation on sufficiency of the evidence.

Facts: The defendant was convicted of unlawful wounding and placed on probation. The defendant violated his probation, but the trial court returned him to probation. Among the conditions that the trial court imposed after the first violation was a condition that the defendant "have face to face meetings with Probation Officer a minimum of once per month" for the first twelve months of his supervised probation.

The defendant violated probation again. At the hearing, his probation officer testified that the defendant failed to make any contact whatsoever with her for almost ten months. She explained that she attempted to reach the defendant by phone after he failed to report to a scheduled appointment, and also testified that, in an effort to contact the defendant, she sent a letter to his home address, but the letter was returned as "undeliverable, return to sender, unable to forward, temporarily unavailable." In addition, she checked into whether the defendant might be "in custody or hospitalized" by checking with "central records at Virginia Beach City Jail and with Sentara General Hospital." The probation officer still could not make any contact with the defendant even after contacting his mother and father.

The defendant argued that the evidence did not establish that he had "absconded."

Held: Affirmed. The Court agreed that, as the defendant's whereabouts were entirely unknown the probation office, the trial court did not abuse its discretion in finding that the defendant had absconded from supervision.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0784211.pdf

Smith v. Commonwealth: August 16, 2022

Lunenburg: Defendant appeals the Revocation of his Probation regarding the Conditions of his Probation.

Facts: The trial court convicted the defendant of failure to reregister as a violent sex offender, second or subsequent offense, in violation of § 18.2-472.1(B). Consistent with a written plea agreement, the court sentenced the defendant to five years of incarceration with three years and nine months suspended, conditioned on two years of supervised probation. The sentencing order did not specify a curfew as a condition of probation. The order also did not impose a suspended period of post-release incarceration or require that the defendant be subject to electronic monitoring via a Global Positioning System ("GPS") tracking device during an accompanying period of post-release supervision, as required under § 19.2-295.2:1.

The defendant's probation officer imposed a GPS monitoring requirement under VDOC policy, which requires probation officers to place all sex offenders on a "high level of supervision" for the initial six months of probation. He also imposed a curfew on the defendant.

Within one month, the defendant violated probation. His probation officer discovered, using a GPS, that the defendant had violated the curfew. At his probation violation hearing, the defendant contended that the Commonwealth failed to demonstrate that the curfew imposed by probation and parole was authorized by statute or Court order. Because the trial court failed to impose GPS monitoring in its sentencing order, the defendant maintained that his probation officer impermissibly usurped the trial court's authority by imposing the GPS condition without the court's express authorization. The trial court rejected the defendant's argument.

Held: Affirmed. The Court held that the defendant's probation officer had authority to impose GPS monitoring as a condition of probation under Title 53.1 of the Code. The Court found that these statutes grant VDOC the authority to develop and implement regulations governing the supervision of probationers, to further the well-established goals of probation: "to 'reform' the offender" and restore those who are a good social risk "to a useful place in society. Thus, the Court concluded that the defendant's probation officer had independent authority under Title 53.1 of the Code to impose the GPS requirement, and § 19.2-295.2:1 does not undermine that authority.

The Court also concluded that § 19.2-295.2:1 does not create a non-delegable discretionary authority for a sentencing court. Instead, for a discrete category of offenses, it imposes an administrative duty on a sentencing court to order GPS monitoring as a condition of mandatory post-release supervision, without requiring the court also to circumscribe the specific parameters of the GPS condition.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1341212.pdf

Saul v. Commonwealth: July 5, 2022

Lancaster: Defendant appeals the Revocation of his Probation on Admission of Hearsay

Facts: The defendant, while on probation for various drug offenses, violated probation. Among the violations, the defendant broke into a residence and assaulted two women. During the revocation hearing, the trial court admitted a police report and photographs from the incident into evidence but did not permit the admission of the witnesses' statements. The defendant objected, arguing that, because the witnesses referenced in that police report recanted their statements to the police, the report was inherently unreliable and should have been excluded. The trial court overruled the defendant's objection.

Held: Affirmed. The Court repeated that a defendant has a limited right of confrontation in criminal sentencing and any subsequent revocation proceedings under the Due Process Clause. The Court examined the two tests for determining good cause for admitting hearsay, under *Henderson*: the "reliability test" and the "balancing test." The Court applied the "reliability" test in this case.

The Court noted that the report was a first-hand account from the investigating officer of what he saw and did in making his investigation, and not a mere summary of such reports by a probation officer. The Court also noted that the report, separate from the witnesses' statements, contained many details, and recorded the injuries he observed on the victims' bodies, including such detail as "2 scratches above [one victim's] right breast and a welp with a scratch on her forehead." The Court also pointed out that the officer's observations were corroborated by photographs of the injuries.

The Court concluded that the report was "quite detailed," provided adequate indicia of reliability, and that the photographs also provided internal corroboration of the events. The Court found that the report and photos passed the "reliability" test under *Henderson* for admission.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0636212.pdf

Perjury

Virginia Court of Appeals –
Published

Harper v. Commonwealth: April 11, 2023

Stafford: Defendant appeals his conviction for Inducing False Testimony on sufficiency of the evidence.

Facts: The defendant abducted, strangled, and beat the victim at a hotel. The victim fled in a bath towel and found a hotel employee, who summoned the police. Police documented the assault by interviewing the victim, collecting a written statement from her, and by photographing her injuries.

In violation of a no-contact order, the defendant spoke to the victim on the phone from the jail. The call was recorded. During the call, the defendant repeatedly blamed the victim for the fact that he was in jail. He told her that she should not have told the officer everything that happened and that she should have said everything was "fine." The defendant stated that "the best thing you can probably do is probably not show up to Court," or "show up and tell them that nothing happened."

The victim then appeared at the defendant's bond hearing and testified on his behalf. The victim stated that she lied to the police and that her statements to the police were "false and absurd." She said, "it didn't go down as him just attacking me, he didn't," and she said she wasn't "injured or physically affected in a permanent way."

However, later at trial, the victim re-affirmed her original statement and explained that she had lied for the defendant's benefit at the bond hearing. She stated that she had lied at the bond hearing "all to be on [the defendant's] side" and "to get him out of jail" and because the defendant told her to.

The defendant argued that the victim had never testified that "nothing happened," so he had not induced her to provide false testimony. He contended that the victim did not follow through "in the manner he recommended," and therefore the "causal connection" between his statements to her on the jail calls and her testimony at the bond hearing was lacking.

Held: Affirmed.

The Court explained that an indictment for subornation of perjury does not require the Commonwealth to prove that the person giving false testimony under oath has been convicted of perjury, but the Commonwealth must prove that the person committed perjury. In this case, the Court noted that the indictment alleged that the defendant "did procure or induce another to commit perjury or to give false testimony under oath, in violation of §§ 18.2-436." The Court then examined the meaning of the words "procure" and the word "induce," which the Court had also examined in this week's *Vera* case. The Court ruled that the evidence supported the finding that the defendant induced the victim to testify falsely at his bond hearing.

The Court also found that the other evidence at trial, from the officer, the photographs, and the hotel witness, sufficiently corroborated the fact of the perjury.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0453224.pdf

Racketeering

Virginia Court of Appeals –
Published

Holmes v. Commonwealth: November 22, 2022

Augusta: Defendant appeals her convictions for Racketeering on Jury Instruction Issues and sufficiency of the evidence.

Facts: The defendant operated a criminal enterprise that sold methamphetamine in quantities of a pound and greater. At trial, several cooperating witnesses who had been the defendant's accomplices testified about purchasing pounds of methamphetamine from the defendant on several occasions. The witnesses were longtime methamphetamine users and testified that they were familiar enough with the drug to identify it. The accomplices testified that they communicated with the defendant about purchasing and distributing large quantities of methamphetamine, which she then either delivered or directed to be delivered to Augusta County, and for which she collected large payments.

The trial court gave various jury instructions, including the model "you are the judges of the facts" instruction, the model presumption of innocence instruction, and the model circumstantial evidence instruction.

The trial court rejected three of the defendant's proposed instructions. The first stated that: "Although one or more witnesses may positively testify as to an alleged fact and although that testimony may not be contradicted by other witnesses, you may altogether disregard that testimony if you believe it to be untrue." It went on to state that "If you believe from the evidence that any witness has knowingly testified falsely as to any material fact in this case, you have a right to discredit all of the testimony of that witness or to give to such testimony such weight and credit as in your opinion it is entitled."

The second instruction that the trial court rejected stated that "Where a fact is equally susceptible to two interpretations, one of which is consistent with the defendant's innocence, you may not arbitrarily adopt the interpretation which finds him guilty."

The last instruction that the trial court rejected was the "great care and caution" instruction regarding accomplice testimony, and it stated as follows:

> "You have heard testimony from accomplices in the commission of the crime charged in the indictment. While you may find your verdict upon their uncorroborated testimony, you should consider such testimony with great care and you are cautioned as to the danger of convicting the defendant upon the uncorroborated testimony of an accomplice or accomplices. Nevertheless, if you are satisfied from the evidence of the guilt of the defendant beyond a reasonable doubt, the defendant may be convicted upon the uncorroborated evidence of an accomplice or accomplices."

In rejecting this jury instruction, the court held that the instruction was not warranted because the accomplice testimony was not uncorroborated.

Held: Reversed and Remanded. The Court held that the trial court erred in finding that the accomplice testimony of the accomplices was sufficiently corroborated when it refused the last jury instruction. Because this error was not harmless, the Court reversed and remanded for a new trial.

The Court first found that the evidence was "more than sufficient" to prove the Racketeering offense. Regarding the lack of chemical testing, the Court repeated that users and addicts, if they have gained familiarity or experience with a drug, may identify it.

Regarding the first rejected instruction, the Court agreed that the instruction was an accurate statement of the law. However, the Court found that the model "you are the judges of the facts" instruction fairly and adequately instructed the jury on the principles of law discussed in the rejected defendant's instruction, and therefore a duplicative instruction would inappropriately "single out for emphasis a part of the evidence tending to establish a particular fact."

Regarding the second rejected instruction, the Court again found that the presumption of innocence and circumstantial evidence instructions fairly and adequately instructed the jury on the principles of law discussed in the defendant's rejected jury instruction. The Court explained that to nevertheless grant the defendant's instruction would have been duplicative, inappropriately singled out a particular fact or issue, and may have caused confusion to a jury.

However, regarding the third rejected instruction, although the testimony of the accomplices corroborated each other, the Court found that the "danger of collusion between [these three] accomplices and the temptation to exculpate themselves by fixing responsibility upon others" was not alleviated where the sole corroboration was the testimony of another accomplice to the crime.

The Court explained that the correct standard for determining whether a cautionary instruction should be granted becomes this: "is corroborative evidence lacking?" If it is, the instruction should be granted. The Court then explained that proper standard for determining whether sufficient corroboration exists to refuse the cautionary instruction is: "[T]he corroboration or confirmation must relate to some fact (or facts) which goes to establish the guilt of the accused." Thus, the corroborative evidence, standing alone, need not be sufficient either to support a conviction or to establish all essential elements of an offense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0251223.pdf
and
https://www.vacourts.gov/opinions/opncavwp/0250223.pdf

Rape & Sexual Assault

Virginia Court of Appeals
Unpublished

Garay-Amaya v. Commonwealth: March 28, 2023

Fairfax: Defendant appeals his convictions for Abduction and Object Sexual Penetration on the Incidental Detention Doctrine and sufficiency of the evidence.

Facts: The defendant sexually assaulted a seventeen-year-old victim. The defendant offered the victim a ride, but she became uncomfortable and afraid when the defendant gave her certain "looks" and flirted with her as he drove. Despite using the victim's exact address to navigate via his cell phone's GPS system, the defendant went down another route, stopped his van, and claimed to be lost. When the victim said that she wanted to leave and refused to kiss the defendant, he became "crazy." The defendant then grabbed the victim and locked the van door when she attempted to escape.

The defendant then sexually assaulted and strangled the victim. The victim testified that that the defendant touched her with "his fingers inside [her] vagina." She further characterized this contact as the defendant "putting his fingers in a little bit," and she denied having any doubt that the defendant was in her vagina "because [she] felt his hand."

At trial, the defendant argued that his detention did not constitute abduction due to the "Incidental Detention Doctrine." He also argued that the victim's "reference to her vagina, without more," was insufficient to establish the element of penetration under the indictment's additional, more specific "labia majora language."

Held: Affirmed.

Regarding the Abduction offense, the Court ruled that the defendant abducted the victim before strangling and sexually assaulting her and that his detention was not intrinsic to the strangulation and sexual assault.

The Court repeated that, under *Lawlor*, to determine whether an abduction is "intrinsic" to a defendant's commission of another crime of restraint, the test is "whether any detention exceeded the minimum necessary to complete the required elements of the other offense." In this case, the Court agreed that the evidence demonstrated that the defendant deceived the victim to induce her to "remain" in his van so he could assault her. The Court found that the jury could have inferred that the defendant locked the door specifically to avoid the victim's escape, and the possible detection of his offense, as he attacked her.

Regarding the Object Sexual Penetration, the Court noted that § 18.2-67.2(A) "requires penetration of the victim's labia majora, which is the outermost part of the female genitalia." The Court repeated that penetration "need be only slight." The Court found that the victim's testimony alone was sufficient to prove penetration, and noted its similar 2019 ruling in *Alvarez Saucedo*, rejecting the defendant's analogy to the *Moore* case from 1997.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0417224.pdf

Grasty v. Commonwealth: March 28, 2023

Surry: Defendant appeals his conviction for Aggravated Sexual Battery of a Child Under the Age of 13 on sufficiency of the evidence.

Facts: The defendant repeatedly sexually assaulted a nine-year-old child. At trial, the trial court instructed the jury, without objection, that the "physical appearance of [the defendant] can be sufficient evidence alone to determine that he is over 18 years of age." After the trial, the defendant argued that the evidence failed to prove that he was over 18 years of age at the time of the offenses.

Held: Affirmed. The Court found that the jury could infer that the defendant was an adult when he committed the crimes. The Court noted that the defendant's physical appearance - including his hair, gait, and tone of voice— could only lead a reasonable person to conclude that he was over the age of 18. Given that the jury could judge the defendant's age by his appearance, the evidence suggesting that the defendant was an adult, and the trial court's finding that the "only" conclusion the jury could reach based on his appearance was that he was older than 18, the Court rejected the defendant's argument that the evidence was insufficient to prove his age.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0423222.pdf

Johnson v. Commonwealth: March 21, 2023

Prince William: Defendant appeals his convictions for Child Sexual Assault on sufficiency of the evidence.

Facts: The defendant repeatedly sexually assaulted the victim from the age of twelve. The defendant is a retired police officer whom the victim saw as her "father figure." The victim relied on the defendant as her primary caregiver and went to him with her problems because her mother was frequently unavailable. The defendant provided significant financial support to the victim and her family, paying for their home, clothes, food, and cars, among other necessities. He withheld money from the victim, conditioning it upon her participation in sexual acts. Although the defendant did not physically abuse the victim other than the sexual assaults, the victim did witness the defendant physically strike her brother.

At trial, the victim testified that she succumbed to the defendant's sexual advances because she "felt like [she] had to" because the defendant held "most of the power" in the family, and she feared "losing everything." She noted that, after she reported his abuse, the family did, in fact, lose their home and the financial security the defendant provided. The victim attempted suicide after the defendant's arrest.

At trial, the defendant argued that the Commonwealth failed to prove that he accomplished such acts through force, threat, or intimidation.

Held: Affirmed.

The Court agreed that it was reasonable to conclude that the defendant's paternal role, and his providing necessary financial support for the victim and her entire family, exerted sufficient psychological pressure on the victim to overcome her will and that the victim was "vulnerable and susceptible to such pressure." The Court ruled that a reasonable jury could find beyond a reasonable

doubt that the defendant accomplished his acts of sexual abuse by use of intimidation and that he was guilty of attempted rape, forcible sodomy, sexual penetration with an object, and aggravated sexual battery.

The Court pointed to several cases where there was sufficient evidence of intimidation where the defendant stood in the role of father figure over the victim, including *Boyer, Benyo,* and *Clark*.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0639224.pdf

Dunford-Landers v. Commonwealth: January 31, 2023

Virginia Beach: Defendant appeals his conviction for Indecent Liberties on sufficiency of the evidence.

Facts: The defendant stood with his genitalia exposed at a busy intersection in the close vicinity of a school on a Tuesday morning around the time students were being transported to school. A parent drove by the defendant and stopped at the corner before making a right-hand turn. While stopped, a child saw the defendant with his penis in his hand. Minutes later, the parent saw him again, similarly exposed, following middle school girls toward a school bus stop. Upon being witnessed, the defendant fled. A half an hour after revealing his penis on the street corner near an elementary school, the defendant was again spotted, similarly exposed, following middle school girls near a school bus stop.

At trial, the defendant stated that he masturbated in public for sexual gratification occasionally.

Held: Affirmed. The Court agreed that the evidence was sufficient to support the trial court's conviction of the defendant for indecent liberties with a child under the age of fifteen.

The Court repeated some of the factors that the prosecution may utilize when demonstrating whether a defendant possesses lascivious intent, such as (1) whether "the defendant was sexually aroused; (2) whether the defendant made sexual gestures toward himself or to the child; (3) whether the defendant made improper remarks to the child; or (4) whether the defendant asked the child to do something wrong."

In this case, the Court agreed that a fact finder could properly conclude that there was a reasonable probability that the defendant's acts of exposure would be seen by a child. In a footnote, the Court pointed out that the statute does require that the violative act, such as exposure, be committed "with" a child. Instead, the statute lists prohibited acts such as exposing one's genitals "to" any child. The Court explained that the preposition "with" suggests that the child is an object or target of the attention or behavior.

The Court rejected the Commonwealth's argument that since a child did see the defendant's penis, there was obviously a "reasonable probability" that a child would witness his public display. The Court explained that it rejected "the notion that any act of indecent exposure can be transformed into a conviction for indecent liberties with a child upon the mere happenstance of a car containing a child randomly passing by."

The Court distinguished this case from the *Steggall* case, where the victims encountered the defendant in a store, where he was emotionless and unaroused with his pants down and his genitalia in full view of the child and left without uttering a word or gesturing.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1276211.pdf

Edwards v. Commonwealth: January 17, 2023

Henry: Defendant appeals his convictions for Sexual Battery on sufficiency of the evidence.

Facts: The defendant sexually assaulted his adopted daughter repeatedly. The defendant and his wife had adopted the victim when she was six years old. The defendant began to sexually assault the victim after his wife left the home and while the victim was a teenager. Police interviewed the defendant, who confessed that he sexually assaulted the victim approximately ten occasions after he divorced his wife and before the victim turned eighteen.

At trial, the victim's testimony largely tracked that confession. She testified that a few weeks after her mother left the home, the defendant came into her bedroom, got into her bed, and sexually assaulted her. The victim confirmed the details of the assaults and that the abuse happened on at least ten or fifteen occasions, or perhaps more than twenty times. The defendant twice confessed that the victim was awake and never said anything during the incidents. The victim testimony confirmed that she was always awake and didn't say anything every time that it happened. The defendant confessed that the incidents always happened at the family home. The victim testified that the incidents always occurred in her bedroom at night.

At trial, the defendant argued that the evidence failed to establish the corpus delicti of the ten aggravated sexual battery offenses because it did not corroborate his confession. He also argued that the Commonwealth failed to prove that he abused the victim against her will by force, threat, intimidation, or ruse.

Held: Affirmed. The Court first ruled that the victim's testimony substantially corroborated the defendant's confession to each of the ten counts of aggravated sexual battery.

The Court then noted that intimidation "may occur without threats" because it involves "putting a victim in fear of bodily harm by exercising such domination and control of her as to overcome her mind and overbear her will. Intimidation may be caused by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure." The Court then repeated that a defendant's "paternal bond" with his victim is a "highly relevant circumstance" when considering whether that sexual abuse was accomplished through intimidation. In this case, the Court found that the victim's testimony "described circumstances of emotional domination sufficient to constitute intimidation."

Full Case At:

https://www.vacourts.gov/opinions/opncavwp/0160223.pdf

English v. Commonwealth: November 1, 2022

Roanoke: Defendant appeals his conviction for Rape and Sexual Assault of a Child Under 13, 2nd Offense, on Evidentiary Issues.

Facts: The defendant sexually began sexually assaulting a child soon after her fifth birthday. The defendant was in a relationship with the victim's mother and acted as a caretaker for the victim and her siblings. The victim testified that the defendant was a "father figure" to her. The victim was fourteen years old at the time she reported the abuse. At the time, the defendant had moved out because he was having a child with another woman. The other woman testified that she had been in an "on and off" relationship with the defendant for fifteen years, and at the time of the trial he was her boyfriend.

A SANE nurse, Melissa Harper, examined the victim, who disclosed that the defendant sexually assaulted her daily since sixth or seventh grade. The exam revealed the victim suffered from genital warts. The defendant was diagnosed and treated for genital warts in 2013 and in 2014, during which he was sexually abusing the victim. At trial, a doctor testified that genital warts are "typically" transmitted through sexual contact.

The Commonwealth indicted the defendant for various offenses, alleging a three-year date range from shortly after the victim's tenth birthday. The defendant asked for a bill of particulars to state the dates, locations, and times of all offenses for which he was being charged. The defendant also objected to the requirement that he provide a notice of alibi based on the three-year date range in the indictment. The trial court denied the motion.

Prior to trial, filed a motion in limine seeking to exclude evidence of his prior adjudication of delinquency for the forcible sodomy of an eight-year-old when he was fifteen years old. The trial court denied that motion but gave three limiting instructions regarding the purpose for which the defendant's prior conviction could be considered; the jury was instructed not to consider it as evidence of guilt.

Prior to trial, the defendant sought to exclude evidence regarding his genital warts due to the number of years between the diagnoses and the lack of evidence conclusively establishing that the victim contracted the condition from him. The trial court denied his motion and permitted the Commonwealth to introduce that evidence at trial.

Prior to trial, the Commonwealth's moved to admit evidence of the defendant's prior sexual conduct with the victim prior to the indictment. The defendant sought to exclude evidence of his sexual acts with the victim such as "alleged play fighting, humping, and oral sex." He contended that, because these acts were not the basis of criminal charges, they were not admissible. The trial court ruled that it was relevant under Rule 2:404 (B) to establish the absence of a mistake or an accident.

At trial, the defendant also argued that the Commonwealth failed to establish that he and the victim were not married.

Held: Affirmed.

Regarding the defendant's argument that the Commonwealth failed to prove he and the victim were not married, the Court noted that it was reasonable for the jury to infer that the victim would not have been able to marry the defendant without parental consent. The Court examined the evidence about the defendant's romantic relationships with the victim's mother and the other woman and concluded that a juror could reasonably infer that the defendant was not married to the victim at the time of the offenses.

Regarding admission of the defendant's prior adjudication of delinquency, the Court repeated that, in a proceeding against a defendant under a recidivist statute, evidence of the prior offense is admissible, even when it goes only toward a sentencing enhancement. The Court then explained that a potential prejudice arising from the introduction of a defendant's prior convictions during the guilt phase can be solved by an appropriate limiting instruction to the jury.

Regarding the evidence of the defendant's genital warts, the Court agreed that the evidence was admissible to establish that the defendant began having sexual intercourse with the victim in the same time frame in which he had outbreaks of genital warts.

Regarding the evidence of the defendant's prior sexual acts with the victim, the Court noted that the Commonwealth was required to establish that he acted with "lascivious intent." Thus, the Court explained, the defendant's other sexual misconduct was relevant to establishing that he acted with lascivious intent and that his acts were accomplished knowingly and intentionally. The Court concluded that the duration and escalation of the defendant's sexual contact with the victim before the indictment provided the jury with some evidence of the defendant's state of mind and intent when he committed the offenses after the move.

Regarding the defendant's request for a bill of particulars, the Court repeated that it is improper for a defendant to use a bill of particulars to expand the scope of discovery in a criminal case. The Court noted that under *Clinebell,* an extended period during which alleged sexual crimes occurred against a minor were sufficient to inform the defendant of the time of the offenses. In this case, the Court ruled that the time frames in the indictments and bill of particulars were sufficient to apprise the defendant of "the nature and character of the offenses."

The Court also noted that the defendant never offered any type of alibi defense. The Court ruled that the trial court did not abuse its discretion when it did not require the Commonwealth to provide more specific information about the date, time, and location of the offenses or by overruling the defendant's objection that the lack of more specific dates prevented him from providing an adequate notice of alibi defense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1065213.pdf

Mayberry v. Commonwealth: October 18, 2022

Appomattox: Defendant appeals his convictions for Child Sexual Assault on use of Closed-Circuit Testimony and sufficiency of the evidence.

Facts: The defendant repeatedly sexually assaulted his girlfriend's seven-year-old daughter.

Prior to trial, the Commonwealth moved to present the victim's testimony by Closed-Circuit video. The Commonwealth presented testimony from the child's treatment provider, who was also an expert on child trauma. She opined that if compelled to testify in front of the defendant, the victim's "PTSD would get significantly worse" because "seeing [the defendant] in person would" cause her to become "terrified" and reexperience her trauma. The victim's reexperienced trauma, according to the expert, likely would manifest in "increased anger outbursts and defiance" at home and school, and her PTSD symptoms could escalate into a "crisis situation" involving "anger outbursts," physical aggression, and even suicide. The expert emphasized that the risk of suicide was not mere speculation because she was aware of suicide by children as young as eight years old. Moreover, she expressly distinguished the victim's likely trauma if compelled to testify in front of the defendant from generalized courtroom anxiety. The Court granted the Commonwealth's motion, over the defendant's objection.

In one of the defendant's sexual assaults, the defendant sexually battered the victim by touching her genitals. The trial court convicted the defendant of Indecent Liberties in violation of § 18.2-67.3 for that incident, based on the Commonwealth's argument that "by reaching out his hand" to touch the victim's genitals, the defendant tacitly communicated a proposal to touch her genitals.

Held: Affirmed in Part, Reversed in Part.

Regarding the closed-circuit testimony, the Court found no error in the trial court's ruling that, by finding a substantial likelihood, based on expert testimony, the victim would suffer severe emotional trauma if forced to testify against the defendant in open court. Although the expert, at times, opined that testifying in the defendant's presence "would potentially" cause a "crisis situation," and the victim "could" suffer emotional outbursts, the Court found that this testimony did not render the trial court's finding plainly wrong or without evidentiary support.

Regarding the conviction for Indecent Liberties for touching the victim, the Court found that a plain reading of §18.2-370(A)(3) demonstrates that the word "propose" does not include touching a child's genitals. Thus, in this case, the evidence that the defendant touched the victim's genitals was insufficient to prove that he "proposed" to do so. The Court reversed that conviction, although it affirmed the other convictions in this case.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1380212.pdf

Robinson v. Commonwealth: August 23, 2022

Williamsburg/James City County: Defendant appeals his convictions for Sexual Assault on sufficiency of the evidence.

Facts: The defendant, while working as a massage therapist, sexually assaulted five victims. One victim testified that, during the assault, although she wanted to scream, she was afraid to because the defendant was larger and stronger.

During the period of the assaults, the Virginia Board of Nursing had suspended the defendant's license to practice massage therapy based on sexual assault complaints stemming from incidents in 2018 and 2019 at other massage studios in Virginia. However, the defendant continued to work without a license. Finally, one victim came forward and contacted the police. A SANE examiner found injuries during an examination that the defendant had caused. After the news published a story about the assaults, several more victims came forward.

After several of the assaults, the victims left tips for the defendant. At trial, the victims explained why they did so. One testified that she tips people even after bad service because "that's how people make their living." Another testified that she "was in shock" and "just wanted to get out of there."

At trial, the defendant claimed that the Commonwealth failed to prove that he used any force, threat, or intimidation when he digitally penetrated one victim, repeatedly, without her consent. He also pointed to the tips that the victims left and argued that tipping reveals the absence of any force, threat, or intimidation. The defendant also argued that the Commonwealth failed to prove that he acted with the requisite sexual intent when he touched the five complaining witnesses on their vaginas and anuses. The trial court rejected his arguments and convicted him of multiple counts of aggravated sexual assault and object sexual penetration.

Held: Affirmed. The Court explained that "our precedent establishes that force, threat, and intimidation inhere in a situation like this one, where a massage therapist improperly touches a vulnerable client who lies frozen in fear. … His intent was plain from his conduct, which left no room for any reasonable hypothesis of innocence." The Court also pointed out that "force, threat, or intimidation" is not a required element of aggravated sexual battery when committed by a massage therapist under subsection (A)(5) of § 18.2-67.3.

Regarding the victim's "tipping," the Court noted that: "A sexual-assault survivor might suffer from disassociation, behaving as if nothing had happened despite her severe trauma. Or she might just want to get away as fast as possible, afraid that failing to tip as usual might risk unwanted questioning that could delay her escape."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0036221.pdf

Resisting Arrest

Virginia Court of Appeals
Unpublished

Horan v. Commonwealth: December 6, 2022

Virginia Beach: Defendant appeals his conviction for Resisting Arrest on sufficiency of the evidence.

Facts: The defendant, intoxicated and angry, became angry at a restaurant. The staff asked him to leave, but he refused, so they summoned the police. Officers responded and arrested the defendant. Officers had to take the defendant "to the ground" when he pulled his hands away, but he "remained continuously in . . . close proximity" to the officers. The defendant repeatedly resisted the officers' attempts to handcuff him and place him in the police cruiser. The defendant attempted to flee multiple times. The defendant "bucked" and tried to get away from the officers as they walked him to the patrol car, but they had him hooked under his arms so he couldn't get away. He struggled with the officers, swore at them, and had to be forced to the ground outside the restaurant as well as outside the patrol car.

Among other charges, the trial court convicted the defendant of attempting to prevent his arrest, in violation of § 18.2-460(E). The trial court also convicted the defendant of assault and battery of a law enforcement officer, in violation of § 18.2-57(C), attempting to disarm a law enforcement officer, in violation of §§ 18.2-57.02 and 18.2-26, trespassing, in violation of § 18.2-119, and disorderly conduct, in violation of § 18.2-415.

Held: Reversed as to § 18.2-460(E); affirmed as to other convictions. Because the defendant never fled from the officers by "running away" or "physical[ly] mov[ing] beyond the scope of the officer's immediate span of control," the Court ruled that the evidence did not support his conviction under § 18.2-460(E). The Court repeated that, under *Joseph*, a violation of § 18.2-460(E) requires proof of "running away or movement away from the officer's immediate span of control."

The Court affirmed the defendant's convictions for assault and battery of a law enforcement officer, attempting to disarm a law enforcement officer, trespassing, and disorderly conduct.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1186211.pdf

Traffic

Virginia Court of Appeals
Unpublished

Jones v. Suffolk: May 16, 2023

Suffolk: Defendant appeals his conviction for Reckless Driving on sufficiency of the evidence.

Facts: The defendant, while was driving an 18-wheel truck carrying farm animals in its trailer, failed to negotiate a turn safely as the road curved to the left and his truck flipped over onto its side. The speed limit was 55 mph. Two witnesses described the truck as driving "kinda fast" and "going fast" before it crashed. An officer examined the scene and found that the tire marks left on the road from the truck indicated that the defendant did not use his brakes prior to the crash.

Held: Affirmed. The Court held that the record supported the trial court's conclusion that the defendant drove recklessly.

The Court repeated that many factors may indicate recklessness, including erratic driving, the likelihood of injury to other users of the highways, lack of control of the vehicle, speeding, dangerous driving behavior, intoxication, and noncompliance with traffic markers. The Court also acknowledged that the mere happening of an accident does not give rise to an inference of reckless driving. In a footnote, the Court also acknowledged that driving fast, standing alone, is also not reckless driving; instead, what distinguishes a speeding violation from the misdemeanor of reckless driving is the likelihood of injury to other users of the highways.

In this case, the Court noted that the witnesses reported seeing the defendant driving fast immediately before overturning, which the Court found was evidence that the defendant was speeding. Based on the facts, and the crash itself, the Court found that a rational trier of fact could reasonably infer that the crash was a result of the defendant's recklessness. The Court reasoned that, even if the defendant did not exceed the posted speed limit, the evidence supported the conclusion that he was certainly travelling too fast for the highway conditions. As a result, he could not maintain control of his truck, filled with heavy cargo, thus veering off the right-hand side of the road and overturning.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0806211.pdf

Negron v. Commonwealth: March 21, 2023

Campbell: Defendant appeals his conviction for Driving Suspended on sufficiency of the evidence.

Facts: The defendant drove on a suspended license and crashed into another vehicle after drinking. At trial, the court admitted the defendant's driving record, which stated that the defendant's license had been suspended effective April 20, 2018, as follows:

Suspension
Issue: 2018/05/01 Effective: 2018/04/20 Term: INDEFINITE
FAIL PAY CT FINE/COST/FEES
CONVICTION: 2018/03/21 GENERAL DISTRICT CT FRANKLIN COUNTY CONVICTION: 2018/03/21 GENERAL DISTRICT CT FRANKLIN COUNTY CONVICTION: 2018/03/21 GENERAL DISTRICT CT FRANKLIN COUNTY NOTIFIED: 2018/03/21 BY COURT DC225
ORDER DELIVERY DATE:

At trial, the defendant argued that he the evidence did not prove that he had any knowledge that his license was suspended at the time of the incident and that the DC225 was "not sufficient notice because we don't know if he got it." The defendant complained that "Form DC210 is used when a defendant is present in court" and "Form DC225 is used when a defendant is absent from court."

Held: Affirmed.

The Court pointed out that notice that a driver's license is suspended may be sent by "certified mail to the driver at the most recent address of the driver on file at the Department" under § 46.2-416(A). The Court repeated that that § 46.2-416 evinces the General Assembly's intent that a "certified driving record . . . is 'prima facie evidence' of [a] violation of Code § 46.2-301." In this case, the Court noted that the defendant's driving record unambiguously indicates that he was notified on March 21, 2018, that his license was suspended, "BY COURT DC225."

The Court found that the certification provided "prima facie evidence" of the § 46.2-301 violation under *Hodges* and noted that the defendant did not provide any evidence that would negate such a notification. Thus, the Court ruled that the defendant's driving record was sufficient evidence to conclude that the defendant was guilty of driving on a suspended license after having previously been notified of the suspension.

The Court distinguished the *Bishop* case, pointing out that in that case, the Commonwealth did not rely on § 46.2-416, which provides that a certified driving record is "prima facie evidence" of a violation of § 46.2-301.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0274223.pdf

Brown v. Commonwealth: January 17, 2023

Virginia Beach: Defendant appeals his conviction for Racing on sufficiency of the evidence.

Facts: The defendant raced another individual until the other individual crashed into the victim's car. The victim suffered serious injury. The Commonwealth charged the defendant with violating § 46.2-865.1.

Police interviewed the defendant. The defendant stated that he knew the other driver. He stated that he pulled alongside the other racer at a stoplight and accelerated quickly ahead of him when the light turned green. The defendant pulled ahead of the other racer, until the other racer passed the defendant after about ten seconds. Both vehicles were traveling at 80 or 90 miles per hour in a 45-mph zone. The race ended only seconds after the other racer passed the defendant —stopping when the other racer crashed into the victim.

Held: Affirmed.

The Court noted that under § 46.2-865.1, a defendant must have engaged in a race in "a manner so gross, wanton and culpable as to show a reckless disregard for human life." The Court wrote that it would "analyze this element in the same manner as criminal negligence in involuntary manslaughter cases…. In doing so, we consider whether the defendant had a "conscious awareness of the risk of injury created by his conduct" or whether "a person of ordinary prudence would have known the risk... In other words, we ask whether the defendant "had an actual or constructive consciousness of the danger involved in his act or omission."

The Court found that, when the defendant accelerated after the other racer accelerated, he indicated an intent to race. In this case, the Court agreed that a reasonable fact finder could conclude that an ordinarily prudent person would have known that racing another at speeds of eighty or ninety miles per hour in a forty-five mile per hour zone posed a risk of serious injury to the race participants and other drivers.

The Court rejected the defendant's reliance on the fact that he was able to safely stop, finding that the defendant's actions in racing contributed to the other racer's inability to avoid the other driver. Moreover, the Court noted, the high rate of speed alone posed a high degree of risk that he would collide with somebody or something, even if that risk was not actualized in this specific case. As such, the Court concluded that there was sufficient evidence supported the finding that the defendant acted with reckless disregard for human life under § 46.2-865.1.

Likening this case to *Doggett* and *O'Connell*, the Court observed that the defendant decided to race at speed where it was foreseeable that one of the racers would be unable to avoid other vehicles or would otherwise lose control. Although the other racer, not the defendant, ultimately crashed, the Court agreed that a reasonable fact finder could conclude that the defendant's decision to race the other racer proximately caused the accident.

The Court acknowledged that the defendant, unlike *Doggett*, did not make hand motions indicating an intent to race and that he did not attempt to pass after the other racer pulled ahead. The Court explained, though, that "*Doggett* does not provide a rigid test nor suggest that every factor noted by this Court must be present for a race to occur."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0014221.pdf

Slurry Pavers v. Commonwealth: January 17, 2023

Smyth: Defendant appeals its conviction for an Overweight Vehicle on sufficiency of the evidence.

Facts: The defendant, a paving company, drove a paver for two miles and across a railway crossing in violation of the weight limits under § 46.2-1126, which defines the maximum gross weight permitted "on the highway by a vehicle" operated without a special permit. The paver was loaded with bags of lime and was also carrying other employees at that time.

At trial, the evidence established that the paver had steering wheels on both sides and an operator can sit on either side to drive the paver. It did not have an enclosed cab, a seat belt, or a license plate. The maximum speed of the paver is about 16 miles per hour. The paver did not have a transmission or a drive shaft; it had "two propulsion pumps attached to a planetary, which had four independent wheel motors that move the machine." It also had a hand throttle and a gas pedal and used diesel gas. The paver moved on its own and did not need to be pulled, pushed, or towed to move.

The defendant argued that the Commonwealth failed to produce sufficient evidence that it had illegally operated a "vehicle" as defined by § 46.2-100. The trial court rejected the defendant's argument.

[*Great work to Jill Lawson for handling this case herself on appeal – EJC*].

Held: Affirmed. The Court concluded that, under § 46.2-100, these circumstances established that the paver was a "device in, on or by which any person or property is or may be transported or drawn on a highway" and not a "personal delivery device," a "device moved by human power," or a device "used exclusively on stationary rails or tracks". Accordingly, the Court rejected the defendant's argument that the paver was not a vehicle because it does not share many characteristics traditionally associated with other commercial or personal vehicles.

In a footnote, the Court declined to resolve whether a violation of § 46.2-1126 is civil or criminal. In another footnote, the Court noted that nothing in the plain language of § 46.2-100 mandates that a vehicle be licensed or registered with DMV to constitute a vehicle under that code section.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0204223.pdf

Perry v. Commonwealth: May 9, 2023

Lynchburg: Defendant appeals his conviction for Vehicle Tampering on sufficiency of the evidence.

Facts: Two days after someone stole the victim's car, police found the car with significant damage. An officer found a right thumbprint on the front of the rearview mirror. Fingerprint analysis showed that the fingerprint belonged to the defendant. At trial, the car owner did not testify as to whether the mirror had been adjusted or was otherwise out of place.

Based on the position of the thumbprint, the trial court found that the defendant adjusted the rearview mirror. The trial court convicted the defendant of tampering with an automobile in violation of § 18.2-146.

Held: Reversed.

The Court examined § 18.2-146 and noted that in Cox, the Virginia Supreme Court adopted Black's Law Dictionary's definition of tamper: "to 'interfere improperly' and 'to meddle so as to alter a thing, especially to make corrupting or perverting changes.'" The Court concluded that "tampering" requires something more than merely touching a thing.

In this case, the Court contended that, even if it accepted the trial court's conclusion that the defendant's fingerprint was positioned as if he were adjusting the mirror, the evidence does not show that the defendant did adjust or otherwise interfere with the mirror. The Court complained that even though the owner of the car and the police officers who found the car testified at trial, the Commonwealth did not introduce any evidence to suggest that the mirror was out of place.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1217223.pdf

DEFENSES

Advice of Counsel

Virginia Court of Appeals
Unpublished

Rhodes v. Commonwealth: October 11, 2022

Roanoke: Defendant appeals his conviction for Practicing Chiropractic Medicine with a Suspended License and False Pretenses on sufficiency of the evidence and the "Advice of Counsel" defense.

Facts: The defendant practiced as a licensed Chiropractor until the Board of Medicine suspended his license in 2018. The order stated that the defendant's license was "SUSPENDED"; the order further explained that the suspension would be stayed "upon proof of [the defendant's] entry into a contract" with Virginia's Health Practitioner's Monitoring Program (HPMP). Despite his suspension, he continued to treat patients. When confronted, he first denied continuing to treat patients, but later admitted it.

At trial, the defendant contended that the wording of the Board of Medicine's order did not provide the defendant with adequate notice that he was required to await formal notification of the reinstatement of his license. The defendant claimed at trial that his attorney advised him that he could continue to treat patients following this order so long as he was attempting to enter into a contract with the HPMP. Neither his attorney nor any other evidence corroborated that defense. The trial court did not find the defendant to be "believable," also noting he obfuscated and failed to answer the Board truthfully in his testimony at times. The trial court specifically found that the defendant was "incredible," and his explanations "almost farcical."

Held: Affirmed. The Court found no error in the convictions for either Practicing without a License under § 54.1-2409.1(iii) or Larceny by False Pretense. The Court noted that, in addition to willfully practicing with a suspended license, the defendant also improperly received payments for treatment he provided without a valid license.

In a footnote, the Court observed that, in Virginia, there is no authority that has applied the "advice of counsel" defense in a criminal context; the defense "is most often exercised in Virginia in a civil matter involving a tort." The Court acknowledged that Federal courts have found that the defense can be permissible in a criminal context, where it is properly established by credible evidence. Because the trial court rejected the defendant's testimony, the Court found it unnecessary to reach the question of whether the defense applies to criminal matters in Virginia state courts.

In another footnote, the Court also noted that, to the extent that the defendant relied on the "good faith" defense regarding advice from a public body, his argument failed, as there was no evidence of reliance on any affirmative assurance from a public body.

Full Case At:

https://www.vacourts.gov/opinions/opncavwp/1196213.pdf

Entrapment

Virginia Court of Appeals
Unpublished

Bean v. Commonwealth: November 22, 2022

Henrico: Defendant appeals his conviction for Internet Solicitation, alleging Entrapment.

Facts: The defendant communicated with an undercover police officer on a website called MocoSpace. The purported child's profile stated that she was an 18-year-old female. The defendant soon began engaging in direct text messaging with the purported child. Then, in only his third text message to the purported child, and without the officer having raised the subject of school, the defendant asked her, "why u not in school or are you graduated." In his seventh and eighth text messages, sent only five minutes into his conversation with purported child, the defendant told her, "be honest with me how old are u . . . . It's ok I know your not 18." The officer stated that she was almost 15.

The defendant reassured the purported child that "it's ok" that she was not eighteen. The defendant asked whether the purported child "liked being told what to do is that wh[a]t u like you like it when a guy takes charge." The purported child responded affirmatively, and the defendant told her, "[y]ou got it." Moments later, the defendant texted the purported child to ask her if she wanted to "honor me and to obey m[e]." When she responded that she did, he replied, "[o]k let's see if u will obey." He then told the purported child to send him photographs, including of her "sexy legs" and one "[f]rom [the] waist done [sic]."

When the purported child sought clarification, asking, "[n]aked?" the defendant replied, "[h]ey you s[a]id you where ready to obey me." The defendant then began a series of sexually explicit solicitations of the purported child.

At trial, the defendant argued that that nothing about his initial contact with the officer suggested an attempt to solicit a child younger than fifteen and that the officer's statement that she was "almost 15" was "new information" that demonstrated the officer's conception and planning of the defendant's offense. The defendant also contended that he was entrapped because he only requested a naked selfie from the purported child after she first broached the subject of naked photographs.

The trial court convicted the defendant of use of a communication system to solicit a child under the age of fifteen to engage in sexual acts, in violation of § 18.2-374.3(C).

Held: Affirmed.

The Court repeated that Entrapment is an affirmative defense that "occurs when the defendant's criminal conduct was the product of '"creative activity" by the police that implants in the mind of an otherwise innocent person the disposition to commit an offense and induce its commission in order to prosecute."

In this case, the Court found that the evidence did not demonstrate Entrapment. Rather than demonstrating that the officer conceived and planned the defendant's offense, the Court found that the evidence and reasonable inferences from it demonstrate that the officer did nothing more than afford the defendant the opportunity to commit a crime already conceived by the defendant. Although the purported child first used the term "naked" in reference to selfies, a reasonable factfinder could conclude from the record that the purported child did so only after the defendant led her to believe that a naked selfie is what he wanted and expected her to provide. Thus, rather than the defendant's later requests for naked selfies arising from police activity that planted the idea of those requests in the defendant's mind, the Court found that the defendant himself conceived of manipulating the child into sending him naked selfies.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0107222.pdf

Heat of Passion

Virginia Court of Appeals
Published

Washington v. Commonwealth: October 18, 2022
75 Va. App. 606, 878 S.E.2d 430 (2022)
Fredericksburg: Defendant appeals his convictions for Aggravated Malicious Wounding and Use of a Firearm on denial of his Self-Defense and Heat of Passion Defenses.

Facts: During a heated argument involving numerous offensive insults in a parking lot, the victim called the defendant a racial epithet. The defendant drew a firearm and pointed it at the victim's head. When the victim turned away, the defendant moved behind the victim and shot her in her ankle. The defendant then calmly walked away. Surveillance video captured the entire incident.

At trial, the defendant argued self-defense and heat of passion. Regarding heat of passion, the defendant contended that that the victim's "racial epithet, as a matter of law, was likely to create fear or anger which could incite violence.'" He argued that the victim's "overt racism" created "a mental state that negates malice."

Held: Affirmed. Regarding self-defense, the Court agreed that the record did not support the defendant's claim that he acted in self-defense. Regarding heat of passion, the Court agreed that the victim's racist language has an "utterly devastating impact on individuals and society." Even so, the Court explained, binding precedent is clear that words by themselves do not constitute provocation sufficient to support the heat of passion defense. In this case, the Court found that the facts coupled with the defendant's intentional use of a deadly weapon supported an inference that he acted with malice.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1256212.pdf

Virginia Court of Appeals
Unpublished

Fries v. Commonwealth: February 14, 2023

Chesterfield: Defendant appeals his conviction for Aggravated Malicious Wounding on Speedy Trial grounds.

Facts: The defendant stabbed his boyfriend during an argument and then drove him home, rather than the hospital. As a result, the victim fell into a coma for several weeks and suffered permanent injuries. At trial, the defendant contended that the argument led to him acting in the "heat of passion," rather than out of malice.

Police arrested the defendant in January 2020, and he was held without bond. The defendant asserted his speedy trial right for the first time in January 2021. In April 2021, the defendant moved to dismiss under statutory and Constitutional speedy trial. The trial court denied the motion.

Held: Affirmed.

Regarding the defendant's "heat of passion" claim, the Court concluded that evidence here establishes that the defendant acted with malice rather than in the heat of passion. The Court reasoned that the only possible provocation for the stabbing was the heated argument the two had, but the Court repeated that words are never enough to constitute heat of passion.

Regarding statutory speedy trial under § 19.2-243, the Court repeated that under *Ali* and *Brown*, the COVID-19 pandemic qualified as a "natural disaster" for tolling the statutory right to a speedy trial. Therefore, the trial did not violate the defendant's statutory speedy trial right.

Regarding Constitutional speedy trial, the Court repeated that delay is calculated from the time of arrest and that that delay approaching one year is presumptively prejudicial and requires further review. In this case, the Court held that the twelve-month delay attributable to the Commonwealth had a valid justification in the ordinary course of the administration of justice, specifically, the Supreme Court's emergency orders in response to the COVID-19 pandemic.

The Court then applied the four-part test under *Barker v. Wingo.* The Court pointed out that the defendant, who had been in custody since his arrest in January 2020, did not assert his constitutional right to a speedy trial until nearly a year later. The Court found that his assertion of his speedy trial right was merely a formality to preserve the issue for any future appeal.

Regarding the element of "prejudice," the Court quoted the three-tiered test set forth in *Shavin*. As most of the delay was justified by the COVID-19 pandemic, the Court required the defendant to show he was specifically prejudiced by the delay. In this case, the Court found no evidence of prejudice to the defendant.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0989212.pdf

Carr v. Commonwealth: August 23, 2022

Suffolk: Defendant appeals his convictions for Attempted Capital Murder, Armed Burglary, and related offenses on sufficiency of the evidence.

Facts: The defendant planned to sneak into the victim's house at night to see if she was "cheating" on him. He borrowed his mother's car and parked it nearby for easy access to the backyard. He planned a break-in using gloves, garden shears, and a ladder that he took from the shed. He planned to use the ladder to climb to the second floor to spy on the victim, and he planned to use the garden shears to break through the window screen. He brought a digital device with him to record the events. The defendant then fell off the ladder and instead broke into the house through the back door. He then unplugged all but one of the security cameras, disarmed the alarm, and ripped the telephone cord from the wall. He braced the back door with a chair.

The defendant then savagely attacked his estranged wife for nearly an hour. At trial, the defendant argued that he acted only in the heat of passion. He contended that he became enraged when he spied the victim texting a picture of herself to someone else, losing control of his actions.

The defendant also argued that he was not guilty of armed-burglary and burglary-tools because he could not break into a home that he claims he shared with his wife. The parties had been separated for a year, and the victim had made it clear to the defendant that he was not welcome at the home, which was only titled in the victim's name. The defendant was living with his mother at the time of the attack. The victim had changed the locks and installed a security system to protect herself.

Held: Affirmed. The Court agreed that the evidence sufficed to allow the factfinder to conclude that the defendant's actions were planned and premeditated, not spontaneous or without conscious reflection. Regarding burglary, the Court agreed that the evidence showed that the defendant knew that he had no right to enter the victim's house.

The Court rejected the defendant's claim of "heat of passion," noting that the defendant's actions reflected "a considered plan" that required "both thought and calculation." The Court concluded that the deliberate nature of his actions undermined his argument that he acted only "on impulse without conscious reflection." The Court acknowledged that the defendant's actions appeared to have been motivated by anger, jealousy, and vengeance. The Court countered, however, that malice includes "every unlawful and [unjustified] motive," including "anger, hatred and revenge." The Court also pointed out that malice is also shown where the attack, as in this case, "was a completely unprovoked, cruel, and vicious assault, deliberately and maliciously carried out under terrifying conditions."

Regarding the burglary convictions, the Court acknowledged that, under *Justus*, "a person may not unlawfully break and enter a home in which she has the right to occupy." However, the Court explained that the fact that a defendant may have some sort of legal title in the property or license to use it does not establish his right to occupy it. In this case, the Court noted that the defendant had no

legal or proprietary interest in the victim's home, which was titled exclusively in her name, and had to break into the home to get access. Thus, the Court agreed that the trial court had ample evidence to support its conclusion that the defendant had no right to occupy the home.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0773211.pdf

Intoxication

Virginia Court of Appeals
Unpublished

Braxton v. Commonwealth: February 28, 2023

Henry: Defendant appeals his conviction for Attempted Capital Murder of a Law Enforcement Officer on his defense of Voluntary Intoxication.

Facts: While fleeing from the police in a truck, the defendant avoided other cars on narrow roads until he was able to abandon his truck and flee on foot. While running towards his nearby house, the defendant abruptly stopped, turned around to face a pursuing officer, and began firing multiple shots at close range. The defendant shot the officer, striking him in the arm and grazing the top of the officer's head. The officer shot the defendant as well. Police then captured the defendant.

Later, the defendant told police that he fled because he was high on drugs, possessed more drugs, and was also in possession of a firearm that he knew he was not allowed to have. He claimed his intent at that point was to get home to his wife.

At trial, the defendant attempted to argue that his voluntary intoxication by heroin and meth prevented him from forming the required "willful, deliberate, and premeditated" intent under § 18.2-31(6).

Held: Affirmed. The Court deferred to the trial court's factual determinations that the defendant's voluntary intoxication did not prevent him from forming the intent to kill.

The Court noted that the defendant "operated a vehicle with what would be surprising skill and dexterity if he was so intoxicated as to be unable to form specific intent" and twice concocted a false narrative to police about what happened that night. The Court acknowledged that the defendant consumed both heroin and methamphetamine at some point prior to his contact with the police. However, the Court repeated that "Mere intoxication from drugs or alcohol, however, is not sufficient to negate premeditation." In this case, the Court ruled that the defendant failed to present evidence showing that his intoxicated state rose to the required level to render him incapable of forming specific intent.

The Court examined the facts and observed that the moment where the defendant chose to end his flight and instead shoot at the officer head-on "captures the formation of his premeditated intent to

kill" the officer and thus prevent the officers from arresting him for his illegal possession of a firearm and heroin.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0179223.pdf

Mental Condition & Diminished Capacity

Virginia Court of Appeals
Published

Calokoh v. Commonwealth: February 28, 2023

Fairfax: Defendant appeals his convictions for Rape and Object Sexual Penetration denial of Diminished Capacity Evidence and Jury Instructions.

Facts: The defendant assaulted and raped a woman. Afterwards, the defendant referred to the incident in texts to the victim. Police investigated and identified the defendant using DNA collected from the victim. The defendant claimed to police that he had not had sex with the victim, despite the DNA evidence.

At trial, the defendant's mother testified. She testified regarding the defendant's "learning issues" in school. During her testimony, the defendant sought to introduce his school records, specifically his Individualized Education Plan (IEP) into evidence. The Commonwealth objected, arguing that the records were not relevant to whether the defendant had the intent to rape the victim at the time of the offense. The trial court sustained the objection.

The defendant then called a forensic psychologist who testified regarding whether the defendant had an intellectual disability. Again, the defendant tried to introduce the school records, and again the Commonwealth objected. The expert testified that he "didn't rely so much specifically on the IEPs. The IEPs are simply what happens after you demonstrated that someone has an intellectual disability." The defendant argued that the records were admissible because the expert had relied on them to establish that the defendant had an intellectual disability and that it occurred prior to the age of eighteen, which was necessary under § 19.2-271.6.4.

The trial court sustained the Commonwealth's objection and refused to admit the IEPs. The trial court permitted the psychologist to testify about the portions of the record that he relied on that related to whether the defendant had an intellectual disability and it also permitted him to testify about how that disability may have impacted the defendant's decision making during the assault.

At the jury instruction phase, the defendant argued that § 19.2-271.6 created a new affirmative defense, and he argued that in addition to the other elements, the Commonwealth had to prove that the defendant "knowingly and intentionally" acted against the victim's will and without her consent. He asked that the words "knowingly and intentionally" be inserted into the model jury instructions for rape and animate object sexual penetration. The trial court ruled that § 19.2-271.6 did not permit the jury to

consider his intellectual disability when considering whether he "knowingly and intentionally had intercourse with the complaining witness against her will, and without her consent."

Instead of the defendant's proposed instructions, the trial court granted Commonwealth's Instructions, which stated, "You may consider evidence of defendant's mental condition if it tends to show the defendant did not have the requisite intent at the time of offense. Intent is established upon proof that the accused knowingly and intentionally committed the acts constituting elements one (1) and three (3)" of rape and object sexual penetration.

During jury deliberations, the jury asked: "whether or not we may consider the Defendant's intellectual disability in relation to the #2 element of the rape charge (ie: whether he believed she had consented)?" Over the defendant's objection, the trial court responded, "No, you may not consider Defendant's intellectual disability in relation to element #2."

[*Great job to Whitney Gregory and Tyler Bezilla, who prosecuted this case – EJC*]

Held: Affirmed.

The Court first ruled that, because § 19.2-271.6 does not create an affirmative defense and did not amend the elements of rape or animate object penetration, the trial court did not err when it denied the defendant's proffered jury instructions and granted the Commonwealth's instructions. The Court also found that the trial court did not err when it answered the jury question by telling the jury that the evidence of the defendant's mental condition could not be considered in relation to whether the victim consented.

The Court repeated that § 19.2-271.6 did not create an affirmative defense, but instead is an evidentiary rule that abrogated the common law. The Court explained that under § 19.2-271.6(B), a defendant may deny that he had the "intent required for the offense charged." However, the Court rejected the defendant's argument that the statute means the Commonwealth must prove that he knowingly and intentionally acted without the victim's consent.

Regarding the defendant's IEP, the Court repeated that, while an expert witness must base his or her testimony upon facts in evidence, the expert's reliance on or review of certain facts or documents does not automatically render those facts or documents admissible evidence. Instead, the Court explained that the evidence relied upon must be admissible under the rules of evidence. In this case, the Court examined the facts and ruled that the IEPs were not relevant.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0226224.pdf

Virginia Court of Appeals
Unpublished

Temple v. Commonwealth: October 4, 2022

Virginia Beach: Defendant appeals her conviction for Assault on Law Enforcement on Sufficiency of the Evidence.

Facts: The defendant bit and kicked several police officers. A neighbor had called 911 after hearing the defendant banging on the wall of her apartment screaming "help me, help me." Officers found the defendant alone, naked, and screaming in a house that was "trashed." The defendant told the officers that invisible bugs were biting her, that her mother was paying them to take her into custody, that a man conspired to have her arrested, and that this entire interaction was being posted to Facebook.

At first, the defendant agreed to allow EMS to check on her, but then she changed her mind. At that point, an officer found that the criteria for an emergency custody order (ECO) had been met, concluding that there was probable cause the defendant had a mental illness, a substantial likelihood that the illness would cause serious physical harm to herself or others, and that she needed hospitalization or treatment but was unable or unwilling to voluntarily get that treatment. The defendant continued to refuse to be taken for medical care pursuant to the ECO. As two officers tried to forcefully remove her from her apartment, she bit one on the arm and kicked at the other. After she was ultimately placed in wrap restraints, the officers concluded she had committed multiple criminal offenses which superseded the ECO. Therefore, they took the defendant to jail.

At trial, the defendant argued that the trial court erred in convicting her because her mental health crisis, as evidenced by the ECO, negated the intent necessary to commit the offenses. The Commonwealth asserted that the defendant's argument was foreclosed because she failed to follow the procedural requirements in § 19.2-271.6, which permits a defendant to offer certain evidence "concerning the defendant's mental condition at the time of the alleged offense." However, the defendant never argued in the trial court that § 19.2-271.6 applied to her case. Instead, she argued that the ECO was determinative and that once the officers determined under § 37.2-808 that there was probable cause to believe the defendant had a mental illness that may lead to imminent harm to herself, or others, she could not have specifically intended to commit the offense.

Held: Affirmed.

The Court examined the new "diminished capacity" code section, § 19.2-271.6. The Court found that the General Assembly intended to partially abrogate the common law rule that all mental state evidence was inadmissible and irrelevant to a defendant's intent, unless the defendant pursued a defense of insanity, by allowing the defendant to present evidence of "the defendant's mental condition" as set out in Code. The Court concluded that § 19.2-271.6 permits a defendant to argue that she lacked the requisite intent by presenting evidence that she has one of the three specific categories of mental conditions under § 19.2-271.6(B) and is not raising an insanity defense under *Stamper* and its progeny.

The Court then concluded that § 19.2-271.6 does not set out an affirmative defense. The Court looked to cases from Texas and Massachusetts, which have similar rules of evidence. The Court also found that both expert and non-expert testimony may be introduced as to a defendant's mental condition. The Court observed that the statute permits the admission of evidence relevant to whether a defendant has a "mental illness," defined as "a disorder of thought, mood, perception, or orientation that significantly impairs judgment or capacity to recognize reality," or a "developmental disability or

intellectual disability," relying on definitions from § 37.2-100. The Court noted that neither definition identifies specific conditions.

The Court then reasoned that the statute "contemplates the admission of a wide berth of potential evidence relevant to whether a defendant has a qualifying mental condition and whether that condition tends to 'show the defendant did not have the intent required for the offense charged.'"

In this case, though, the Court found that any error by the trial court in failing to enforce the procedural requirements of § 19.2-271.6 were harmless, because the evidence demonstrated that the defendant had the requisite intent. Because § 19.2-271.6 does not set out an affirmative defense, the Court explained that the Commonwealth had the burden of both production and persuasion in showing that the defendant had the requisite intent for each offense, and the factfinder was entitled to make that determination after weighing all the evidence presented. The Court noted that the defendant knew that the officers were police officers, as she repeatedly said that they were arresting her and questioned why they were arresting her; that the defendant had the presence of mind to request permission to call her mother prior to being removed from her apartment, and the officers allowed her to do so; and that she bit and kicked the officers while repeatedly saying, "I'll fight you," and yelling at them to leave her home.

The Court ruled that issuance of an ECO, along with the condition of the defendant's apartment and her irrational statements and actions, collectively constituted evidence that may be relevant as to whether she had a mental illness when offered under § 19.2-271.6, although the defendant did not raise that defense in this case. However, in a footnote, the Court rejected the defendant's argument that that the issuance of an ECO alone establishes that a person under the ECO can never have the requisite intent for any criminal action. "Probable cause to believe a person is acting under any mental illness or incapacity does not by itself prove that a person could not form the intent to commit a criminal offense."

In a concurrence, Judge Ortiz wrote separately "to address the failure of our community to properly respond to the mental health crisis, and the officers' hasty decision to take Temple to jail instead of the hospital." He wrote, "Unfortunately, neither Code § 37.2-808 nor any other statute provides a remedy for law enforcement officers' failure to perform their duty under Code § 37.2-808(G). While I join the Court's decision because the trial court has broad discretion in weighing existing evidence, I am skeptical that the officers' actions complied with Code § 37.2-808(G) when no change of circumstances negated the initial probable cause that supported the ECO."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1172211.pdf

Stephenson v. Commonwealth: August 23, 2022

Augusta: Defendant appeals her convictions for Assault on Speedy Trial grounds and Refusal to Admit Evidence of Mental Condition at the Time of the Offense.

Facts: The defendant assaulted two firefighters with a shovel. On January 9, 2020, the general district court found probable cause to certify the charges to the grand jury and, on January 27, 2020, the grand jury indicted her. The defendant demanded a jury trial, which was initially set for April 27, 2020.

However, on March 16, 2020, the Supreme Court of Virginia declared a judicial emergency in response to the COVID-19 pandemic and restricted all trials and non-emergency proceedings. On February 5, 2021, the Supreme Court approved the trial court's plan to resume jury trials. The trial court then set the defendant's jury trial for August 11 and 12, 2021. The defendant moved to dismiss on statutory and Constitutional speedy trial grounds, arguing that the Commonwealth was "using COVID-19 as an excuse" to extort inmates by prolonging their pretrial incarceration. The trial court denied the motions.

At trial, the defendant offered testimony from an emergency room physician, who explained that the defendant "exhibited delusional thinking" when she was admitted to the emergency room. He stated that he determined that "effects of multiple medications" likely caused the defendant's delusions, rather than a mental condition.

Along with the doctor's testimony, the defendant sought to admit an emergency department report that contained a summary of her psychiatric history. Specifically, the report stated that she had "a history of T2DM, depression, anxiety, PTSD, HCV, fibromyalgia, and MVC in March 2017." The Commonwealth objected that the psychiatric history was inadmissible under § 19.2-271.6 because the statute required the defendant to establish that she had a mental condition that "existed at the time of the offense." The defendant contended that the statute "entitled" the jury to receive such evidence because it was probative of her intent at the time of the offense. The trial court excluded the report.

Held: Affirmed. Regarding statutory speedy trial, the Court found that the recent ruling in *Ali* was dispositive. During the pendency of this case, the Court repeated that the Supreme Court's emergency orders tolled the running of any statutory speedy trial period. Regarding Constitutional speedy trial, the Court concluded that the defendant waived her argument, as she did not offer any theory on how speedy trial applied to the facts of this case.

Regarding the ER report, the Court ruled that the trial court did not abuse its discretion by excluding the proffered report because the defendant failed to establish that she suffered from a "mental condition" as defined in § 19.2-271.6, or that any such mental condition existed at the time of her offenses. The Court noted that the report did not indicate whether any of her prior diagnoses constituted "a disorder of thought, mood, perception, or orientation that significantly impair[ed] [her] judgment or capacity to recognize reality." In addition, although the doctor testified that the defendant manifested "delusional thinking" when she arrived at the emergency room, he acknowledged that he was not qualified to diagnose the defendant with a mental illness that existed when the assault occurred. Moreover, the Court emphasized, the doctor concluded that the "effects of multiple medications"—not a mental illness—likely caused her delusions. Thus, the Court ruled that the defendant failed to establish the requisite "underlying mental condition" to admit the report under § 19.2-271.6.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0974213.pdf

and
https://www.vacourts.gov/opinions/opncavwp/0972213.pdf

Necessity

Virginia Court of Appeals
Published

Warren v. Commonwealth: March 7, 2023

Chesapeake: Defendant appeals his conviction for DUI on Jury Selection issues and denial of his Defense of Necessity.

Facts: An officer stopped the defendant for driving 96 in a 60 mile-per-hour zone and learned that the defendant was intoxicated. The defendant claimed that he had just received a phone call from his cousin's girlfriend, who told him that his cousin had been shot, and was dying of a wound in front of his grandmother's home. The defendant told the officer that he got in his car and drove back to Portsmouth, because he had the belief that given the situation, it would take an ambulance quite a while to get to that scene to take his cousin to the hospital to receive medical treatment. The cousin died from that gunshot wound later that evening. The defendant's BAC was .12.

Prior to trial, the Commonwealth raised a pre-trial motion to object to the defendant's presentation of a necessity defense. The trial court required the defendant to lay a foundation for the testimony he intended to present to the jury by proffering evidence on each element of the necessity defense at the motion in limine. The defendant proffered the facts of the case and the trial court ruled that the facts were insufficient to support a defense of necessity and granted the Commonwealth's motion.

During voir dire of the jury pool, a juror stated that he had been convicted of felony DUI. However, the juror stated that that the governor had restored his civil rights, although he did not know when or which governor restored his rights. The Commonwealth investigated and the evidence showed that the juror was twice convicted of felony DUI. The VCIN record reflected these convictions and did not show that his rights had been restored. When the court accessed the Governor's website for any clarifying information on the rights restoration, the website did not show records matching the juror's name, which he testified had never changed. The trial court struck the juror due to his felony conviction.

Held: Affirmed.

The Court first ruled that under § 8.01-338, the fact of the juror's two felony convictions coupled with the lack of clear evidence that his rights had been subsequently restored supported the trial court's reasonable doubt as to the juror's qualifications to serve as a juror.

Regarding the defense of necessity, the Court ruled that the trial court did not err in requiring the defendant to lay a foundation for the testimony he intended to present to the jury by proffering

evidence on each element of the necessity defense at the motion in limine. The Court repeated that the essential elements of this defense include:

(1) a reasonable belief that the action was necessary to avoid an imminent threatened harm;

(2) a lack of other adequate means to avoid the threatened harm; and

(3) a direct causal relationship that may be reasonably anticipated between the action taken and the avoidance of the harm.

In this case, the Court ruled that the necessity defense failed because the defendant proffered no evidence to support the second element: a lack of other adequate means to avoid the threatened harm. The Court noted that the defendant did not proffer any evidence that he called 911 or anyone else to help his cousin and found them unavailable. The Court also complained that the defendant did not proffer that he called other family members to help his cousin; nor that he attempted to get someone else to drive him to his cousin to avoid his driving under the influence.

The Court concluded that the trial court did not abuse its discretion by excluding the defendant's proffered "necessity" evidence because it lacked relevance. The Court observed that the evidence was only relevant to the necessity defense, and such evidence became immaterial to the case when he failed to proffer minimal evidence as to each element of the defense. The Court wrote: "We are sympathetic to Warren's desire to be with his fatally wounded cousin. Nevertheless, his claimed unawareness of other adequate means to get aid to his cousin does not satisfy the requirement that no other adequate means were available to aid his cousin."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0533221.pdf

Virginia Court of Appeals
Unpublished

Lambert v. Commonwealth: January 17, 2023

Henrico: Defendant appeals his conviction for Possession of a Firearm by Felon on his Defense of Necessity.

Facts: The defendant, a convicted felon, possessed a firearm and brought it to a drug sale. There, he was involved in a shootout with another person. Police recovered the defendant's firearm and found the defendant's blood and DNA on it.

At trial, the defendant claimed that he obtained the firearm only when he wrested it free from one of his attackers who physically engaged him. However, the trial judge explicitly rejected the defendant's account of how he gained possession of the firearm, stating that he did not accept that "the defendant was attacked, and he took somebody's gun away from them to protect himself."

Held: Affirmed.

The Court acknowledged that a defendant may raise the defense of necessity against the charge of possessing a firearm after having been previously convicted of a felony. The Court repeated that, to benefit from the defense of duress or necessity, a defendant must show:

(1) a reasonable belief that the action was necessary to avoid an imminent threatened harm;

(2) a lack of other adequate means to avoid the threatened harm; and

(3) a direct causal relationship that may be reasonably anticipated between the action taken and the avoidance of the harm.

In this case, the Court agreed that a rational factfinder certainly could reasonably infer that the defendant brought the firearm with him to the drug sale, and, consequently, that the defendant had possession of the firearm before the attack began.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1290212.pdf

Sanity

Virginia Court of Appeals
Published

Khine v. Commonwealth: September 13, 2022
75 Va. App. 435, 877 S.E.2d 514 (2022)
Chesapeake: Defendant appeals his conviction for First Degree Murder on Hearsay and Insanity grounds.

Facts: The defendant strangled and beat his wife to death. Afterwards, the defendant claimed that he had heard voices "controlling his mind" that told him to kill the victim. The defendant later said that "the voice it was hurting me, it was telling me to go to work, the controller he attacked me. It was like I can't control my mind." The parties tried the matter to a judge, rather than a jury.

At trial, the Commonwealth introduced, over the defendant's objection, a witness's hearsay statement that the victim said the day before she was killed that she planned to tell the defendant that she wanted a divorce. The witness further testified that the victim told her that plan the day before the killing. The witness later saw the couple leaving a store together, with the defendant visibly upset.

The defendant offered expert testimony in favor of his insanity defense, claiming an "irresistible impulse." The defense expert opined that, at the time of the offense, the defendant "was responding to delusional thoughts and auditory hallucinations, resulting in his actions. That is, he was unable to rationally think through the reality of the situation, and assaulted his wife, following the directives of the voices he was hearing." The expert concluded that the defendant "was indeed suffering from the symptoms consistent with an acute episode of psychosis." "Additionally, . . . there is evidence to suggest that [the defendant] was experiencing symptoms to the extent of impairing his ability to resist the impulse to commit the offense."

After receiving all evidence and hearing closing arguments, the trial court granted the Commonwealth's motion to strike the defendant's insanity defense, finding as a matter of law that the

defendant failed to show that he was "totally deprived of the mental power to control or restrain" his actions. The trial court complained that the defendant's expert had failed to testify that the defendant was "powerless to control himself."

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

Regarding the hearsay issue, the Court found no error in the evidentiary ruling because the statement about the victim's divorce plans was admissible under the state-of-mind exception to the hearsay rule. The Court ruled that this statement was admissible under the "*Hillmon* doctrine," referencing an 1892 case from the Virginia Supreme Court. The Court analogized this case to the 2006 *Hodges* case, where the Supreme Court held that the trial court properly admitted a witness's testimony that, the day before she was killed, the victim said she was "going to meet" the defendant and "would be right back."

In this case, the Court noted that the victims' statement that she was going to "tell [the defendant] she wanted a divorce" was admissible as evidence that the victim acted in accordance with her plan. Taken together with the witness's personal observations, the evidence made it more probable than if there had been no such proof that the victim carried through with her stated intent.

However, the Court ruled that the trial court erred in striking the defendant's insanity defense because it failed to view the evidence in the light most favorable to the defendant. Under that standard, the Court found that the defendant had met his burden of production on his affirmative defense. The Court explained that the trial judge, sitting as the factfinder, should have instead determined whether the defendant carried his burden of persuasion to prove by a preponderance of the evidence that the defendant was totally deprived of the ability to resist the voices that he claims commanded him to kill his wife.

The Court acknowledged that the defense expert's testimony had some ambiguity, but found that, at a motion to strike, the evidence from the expert supported the defendant's affirmative defense that he was totally unable to resist the voice in his head that commanded him to kill his wife. Because the trial court failed to apply the correct legal standard, the Court ruled that the trial court erred in granting the Commonwealth's motion to strike.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0900211.pdf

Self-Defense

Virginia Supreme Court

Colas v. Tyree: January 26, 2023

Virginia Beach: Police officer appeals a jury verdict in a Lawsuit for a Fatal Shooting

Facts: Police responded to a call in which the plaintiff was experiencing a mental breakdown, was angry and agitated, and had pushed his sister until she fell to the ground. The plaintiff was armed with a "military-style" knife, expressed that he wanted to kill himself, and stated: "I'm going to slit my throat and you guys are going to watch me bleed out or I'm going to charge at an officer and force you to shoot me." He also said he did not want to hurt the officers but indicated he would if they made him or if it was what he had to do. However, he did not advance on the police so long as they stayed out of his yard.

As the plaintiff's mental state deteriorated, officers developed a plan to convince the plaintiff to surrender his weapon and then subdue him. The plaintiff agreed to surrender his knife. However, as an officer tried to tackle the plaintiff to restrain him, the plaintiff retrieved his knife. Within less than two seconds, as the officer who tackled the plaintiff was starting to roll away, the plaintiff made a sudden gesture, raising the knife in the air, and one of the officers shot the plaintiff with a single shot, killing the plaintiff.

At trial for this lawsuit, during the plaintiff's case in chief, the plaintiff called the officers to the stand. The plaintiffs adduced evidence from the officer who killed the plaintiff that he fired the shot in a moment of imminent danger to the life of another officer. At the conclusion of trial, the jury dismissed the plaintiff's gross negligence claim. However, the jury found that the officers unlawfully battered the plaintiff and awarded $1 million in damages.

Held: Reversed. In a 4-3 ruling, the Court ruled that the officer's decision to fire his weapon, on these facts, constituted defense of another as a matter of law.

The Court repeated that the "bare fear" of serious bodily injury, or even death, however well-grounded, will not justify the taking of human life. Instead, there must also be some overt act indicative of imminent danger at the time. In the self-defense context, the Court noted that "imminent danger' is defined as "an immediate, real threat to one's safety." In this case, the Court found that "a mentally disturbed person who seizes a knife and lifts it in the air in very close proximity to the officer who just tackled this person, presents an obvious imminent danger."

The Court wrote that: "the evidence establishes that an officer was on the ground, lying next to a profoundly disturbed and potentially dangerous individual, who then lifted a military-style knife in the air in such a way that the knife might be employed to stab the officer. Applying the adverse party witness rule, the evidence establishes that Detective Colas faced an immediate and possibly mortal danger to a fellow officer, and he was justified in taking a single shot in defense of his fellow officer." "In the immediacy of that moment, Colas was not required to wait and see whether Tyree might plunge the knife into Tuft-Williams' heart or neck, or whether something else might happen."

Regarding the events that led up to the shooting, the Court explained that self-defense turns on the right to respond to an overt act that creates an "imminent danger." For that reason, the Court concluded that what was said and done before this imminent danger may be relevant background, but it was not dispositive on the question of self- defense.

Justices Russell, Goodwyn, and Mann filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1211226.pdf

Virginia Court of Appeals
Published

Taylor v. Commonwealth: March 28, 2023

Chesterfield: Defendant appeals his convictions for Voluntary Manslaughter, Malicious Shooting, and Child Neglect on Denial of a Self-Defense Instruction and sufficiency of the evidence.

Facts: The defendant approached the victim in a mall food court and provoked a fight. When the victim quickly gained the upper hand, the defendant walked to his backpack and retrieved a firearm. The victim restarted the fight, and the defendant shot him twice, also hitting his own sister with a stray bullet. The defendant fled, ahead of his family, including his two-year-old son, later testifying that he did not know where his son was during the fight.

The victim was transported to the hospital and went into organ failure "almost immediately." The victim arrived at the ER close to death and, after a procedure to stop the bleeding, he had a roughly 1% chance of survival according to his treating physicians' testimony. The victim underwent at least 10 operations during his 11-day stay at the hospital, during which he never regained consciousness. The victim ultimately was removed from life support and died.

The defendant argued self-defense. At trial, the trial court gave an instruction which was virtually identical to Virginia Model Jury Instruction-Criminal Model Instruction No. 33.810 for self-defense "with fault." The defendant argued that, left on its own, that instruction placed an undefined burden of proof on the defendant, when instead the Commonwealth bore the burden of proof. The defendant proffered a supplemental instruction:

> "If you find from a consideration of all of the evidence in the case that the defendant's claim of self-defense creates a reasonable doubt that he committed the offense, then you shall find him not guilty."

The trial court rejected that instruction. However, the Court did give the instruction that stated "[t]here is no burden on the defendant to produce any evidence" and gave the instruction that stated: "If you have a reasonable doubt as to whether he is guilty at all, you shall find him not guilty."

At trial, the trial court rejected the defendant's argument that his three rapid-fire shots at the same person in the same instance were insufficient to sustain his convictions for three separate counts of malicious shooting within an occupied building in violation of § 18.2-279. The trial court also rejected the defendant's argument that his convictions for malicious shooting in an occupied building were subsumed by his conviction for voluntary manslaughter. The defendant also unsuccessfully argued that he did not cause the victim's death.

Lastly, the defendant argued that he was not guilty of child neglect under § 18.2-371.1(B) because the evidence failed to prove that he was "responsible for the care" of his son.

Held: Affirmed.

Regarding the defendant's proffered jury instruction, the Court agreed that it is error for a self-defense instruction to affirmatively require the accused to carry the burden of proof. On the other hand, though, the Court explained that it is not necessary to instruct the jury that the Commonwealth "must disprove beyond a reasonable doubt every fact constituting" a claim of self-defense. The Court repeated that if a court properly instructs the jury that "[t]here is no burden on the defendant to produce any evidence," it is not error to refuse an "additional instruction on the burden of proving affirmative defenses."

Regarding the three convictions for Malicious Shooting, the Court examined the statute and concluded that the legislature intended § 18.2-279 to be "bullet specific." The Court likened the offense to § 18.2-154, where the Court had reached the same result in the *Stephens* case that each shot the defendant fired was a "separate, identifiable act." The Court noted that the gravamen of the offense is the risk of endangerment or death to another as a result of discharging a firearm. The Court also noted that another panel had reached the same conclusion in 2019 in the unpublished case *Tate v. Commonwealth*, affirming two counts of malicious shooting at an occupied dwelling when the defendant fired multiple bullets at two occupied motel rooms.

The Court rejected the argument that convictions for malicious shooting in an occupied building were subsumed by his conviction for voluntary manslaughter, finding that malicious shooting within a building was not a lesser-included offense of voluntary manslaughter.

The Court also concluded that the evidence was sufficient to show that the victim died from his gunshot wounds, noting that the defendant did not present any evidence of an intervening cause, let alone an intervening cause that would fall outside the "probable consequence of [his] own conduct."

Lastly, the Court agreed that the defendant was guilty of child neglect. The Court noted that the defendant shot a gun three times with his son nearby and "then ran out of the mall seemingly without regard for his son's whereabouts."

Judge Chaney filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0433222.pdf

Washington v. Commonwealth: October 18, 2022
75 Va. App. 606, 878 S.E.2d 430 (2022)
Fredericksburg: Defendant appeals his convictions for Aggravated Malicious Wounding and Use of a Firearm on denial of his Self-Defense and Heat of Passion Defenses.

Facts: During a heated argument involving numerous offensive insults in a parking lot, the victim called the defendant a racial epithet. The defendant drew a firearm and pointed it at the victim's head. When the victim turned away, the defendant moved behind the victim and shot her in her ankle. The defendant then calmly walked away. Surveillance video captured the entire incident.

At trial, the defendant argued self-defense and heat of passion. Regarding heat of passion, the defendant contended that that the victim's "racial epithet, as a matter of law, was likely to create fear

or anger which could incite violence.'" He argued that the victim's "overt racism" created "a mental state that negates malice."

Held: Affirmed. Regarding self-defense, the Court agreed that the record did not support the defendant's claim that he acted in self-defense. Regarding heat of passion, the Court agreed that the victim's racist language has an "utterly devastating impact on individuals and society." Even so, the Court explained, binding precedent is clear that words by themselves do not constitute provocation sufficient to support the heat of passion defense. In this case, the Court found that the facts coupled with the defendant's intentional use of a deadly weapon supported an inference that he acted with malice.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1256212.pdf

Virginia Court of Appeals
Unpublished

Bass v. Commonwealth: February 21, 2023

Norfolk: Defendant appeals his conviction for Murder on Self-Defense grounds.

Facts: The defendant stabbed and killed a man at a gathering. The defendant initiated the hostility with the victim because he was angry at finding his girlfriend naked in a bedroom. The defendant confronted the men in the apartment and threatened to "cut" them. When the victim tried to calm the defendant, the defendant pushed him onto the sofa. The victim rose, and the two men briefly fought. During the brief tussle, the defendant stabbed the victim repeatedly in the chest and abdomen, killing him. The victim was unarmed and had made no threats.

At trial, the defendant claimed self-defense. The defendant claimed that he feared for his life and only stabbed the victim because the victim continued to advance towards him. The defendant sought to introduce evidence regarding the victim's criminal history. The trial court admitted three conviction orders pertaining to the victim's prior violent acts, including a 2009 conviction for unlawful wounding and 2014 convictions for assault and public drunkenness. However, the trial court refused to admit evidence of the victim's "prior bad acts of belligerence and aggression" in the form of a 1990 malicious wounding conviction as relevant to the issue of self-defense.

Held: Affirmed. The Court first agreed that the evidence proved that the defendant was the aggressor, initiated the confrontation, and stabbed the unarmed the victim without provocation. The Court then found no basis to disturb the trial court's finding that evidence of the 1990 malicious wounding conviction was insufficiently connected in time and circumstances to characterize the victim's conduct toward the defendant nearly thirty years later. Further, the Court found that the contested evidence was merely cumulative of the other trial evidence. The Court explained that a trial court does

not abuse its discretion by limiting a victim's charges and convictions to only those charges and convictions that are relevant to a defendant's self-defense claim.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0706211.pdf

McCauley v. Commonwealth: February 7, 2023

Prince William: Defendant appeals his conviction for Aggravated Malicious Wounding and Use of a Firearm on Exclusion of Self Defense Evidence.

Facts: In 2019, the defendant shot a man several times, severely wounding the victim. At trial, the defendant claimed that the victim "charged" after him, accused him of being in a rival gang, and threatened that he was going to kill the defendant. The defendant claimed that he shot the victim in self-defense. At trial, the trial court permitted the defendant to testify that the victim was a member of the Bloods gang and that the victim purportedly accused the defendant of being a member of a rival gang.

The defendant also sought to introduce other evidence about the victim, but the Commonwealth objected. The defendant proffered testimony that the victim said that he was "untouchable" in the eyes of the police. The defendant also proffered that the victim behaved in an "accosting" or "belligerent" manner when drunk. Lastly, the defendant proffered testimony that in 2015 the defendant heard the victim's girlfriend screaming that the victim had been violent toward her.

The trial court excluded the evidence, rejecting the defendant's argument that this "information" about, and statements made by, the victim to demonstrated that he was the aggressor and the defendant acted in self-defense. The trial court also found that the 2015 statements were "too remote in time."

Held: Affirmed. The Court did not find that the trial court abused its discretion in limiting the defendant's testimony concerning the victim or his prior statements.

The Court found that the defendant's proffered testimony that the victim said that he was "untouchable" in the eyes of the police was neither proof of a "pertinent character trait" nor an "act of violence" to warrant admission under Virginia Rule of Evidence 2:404(a)(2). Instead, the Court found such a statement amounted to nothing more than a boast of inside connections with law enforcement and had nothing to do with prior acts of violence.

The Court equally rejected the defendant's "vague proffer" that the victim behaved in an "accosting" or "belligerent" manner when drunk. The Court observed that the defendant provided the trial court with no facts tending to show that the victim had committed any specific act of violence and, thus, was likely the aggressor against the defendant.

Lastly, the Court found no basis to conclude that the defendant's testimony regarding hearing the victim's girlfriend shouting about him in 2015 was in any way connected in time and circumstances as "likely to characterize" his conduct toward the defendant several years later. Instead, the Court

observed that the girlfriend's yelling about the victim's conduct towards her in 2015 in no way demonstrated a propensity of aggression against the defendant in 2019.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0202224.pdf

Leech v. Commonwealth: October 4, 2022

Chesterfield: Defendant appeals his conviction for Brandishing a Firearm on Self-Defense grounds.

Facts: The defendant, angry over mis-delivered packages, confronted and yelled at the victim, his neighbor, demanding that he find the missing packages. The victim had broken his ankle in three places and was in bed. The defendant entered the victim's property and yelled at him through the open window, demanding that the victim get out of bed to look for the packages. The victim asked the defendant to leave, but the defendant refused. The defendant then found an item belonging to the defendant in the mailbox but returned to the victim's home to confront the victim again. The victim again asked the defendant to leave, but the defendant refused. The victim then exited his home and limped to the defendant to tell him to leave. The defendant stood in the victim's driveway, "yelling" and "running his mouth."

When the victim reached the defendant, he told the defendant that he would punch him in the nose if he did not leave. The defendant drew a handgun and pointed it at the victim. At trial, the defendant testified that he knew that the victim had been convicted once of brandishing a firearm and believed that he could have had a firearm tucked inside his waistband. He watched the victim's hands but did not see a firearm. Nevertheless, the defendant asserted that he made a "defensive display of his weapon to repel a violent attack." He contended that he produced his weapon only after the victim approached "within a foot or two" and prevented a physical altercation.

Held: Affirmed. The Court ruled that the evidence did not support the defendant's claim that he brandished his firearm in self-defense.

The Court again distinguished "justifiable self-defense" from "excusable self-defense." In this case, the Court found that the evidence demonstrated that the defendant was at fault in bringing on the interaction with the victim. The Court then observed that when the victim confronted the defendant and threated to punch him, the defendant neither retreated nor announced his desire for peace. Based on the defendant's failure to retreat despite the victim's repeated requests to leave the property, the Court ruled that his claim that he acted in excusable self-defense necessarily fails.

In a footnote, the Court explained that, in light of its conclusions that the defendant failed to prove that he retreated as far as he was able to or announced his intention for peace, the Court would not decide whether the defendant proved that the victim, by approaching him, made an overt act demonstrating a threat to the defendant's safety.

Full Case At:

https://www.vacourts.gov/opinions/opncavwp/1005212.pdf

Smallwood v. Commonwealth: June 7, 2022

Henrico: Defendant appeals his convictions for Voluntary Manslaughter and related charges on sufficiency of the evidence.

Facts: The defendant shot the victim repeatedly, twice from behind, killing him. Three guns and two knives were found at the crime scene.

The defendant claimed that the killing was in self-defense. At trial, the defendant testified about a physical altercation with the victim earlier that night at a convenience store, in which the defendant stated he had drawn his gun to protect himself. The defendant described the victim as "rough" and "crazy," and talked about other instances when the victim had acted violently toward the defendant. For instance, the defendant claimed that the victim in 2018 punched the defendant in the jaw four or five times. In 2019, the defendant stated that the victim claimed he would kill people who crossed him. The victim also allegedly threatened the defendant by saying, "I'll shoot your ass" and by brandishing a gun while laughing.

The defendant was charged with second-degree murder, but the jury convicted him of voluntary manslaughter. After trial, the defendant argued that that, because he "was the only person in that room who could provide direct evidence as to why the shooting occurred," his testimony was arbitrarily disregarded, and the law of self-defense required his acquittal.

Held: Affirmed. The Court found that a rational jury could acquit the defendant of second-degree murder but convict him of manslaughter based on the evidence of the defendant's "volatile and unpredictable friendship" with the victim—a relationship that involved threats and brandishing of guns. The Court concluded that the jury could have accepted that the defendant had an unreasonable fear of danger that caused him in the heat of passion to use deadly force against the victim.

The Court rejected the defendant's argument, finding that the rule that he advocated—that the jury must accept a defendant's self-defense claim when the defendant is the only witness to the killing—would "create a perverse incentive for perpetrators to kill any witnesses to the crime."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1053212.pdf

EVIDENCE

Authentication

Virginia Court of Appeals
Published

Canada v. Commonwealth: August 30, 2022
75 Va. App. 367, 877 S.E.2d 146 (2022)
Campbell: Defendant appeals his convictions for Possession of a Firearm, Reckless Handling, and Discharging a Firearm on Authentication and Sixth Amendment Confrontation grounds.

Facts: The defendant, a convicted felon, shot a firearm outside his ex-girlfriend's home. The victim called 911, reported the offense, and provided a description of the defendant and his vehicle. Police responded and found a shell casing at the crime scene. They then located the defendant and his vehicle and recovered the firearm from his car.

At trial, the Commonwealth sought to introduce a recording of the 911 call along with a computer-aided dispatch document summarizing the call. To authenticate the documents, the Commonwealth called the custodian of records the 911 call center, who testified that the recording was a true and accurate copy of the original call. The Commonwealth also introduced a certificate of authenticity for the computer-aided dispatch document.

The defendant objected on the grounds that § 8.01-390(B) required that the recording of the phone call be accompanied by an affidavit and certificate that contained the date, time, and phone number of the call. He asserted that the certificate supplied by the Commonwealth did not include this information, but the trial court overruled the objection, concluding that the live testimony of the custodian was sufficient to authenticate the tape.

The defendant also objected to the introduction of the tape on hearsay and Confrontation Clause grounds. The defendant argued that the victim's statements on 911 were testimonial and that the Commonwealth was therefore required to call her to testify. The trial court ruled that the statements were excited utterances and were non-testimonial and overruled the defendant's objections. The victim later testified as a defense witness and recanted her earlier statements.

Held: Affirmed. The Court ruled that the 911 call center custodian's testimony complied with the authentication requirement of § 8.01-390(A), and the 911 call records were public records that were therefore "self-authenticating" under Rule 2:902. The Court ruled that § 8.01-390(B) is not the exclusive means of authenticating 911 records and the Commonwealth validly authenticated the call under § 8.01-390(A). The Court then held that the statements contained in the 911 call were nontestimonial and therefore not within the scope of the Confrontation Clause.

Regarding the authentication of the 911 call, the Court acknowledged that in general, in order for a public record to be properly authenticated, the proponent of such a record would need the custodian or custodian's supervisor to appear in court and testify to the record's authenticity so that the record can be "authenticated . . . by the custodian thereof." The Court explained that § 8.01-390(A),

however, goes on to provide an alternative means to authenticate these documents: if a document is a "digitally certified copy," whether in electronic or print form, it shall be "deemed to be authenticated by the custodian of the record unless evidence is presented to the contrary."

In a footnote, the Court pointed out that, under § 2.2-3817, a "digitally certified copy" as "a copy of an electronic record created by an agency to which the agency has attached a digital signature." "[D]igital signature means an electronic sound, symbol, or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the document."

The Court rejected the defendant's argument that § 8.01-390(B) imposes a mandatory command on the proponent of the evidence. Instead, the Court explained that the statute simply provides an alternative avenue to authenticate 911 calls that does not require live custodian testimony. Accordingly, the Commonwealth had the option of authenticating the call through live testimony of the custodian, by a certificate of authenticity meeting the requirements of § 8.01-390(B), or by any other collection of direct and circumstantial evidence that supported a finding that the call was what the Commonwealth said it was, per Va. R. Evid 2:901.

In another footnote, the Court explained that, although § 8.01-390 is largely concerned with the public records hearsay exception, the plain language of the statute clearly states that evidence offered in compliance with the statute "shall be received as prima facie evidence." Accordingly, it is "one of the few statutes relating to document admissibility which satisfies the best evidence rule, the authentication requirement and the hearsay rule."

The Court then addressed the Sixth Amendment Confrontation Clause issue. The Court reviewed the factors under *Davis v. Washington*, but ultimately explained that "In the wake of *Bryant* and *Cody*, it is clear that although the *Davis* factors remain relevant to the primary purpose inquiry, courts should consider the totality of the circumstances when determining whether out-of-court statements are nontestimonial." In this case, the Court analogized this case to *Wilder* and found that the totality of the circumstances in this case made clear that the primary purpose for the out-of-court statements was not to create a substitute for trial testimony. The Court also applied the four *Davis* factors and concluded that the primary purpose of the 911 call was to obtain assistance for an ongoing emergency.

The Court noted that the evidence established that the defendant was upset, was a felon and therefore prohibited from possessing a firearm, and that he had already shot the gun once in a dangerous and reckless manner. The questions from the 911 operator, and the victim's responses, were geared towards finding and disarming the defendant so that there would be no further harm. At the time of the call, the defendant's precise location and intentions were unknown, and the victim believed that he was armed with a weapon. Unlike the larceny in *Wilder*, the Court found that the crime in this case presented a threat of physical harm to both the victim and potential bystanders including the children in the victim's home. Furthermore, even though the defendant was not immediately threatening the victim, the emergency did not end until the defendant was apprehended.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1105213.pdf

Virginia Court of Appeals
Unpublished

Petrovics v. Commonwealth: May 16, 2023

Spotsylvania: Defendant appeals his convictions for Rape and Domestic Battery, 3rd offense, on Denial of Impeachment Evidence.

Facts: The defendant violently attacked his wife, after having two previous convictions for that offense, and raped her. The victim testified at preliminary hearing. Defense counsel recorded the hearing and then had a staff member prepare a transcript of that recording.

At trial, the victim then testified for the Commonwealth. The victim testified on cross-examination that she did not recall making certain statements at the preliminary hearing. Defense counsel confronted her with his "transcript" in an apparent attempt to impeach her using a prior inconsistent statement. The trial court sustained the Commonwealth's objection, noting that the victim could not authenticate the transcript and could not use the document to prove the prior inconsistent statement without first authenticating it.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in refusing to allow the defendant to use an unauthenticated "transcript" to impeach a witness regarding prior inconsistent statements.

The Court repeated that, to authenticate a transcript of prior testimony prepared by someone other than a court reporter, counsel must call another witness to prove the first witness had testified as reported in the transcript. In this case, the Court noted that the transcript had not been prepared by a court reporter and thus was not "self-authenticating" under § 8.01-420.3, and the defendant did not call another witness to prove the first witness had testified as reported in the transcript. The Court noted that the victim had no direct knowledge of its preparation and could not otherwise recall making a prior inconsistent statement. Accordingly, the Court ruled that the trial court correctly concluded that the victim was "manifestly incapable" of authenticating the transcript and properly ruled it inadmissible to prove that she had previously testified inconsistently.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0393222.pdf

LeBlanc v. Commonwealth: July 26, 2022

Chesterfield: Defendant appeals her conviction for Perjury on Admission of Video Evidence.

Facts: The defendant falsely testified in court to obtain a protective order against the victim. She had testified at the protective order hearing that the victim entered her vehicle, repeatedly slapped at her hands, shoved her with his shoulder, and screamed in her face. However, the defendant had made

no mention of any physical altercation to the police officer when he responded to her 911 call. The victim denied any assault and provided a video of the incident, which showed that the victim did not enter the defendant's car and that no physical altercation occurred.

At the perjury trial, the victim testified that he purchased the video surveillance system, installed it at his house, and knew how it worked. The surveillance system included four separate cameras that captured different angles of his property, including his driveway. The victim set the surveillance timer to record twenty-four hours a day, seven days a week. The video included a date and time stamp. The system's software came with an app that allowed him to record segments of the video or take screen shots, but it did not include editing tools. Thus, the victim knew how to view the footage and make copies of any recordings, but he could not edit the video.

Following the incident, the victim testified that he saved the video to his laptop, iPad, and a thumb drive. He testified that he did not alter the recording in any way and, after reviewing the video for the jury trial, stated that it was a true and accurate representation of what happened on February 16, 2020.

Held: Affirmed. The Court found that the video was properly authenticated. The Court repeated that "Videotapes, like photographs, when properly authenticated, may be admitted under either of two theories: '(1) to illustrate the testimony of a witness, and (2) as mute, silent, or dumb independent photographic witnesses.'" The Court ruled that the victim's testimony, accepted as true, provided the trial court with sufficient evidence to find that the video was what the victim claimed it to be: an accurate recording of the incident that occurred in his driveway on the date of the offense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0155222.pdf

Reyes Reyes v. Commonwealth: June 21, 2022

Fairfax: Defendant appeals his convictions for Murder, Street Gang Participation, and related charges on Jury Instruction, Admission of Social Media Evidence, Denial of Hearsay Testimony, and sufficiency grounds.

Facts: The defendant and another man beat a child to death. The defendant was member of MS-13 and had a high enough rank to give orders. The other men involved in the killing, were gang-affiliated; one was a lower-ranking gang member told to bury the body. At trial, that man testified that he acquiesced because the defendant was a higher-ranking gang member, and he was fearful that the defendant could retaliate if he did not comply.

Police later spoke with a witness to the incident. When police told her that the victim was dead and that they had located his grave, the witness allegedly stated "good." The defendant sought to admit that statement at trial, as an "excited utterance," but the trial court denied the defendant's request.

At trial, the witness stated that when the defendant and the other man beat the victim to death, they called him a "rival gang member" and discussed "revenge" for a prior stabbing of another person.

The defendant also told the witness she was "in the gang now" after they killed the victim. At trial, a detective provided expert testimony that one goal of MS-13 is to commit violent acts to scare the community. At trial, the defendant himself admitted that the three men armed themselves and intended to beat the victim.

At trial, the Commonwealth introduced evidence from subpoena returns of the defendant's Facebook and Instagram account. A detective testified that he discovered information related to social media accounts possibly maintained by the defendant, and based on that information, he acquired a search warrant that yielded the information in the exhibits. The detective also testified that during the defendant's interview, the defendant identified multiple photos and posts from the two social media accounts and confirmed that the accounts belonged to him and that he was the person in the photos. The defendant objected that, that because the accounts were not registered in his name, the Commonwealth did not properly authenticate the exhibits. The defendant later testified that the accounts belonged to him.

The trial court denied the following instruction from the defendant: "if you find the defendant guilty of first degree felony murder in the commission of an abduction, then you must find him not guilty of the offense of abduction."

Held: Affirmed.

Regarding the social media evidence, the Court noted that Rule 2:901 applies to social media evidence. The Court agreed that the trial court properly determined that the Commonwealth proved, by a preponderance of the evidence, that the social media accounts were authenticated and admissible.

Regarding the witness's statement "Good" regarding the dead victim, the Court noted that the statement was elicited in the context of an extensive interview which, according to her own testimony, took place weeks after the witness watched the defendant kill the victim, so information that he was dead was not a surprise to her. The Court found that the witness' statement here was not an "instinctive reaction to a horrifying event."

Regarding the jury instruction, the Court repeated that, under *Spain*, "the purpose of references to felonies in the murder statutes is gradation and not prohibition of punishment for the underlying felonies." Therefore, multiple convictions in a single trial for murder committed during a felony and the underlying felony do not violate the constitutional protections against double jeopardy. Because the defendant's proposed instruction was an incorrect statement of law, the Court ruled that the trial court did not err in denying it.

Lastly, the Court found the evidence sufficient to convict the defendant.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0525214.pdf

Confessions

Edwards v. Commonwealth: January 17, 2023

Henry: Defendant appeals his convictions for Sexual Battery on sufficiency of the evidence.

Facts: The defendant sexually assaulted his adopted daughter repeatedly. The defendant and his wife had adopted the victim when she was six years old. The defendant began to sexually assault the victim after his wife left the home and while the victim was a teenager. Police interviewed the defendant, who confessed that he sexually assaulted the victim approximately ten occasions after he divorced his wife and before the victim turned eighteen.

At trial, the victim's testimony largely tracked that confession. She testified that a few weeks after her mother left the home, the defendant came into her bedroom, got into her bed, and sexually assaulted her. The victim confirmed the details of the assaults and that the abuse happened on at least ten or fifteen occasions, or perhaps more than twenty times. The defendant twice confessed that the victim was awake and never said anything during the incidents. The victim testimony confirmed that she was always awake and didn't say anything every time that it happened. The defendant confessed that the incidents always happened at the family home. The victim testified that the incidents always occurred in her bedroom at night.

At trial, the defendant argued that the evidence failed to establish the corpus delicti of the ten aggravated sexual battery offenses because it did not corroborate his confession. He also argued that the Commonwealth failed to prove that he abused the victim against her will by force, threat, intimidation, or ruse.

Held: Affirmed. The Court first ruled that the victim's testimony substantially corroborated the defendant's confession to each of the ten counts of aggravated sexual battery.

The Court then noted that intimidation "may occur without threats" because it involves "putting a victim in fear of bodily harm by exercising such domination and control of her as to overcome her mind and overbear her will. Intimidation may be caused by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure." The Court then repeated that a defendant's "paternal bond" with his victim is a "highly relevant circumstance" when considering whether that sexual abuse was accomplished through intimidation. In this case, the Court found that the victim's testimony "described circumstances of emotional domination sufficient to constitute intimidation."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0160223.pdf

Cross-Examination and Impeachment

Virginia Court of Appeals
Unpublished

Petrovics v. Commonwealth: May 16, 2023

Spotsylvania: Defendant appeals his convictions for Rape and Domestic Battery, 3rd offense, on Denial of Impeachment Evidence.

Facts: The defendant violently attacked his wife, after having two previous convictions for that offense, and raped her. The victim testified at preliminary hearing. Defense counsel recorded the hearing and then had a staff member prepare a transcript of that recording.

At trial, the victim then testified for the Commonwealth. The victim testified on cross-examination that she did not recall making certain statements at the preliminary hearing. Defense counsel confronted her with his "transcript" in an apparent attempt to impeach her using a prior inconsistent statement. The trial court sustained the Commonwealth's objection, noting that the victim could not authenticate the transcript and could not use the document to prove the prior inconsistent statement without first authenticating it.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in refusing to allow the defendant to use an unauthenticated "transcript" to impeach a witness regarding prior inconsistent statements.

The Court repeated that, to authenticate a transcript of prior testimony prepared by someone other than a court reporter, counsel must call another witness to prove the first witness had testified as reported in the transcript. In this case, the Court noted that the transcript had not been prepared by a court reporter and thus was not "self-authenticating" under § 8.01-420.3, and the defendant did not call another witness to prove the first witness had testified as reported in the transcript. The Court noted that the victim had no direct knowledge of its preparation and could not otherwise recall making a prior inconsistent statement. Accordingly, the Court ruled that the trial court correctly concluded that the victim was "manifestly incapable" of authenticating the transcript and properly ruled it inadmissible to prove that she had previously testified inconsistently.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0393222.pdf

Jones v. Commonwealth: May 16, 2023

Pittsylvania: Defendant appeals his convictions for Strangulation and Domestic Assault on Denial of Impeachment Evidence.

Facts: The defendant attacked and choked the mother of his children and later attacked her again as she tried to flee, injuring their child as well. At trial, during the Commonwealth's case, the defendant cross-examined the victim about the incident, but did not ask whether she had made any prior statements that were inconsistent with her trial testimony.

After the Commonwealth rested, the defendant called the victim as a defense witness. During the victim's direct examination, the Commonwealth objected to the defendant asking the victim to authenticate her written complaint to the magistrate, asserting that the defendant was improperly

attempting to impeach his own witness with a prior inconsistent statement. The trial court allowed the defendant to continue examining the victim, but cautioned, "You can't impeach your own witness. It would have been different when [the victim] was on the stand previously but now she's your witness." The victim authenticated the complaint, and the defendant again attempted to introduce it into evidence. The trial court excluded the exhibit, ruling that the complaint was irrelevant except to impeach the victim. Resuming direct examination, the defendant asked the victim a series of questions concerning whether she made prior inconsistent statements or omissions to police or the magistrate regarding the incident. The trial court sustained the Commonwealth's objection to each question on the same grounds as it previously ruled.

The defendant contended that the victim "proved adverse" because "her story related to whether she suffered any injuries from the alleged choking changed from her prior statements of there being 'no injury.'" In addition, he argued that the victim was an adverse witness because "she was an opposing party and had a personal interest in the outcome of the case." Finally, the defendant argued that because the victim's "testimony substantiated" his claim that he did not abduct her, he had not called her solely to impeach her. The trial court refused the defendant's request to deem the victim to be adverse.

Held: Affirmed. The Court ruled that the trial court properly sustained the Commonwealth's objections to the defendant's questions concerning the victim's prior statements.

The Court agreed that the record supported the trial court's finding that the defendant called the victim solely to impeach her. The Court examined § 8.01-403 and § 8.01-401, which concern impeachment of adverse witnesses, but repeated that, even if a witness has proven adverse or has an adverse interest, a party may not call that witness "solely for the purpose of impeaching her with her prior statements." Thus, regardless of whether the victim was "adverse" under § 8.01-401(A) or § 8.01-403, the Court found that the trial court rationally concluded that the defendant called her solely to impeach her; therefore, the trial court did not err in excluding her testimony about her prior statements.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0586223.pdf

Nevers v. Commonwealth: March 21, 2023

Amelia: Defendant appeals his conviction for Rape on Rape Shield and Denial of Impeachment Evidence grounds.

Facts: The defendant raped an intoxicated juvenile at a party in May of 2020. Prior to trial, the defendant filed a "Notice of Intent to Introduce Evidence of Prior Sexual Conduct," advising that at trial he intended to introduce evidence of his prior sexual relationship with the victim. The Commonwealth filed a motion in limine seeking to exclude the evidence because it was not relevant or "reasonably proximate to the offense charged" under § 18.2-67.7(A)(2).

At a pretrial hearing, the victim testified that her friendship with the defendant began in 2015 and developed into a sexual relationship in July 2019. It was undisputed that the sexual relationship ended in November 2019. Thereafter, they "text[ed] each other sometimes" but never discussed or had sex. In a letter opinion, the trial court granted the Commonwealth's motion to exclude the evidence.

At trial, during cross-examination a Commonwealth's witness who had attended the party, the defendant repeatedly asked if the witness saw the victim dancing at the party. The witness replied "no" multiple times. The court precluded the defendant from showing the witness photographs to refresh his recollection because the witness had unequivocally testified that he did not see the victim dancing.

Held: Affirmed.

Regarding the Rape Shield issue, the Court ruled that the trial court did not err in excluding the evidence of the defendant and the victim's prior sexual relationship. The Court likened this case to *League*. The Court rejected the defendant's argument that the Court violated his Sixth Amendment rights by granting the Commonwealth's motion. The Court observed that, given the "clean break" in the relationship and merely innocuous communications in the six months before the offense, any evidence of the victim's prior sexual relationship with the defendant does not "relate[] to a matter properly at issue." The Court rejected the defendant's argument that the trial court was required to weigh the probative value of the evidence against its prejudicial effect, a requirement only applicable to "other relevant, material evidence, not within the enumerated exceptions."

Regarding the defendant's attempted cross-examination, the Court pointed out that the witness did not have a "memory lapse on the stand." Instead, he stated multiple times that he had not seen the victim dancing at the party. Thus, the defendant was not attempting to refresh the witness's recollection but, rather, to contradict his testimony. Under those circumstances, the Court ruled that the trial court lawfully refused to allow the defendant to show him photographs that contradicted his testimony ostensibly to refresh his recollection.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0291222.pdf

Experts

Virginia Supreme Court

Commonwealth v. Kilpatrick: August 4, 2022
Rev'd Court of Appeals Ruling of May 4, 2021
876 S.E.2d 177 (2022)
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 claimed that he believed the child was at least twenty and

the two were merely role-playing and fantasizing about her being a younger schoolgirl. However, during the conversations, the defendant urged the child to delete their "text trail" weekly "so that no one would get too suspicious by seeing lots of stuff or our ages." When the police initially questioned the defendant about how old he believed the child was, he responded that she was fourteen. He also wrote an apology letter to the child's "parents" expressing his "remorse for inappropriate texting with [their] daughter."

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.

On appeal, the Court of Appeals reversed the conviction. 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 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.

Held: Conviction Reinstated, Court of Appeals ruling vacated. The Court found that the trial court's decision to exclude the expert testimony, if error, was harmless as a matter of law. The Court also found that the defendant waived any argument that the claimed error in excluding the expert testimony violated his due process rights or any other constitutional principle.

The Court agreed with Judge Malveaux's dissent in the Court of Appeals that the other evidence against the defendant was so overwhelming that any error in excluding the testimony was insignificant by comparison.

Judges Millette, Goodwyn and Koontz dissented. In the dissenting opinion, Justice Millette contended that the majority had ruled that the expert's testimony did not go to the ultimate issue at trial and therefore should not have been excluded by the trial court. [*The majority did not make that finding in their opinion* – EJC].

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1210530.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/2043193.pdf

Virginia Court of Appeals
Unpublished

Snead v. Commonwealth: March 7, 2023

Pittsylvania: Defendant appeals his conviction for DUI Manslaughter on Admission of Hospital Records, Admission of Expert Testimony, and Sufficiency of the Evidence.

Facts: The defendant drove while intoxicated, failed to recognize a curve in the road, continued straight, struck two road signs, careened down an embankment, and crashed into a tree, killing his passenger. The defendant arrived at the emergency room, where staff collected a blood test. The defendant's "serum" BAC" was .20 %.

At trial, Dr. Trista Wright, a forensic toxicologist, testified that when she converted the defendant's "serum" blood alcohol test results to "whole blood" alcohol results, the "whole blood" BAC was between 0.16 and 0.18 at the time of testing. She also opined that the defendant's "whole blood" BAC at the time of the accident was 0.2. She testified that a 0.2 BAC level would negatively impact the defendant's ability to drive by interfering with "the critical judgment . . . and . . . the motor skills . . . needed to react to different stimuli[,] . . . stay into [sic] the lanes or react to the speed and the distance between objects." Dr. Wright also noted that, "at night, visual acuity m[ight] become an issue."

At trial, the defendant objected to admitting the blood alcohol results contained in his hospital records because he argued that there was insufficient evidence presented on the chain of custody of the blood test and therefore the evidence was unreliable. The trial court overruled his objection.

The defendant also argued Dr. Wright's opinion was too speculative to be admissible because the blood test results were unreliable due to the lack of chain of custody evidence. At trial, the defendant the defendant attempted to impeach the expert's opinion on that basis when he questioned both she and the custodian of the hospital records about their lack of knowledge on chain of custody issues. The trial court overruled the objection.

Regarding the sufficiency of the evidence, the defendant argued that his BAC test could have been compromised by the drugs administered to him after the accident, although he presented no evidence of that. The defendant also argued that the evidence was insufficient to demonstrate his intoxication caused the crash and insufficient to demonstrate that he had demonstrated criminal negligence.

Held: Affirmed.

The Court first addressed the admission of the hospital records. The Court ruled that the trial court did not abuse its discretion by admitting the blood test results and hospital records without further chain of custody foundation. The Court cited the 4th Circuit's ruling in *Thomas v. Hogan* that "there is good reason to treat a hospital record entry as trustworthy." The Court explained that "hospital records are deserving of a presumption of accuracy even more than other types of business entries." The Court cited *Stevens v. Commonwealth*, 46 Va. App. 234, 246 (2005), where the defendant had similarly argued that, though the rule against hearsay did not bar admission of a hospital toxicology report, the Commonwealth had laid insufficient foundation for its admission.

The Court then addressed the defendant's chain of custody objection and ruled that the blood tests upon which Dr. Wright's opinion rested were properly admitted into evidence. The Court found that the defendant's chain of custody concerns went to the weight of the expert's opinion, not its admissibility. The Court noted that the defendant produced no evidence suggesting that the analysis of the BAC in his blood samples was flawed or that any drugs he received altered his BAC readings. The Court found that the expert's opinion was based on assumptions that were either supported by the evidence or uncontested.

The Court then concluded that, based on the defendant's BAC test results and the expert's opinion that the BAC was 0.2 when the accident occurred, the evidence supported the trier of fact's rational conclusion that the defendant was intoxicated at the time of the crash. Regarding the defendant's claim that his BAC test could have been compromised by the drugs administered to him after the accident, the Court complained that the defendant cited no evidence supporting that theory.

Regarding causation, the Court examined the facts in detail. The Court found that the tire tracks in the snow demonstrated that the defendant made no attempt to correct his path or brake after leaving the road, despite the presence of a road sign marking the curve. Based on the extensive damage to the front of the car and the straight path from the road to the tree, the Court ruled that the evidence supported the trial court's finding that the defendant drove directly into the tree at a high rate of speed. The Court also noted that the expert testified that a BAC of 0.2 would interfere with a driver's "judgment" and reaction time as well as his ability to judge speed and his ability to stay in his lane of travel. Accordingly, the Court concluded that the record was sufficient to prove beyond a reasonable doubt that, as a result of driving under the influence of alcohol, the defendant caused his passenger's death.

Lastly, the Court examined the evidence of criminal negligence. The Court noted that it had already held that driving with a BAC of more than 0.25, standing alone, constitutes "a willful act" sufficiently "gross, wanton, and culpable" to prove a violation of § 18.2-36.1(B). In this case, though, the Court did not decide whether driving with a BAC of 0.2 was sufficient, standing alone, to establish the "gross, wanton, and culpable" conduct required to prove aggravated involuntary manslaughter. Instead, in this case, the Court ruled the BAC evidence proved that the defendant's level of intoxication was two and one-half times the legal limit, and therefore the defendant was substantially impaired by alcohol. The Court also found that the evidence supported the trial court's finding that, as a result of the level of intoxication, the defendant did not conform his driving to the weather and road conditions.

The Court wrote: "The evidence proved that, while he was extremely intoxicated, Snead chose to drive a curvy, dangerous road when the road and visibility conditions were poor. He failed to heed the road signs marking the curve, and instead, drove straight off the road at a high rate of speed directly into a tree. Viewed as a whole and in combination, the circumstances here were sufficient to support the reasonable conclusion that Snead was criminally negligent when he chose to transport Adams down a treacherous stretch of road when the road conditions were deteriorating, all while his intellectual and motor skills were substantially impaired by alcohol."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0044223.pdf

Schreiner v. Commonwealth: October 4, 2022

Lynchburg: Defendant appeals his conviction for DUI on Admission of Expert Testimony

Facts: The defendant drove while intoxicated, hit a curb, and nearly crashed into a police car. When the defendant exited her vehicle, she fumbled with her seat belt and had difficulty standing. While performing the standard field sobriety tests, the defendant had difficulty balancing, did not listen to instructions, and had involuntary eye movements. After her arrest, the officer learned that the defendant had a BAC of .06.

At trial, the Commonwealth offered the officer as "an expert with regards to the field sobriety tests administration." While the defendant did not object to the officer being qualified as an expert in the administration of field sobriety tests, the defendant objected to the officer opining on what caused the defendant to perform poorly on the field sobriety tests. The trial court overruled the objection.

The officer testified that he had over eighty hours of field sobriety test training. He affirmed that he had specific training with regards to DUIs and the performance of standard and non-standard field sobriety tests. He attested that he had worked over 110 driving impairment cases in his 21-year career. Rather than testifying that alcohol caused the defendant's poor performance, the officer testified to his observations while conducting field sobriety tests. He testified that the defendant had poor balance, involuntary eye movements, and failed to follow directions during the various field sobriety tests. Based on his training and experience, these observations, he stated, were indicators that she was likely impaired.

Held: Affirmed. The Court also agreed that the officer's training and experience provided a sufficient foundation to qualify him as an expert in the administration of field sobriety tests. Thus, the Court ruled that the trial court did not abuse its discretion when it admitted him as an expert in that field. The Court then ruled that the officer's testimony regarding the defendant's inability to perform the sobriety tests did not opine about any precise or ultimate fact in issue. Instead, the Court found that these observations were all facts that were personally known to the officer and not improper expert testimony.

The trial court also found that, from the testimony, the trial court could reasonably infer that the defendant was driving under the influence.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0917213.pdf

Roach v. Commonwealth: July 19, 2022

Pittsylvania: Defendant appeals his convictions for Receiving Stolen Property on admission of the Victim's Testimony Regarding Value

Facts: The defendant possessed two boats that had been stolen from the victim. At trial, regarding the value of the boats, the victim testified that although he was "not sure" of the "NADA book value" of one of the boats, he thought that it would have been a substantial amount, over $5,000, and was certain that it was more than $500. He also testified that he would have sold the other boat for "well over" $500. The victim testified that he paid over $5,000 for each boat in the 1990s.

The defendant objected and argued that the trial court should not have considered the victim's testimony regarding the price at which he would have sold the boats as evidence of their value. He also contended that the owner's value estimation was "impossible for a boat bought thirty years ago."

Held: Affirmed. The Court noted that the victim was the boat owner, and consequently the trial court did not abuse its discretion in allowing his testimony as evidence of the value of the boats at the time of the offense. The Court repeated that simply the status as owner of the stolen property renders a witness qualified to estimate the value of the item or items. The Court agreed that the victim's testimony was sufficient evidence to determine that the value of each boat exceeded $500, which was the felony larceny threshold at the time of the offense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0921213.pdf

Hearsay

Fourth Circuit Court of Appeals

U.S. v. Ezequiel Arce: September 8, 2022
49 F.4th 382 (2022)
E.D.Va: Defendant appeals his convictions for Possession of Child Pornography on Fifth Amendment *Miranda* grounds and Sixth Amendment Confrontation grounds.

Facts: The defendant shared child exploitation material online. Police discovered the defendant's material being uploaded from an IP address and obtained a search warrant for the residence of the IP address. Executing the warrant, two officers knocked on the door where the defendant was housesitting. The defendant answered and let several officers in.

Officers never drew their guns and never physically restrained the defendant. The officers displayed a calm demeanor throughout. The officers kept the defendant under observation during the house search but told the defendant that he was free to leave. The officers asked the defendant to speak with them while sitting in a police car's front seat for less than an hour. The officers not only let the defendant go after this interaction but allowed him to turn himself in once they had a warrant for his arrest. The defendant confessed to officers during this conversation.

Rather than turning himself in, the defendant fled to the Mexican border. However, local police arrested him after responding to a trespassing call, despite the defendant attempting to use a false

identity. At trial, the defendant argued that his confession was obtained in violation of his Miranda rights because he was in custody when questioned. The trial court denied his motion to suppress.

While executing the search warrant, police seized the defendant's cellphones. Later, an officer used "Cellebrite" software to extract files and data from the phone, including Internet search terms and image-and-video files on the phone. The extracted files were then fed into "Griffeye," which is a program that uses a hashing algorithm to identify unique images and match them with known child-pornography images. (A hashing algorithm generates for a given image an alphanumeric identifier, which, essentially, is unique to that image; a sort of digital fingerprint.) Griffeye then compares that image's hash value to the hash values of database images that have been identified as child pornography by law enforcement analysts.

Based on this comparison, an officer used Cellebrite to generate a report that classified certain images as child pornography. At trial, an officer explained that the Cellbrite software compared the hash values of images from the defendant's phone to a database of "known" child-pornography images that Griffeye created using input from law enforcement officers. In the Cellebrite report, one column that the officer presented reflected, based on hash value, which images or videos were "Child Abuse Material (CAM)" or "Child Exploitation Material (non-CAM)/Age Difficult."

At trial, the defendant objected to admission of the report detailing items downloaded from his phone, arguing that it violated his Sixth Amendment right to confront witnesses because the report included testimonial statements that certain images were likely child pornography. The trial court overruled the defendant's objection.

Held: Affirmed. Looking at the totality of the circumstances of his interview, the Court held that the defendant's Miranda rights were not violated because he was not in custody. The Court then held that, while the inclusion of the Cellebrite report violated his Confrontation Clause rights, the error was harmless.

Regarding the *Miranda* issue, the Court distinguished cases where defendants were arrested and handcuffed, where officers executed search warrants with a battering ram, with guns drawn, where officers woke suspects naked and led them out of their own home, and where defendants were held in custody in their own homes. The Court explained that, in this case, the fact that officers kept the defendant under observation while he was in the house during the search did "little to establish that [the defendant's] freedom of action would be reasonably perceived as curtailed to a degree associated with formal arrest." In a footnote, the Court also explained that telling a defendant that he is "not under arrest" is a factor, but not a determining factor, in determining whether a defendant is in custody.

Regarding the Cellebrite report, the Court ruled that, though most of those reports contained only non-testimonial evidence that was not implicated by the Confrontation Clause, one report included testimonial statements categorizing images as likely child pornography, and that was improper. The Court concluded that statements in the Cellebrite report identifying a given image as Child Exploitation Material or Child Abuse Material were testimonial and including those testimonial statements violated the defendant's Confrontation Clause rights.

The Court explained that, in general, when "machines generate[] data . . . through a common scientific and technological process," the operators of those machines do not make a "statement" under the Confrontation Clause when reporting the data. Thus, a Cellebrite report, consisting of files viewable

in a report or on a computer, that stopped at downloading the files, would not typically implicate the Confrontation Clause. The Court found that the premise that the hash value of one of the known images matches that of an image found in the Cellebrite download "may just be the kind of machine-generated data from a common technological process that is non-testimonial."

However, the Court clarified that characterizations of, or conclusions drawn from, the data are statements. The Court found that the premise that the images in the Griffeye database were child exploitation or abuse material derives from unknown law enforcement officers' judgments that certain images qualify, and thus that premise creates a Confrontation Clause problem. The Court explained that the premise that "a given image in the Griffeye database is child exploitation or abuse material—is classic testimonial evidence. That conclusion depends on the judgment of law enforcement that a given image is child pornography."

In this case, however, in the context of this trial, the Court found that error to be harmless. The Court found that overwhelming evidence established that the charged images were child pornography.

Full Case At:
https://www.ca4.uscourts.gov/opinions/204557.P.pdf

Virginia Court of Appeals
Published

Hargrove v. Commonwealth: May 2, 2023

King William: Defendant appeals his convictions for Murder, Robbery, and related offenses on issues of Joint Trial, Sixth Amendment confrontation, and Exclusion of Evidence.

Facts: The defendant and his confederate shot and killed an 8-year-old child while robbing the victim's family. The defendant and his confederate targeted the family after the father had posted on social media about recent lottery winnings. Over a week later, police arrested the defendant in Richmond in possession of a firearm. The defendant later pled no contest to possession of that firearm. Subsequently, DFS determined that the gun was used in the murder.

The police also seized a cell phone from the defendant during his arrest. The defendant admitted to police that it was his phone. A data extraction revealed "selfies" of the defendant, an associated email address, and several internet searches made the day after the crime, including searches for "crime reports for King William County, VA." The data extraction also revealed that prior to the robbery and murder, the defendant and his co-defendant exchanged several text messages about meeting that night and had discussed a planned "lick" or robbery. FBI Special Agent Jeremy D'Errico also later testified about how he used cell site records to track the defendant and his confederates' movements.

Prior to trial, the Commonwealth moved in limine to admit the evidence of the firearm and the defendant's conviction. The defendant objected, but the trial court overruled his objection. The trial court also granted a joint trial of the defendant and his co-defendant, over the defendant's objection.

At trial, three different witnesses, two friends and an inmate, testified that the co-defendant confessed to them after the murder. The defendant objected to that evidence on *Crawford* confrontation grounds, but the trial court overruled his objection.

The defendant introduced testimony from his girlfriend at trial. The court sustained the Commonwealth's objection to questions about the defendant's financial stability as not relevant to robbery. The defendant later proffered that the girlfriend would have testified that the defendant made thousands of dollars a night running card games and was doing well financially. The defendant also sought to introduce testimony from the girlfriend that he "often" left his phone at his residence and that "several times" in the past, another person answered when she called the defendant's phone. The court excluded the evidence because the girlfriend could not testify to the whereabouts of the phone on the day of the murder.

Held: Affirmed.

The Court first held that the admission of the co-defendant's confessions did not violate the defendant's Confrontation Clause rights. The Court first examined the "*Bruton*" doctrine, which states that at a joint trial, the admission into evidence of a non-testifying co-defendant's out-of-court confession violates the Confrontation Clause if the confession incriminates the other defendant. The Court concluded that, because *Crawford* limited the scope of the Confrontation Clause to testimonial statements, and the *Bruton* doctrine depends on the Confrontation Clause, it therefore follows that *Crawford* limited *Bruton's* protections to those statements that implicate the Confrontation Clause— to wit: testimonial statements. In this case, the Court ruled that *Bruton* did not apply because the defendant could not show that the confessions he challenged were "testimonial" statements.

The Court pointed out that out-of-court statements are "testimonial" if, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. In this case, the Court found that the three confessions were non-testimonial. The Court reasoned that when the co-defendant confessed, a reasonable person would not have intended to create a statement "for use in an investigation or prosecution of a crime;" Instead, a reasonable person in the co-defendant's position was likely to confide in people he was close to, whom he did not anticipate would participate in his prosecution.

Regarding the joint trial, the Court acknowledged that prejudice may result if evidence against a defendant, if tried alone, is admitted against a co-defendant in a joint trial. In this case, the Court concluded that the evidence admitted specifically against the defendant failed to establish a sufficient basis for concluding the jury was prevented from making a reliable judgment about his guilt or innocence.

Regarding admission of the prior conviction, the Court noted that, in pleading no contest to a charge as set forth in the indictment, the defendant agreed to or admitted that the facts set forth in the indictment were true. Further, the Court rejected the defendant's contention that nothing in the guilty plea admitted a connection to the particular firearm. The Court concluded that the conviction was highly relevant to prove the defendant's identity, presence, and involvement in the crimes, and therefore the court did not err in admitting the evidence.

Regarding the defendant's girlfriend's excluded testimony, the Court found that the proposed testimony was irrelevant. Regarding the witness' testimony about the defendant's income, the Court

repeated that although lack of motive is generally admissible to prove lack of a reason or intent to commit an offense, the proffered evidence would not have established that "logical tendency." Regarding the witness' testimony about the defendant's phone, the Court observed that the defendant was attempting to establish that he was not in possession of the cell phone on the night of the murder. The witness, however, was unable to testify as to the location of the cell phone that night. Therefore, the Court found no abuse of discretion in the court's determination that the proffered testimony about the cell phone lacked relevance and was therefore inadmissible.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1351212.pdf

Bista v. Commonwealth: December 6, 2022

Fairfax: Defendant appeals his convictions for Child Sexual Assault on Hearsay grounds.

Facts: The defendant sexually assaulted a child. The victim was eleven years old at the time and suffered from autism. The child's mother discovered the assault after personally witnessing the defendant assaulting the victim. After police began an investigation, a forensic interviewer conducted a recorded interview with the victim. The child described several assaults by the defendant. Police also obtained DNA evidence that identified the defendant as the perpetrator. The victim then testified at a preliminary hearing.

Prior to trial, the defendant asked the trial court to evaluate the victim's competency to testify. After a hearing, the trial court determined that the victim did not have the "capacity to comprehend the legal significance of an oath," "distinguish truth from a falsehood," or "understand the questions propounded and make intelligent answers." Accordingly, the trial court concluded that the victim was "not competent to testify at this time."

Before trial, the Commonwealth moved the trial court to admit the victim's out-of-court disclosures to her parents, teacher, and the forensic interviewer under § 19.2-268.3. The interviewer was no longer employed at the forensic facility, but the executive director authenticated the video from the forensic interview. The defendant objected, but the trial court overruled the objection.

The defendant then moved to exclude the video of the forensic interview from trial under the Sixth Amendment's Confrontation Clause. Although the defendant acknowledged that he had a prior opportunity to cross examine the victim at preliminary hearing, he argued that the examination was defective because at the time:

(1) the defendant "did not face a rape charge";

(2) "[n]either complete discovery nor all of [the victim's] school records had been disclosed";

(3) the defendant was unaware of additional statements "to the victim's parents and her teacher" admitted at trial;

(4) the victim "purposefully" lied regarding certain facts; and

(5) the victim's autism—"the condition that rendered her incompetent"—made her cross-examination "meaningless."

The trial court overruled the defendant's objection.

At trial, the defendant also proffered two proposed jury instructions regarding witness competency. The first instruction provided: "A person is incompetent to testify if the court finds that the person does not have sufficient physical or mental capacity to testify truthfully, accurately, or understandably." The other instruction stated: "A child is competent to testify if it possesses the capacity to observe events, to recollect and communicate them, and has the ability to understand questions and to frame and make intelligent answers, with a consciousness of the duty to speak the truth."

The trial court rejected the instructions. Instead, the trial court instructed the jury: "The Court's competency ruling explains [the victim]'s unavailability at this trial. Credibility determinations as to witnesses and other evidence are determined by you."

Held: Affirmed. As a matter of first impression, the Court held that that §19.2-268.3 does not condition admissibility on the declarant's competency to testify. Thus, the Court held that the trial court correctly concluded that the victim's incompetency to testify did not automatically render her hearsay statements inadmissible.

The Court noted that the United States Supreme Court has considered statutes similar to § 19.2-268.3 in the context of the Confrontation Clause and recognized that a child sexual assault victim's incompetency to testify does not per se render the child's out-of-court disclosures inadmissible. The Court analogized this case to the *Massey* case, where the defendant faced charges of rape and abduction and the victim died after testifying at the preliminary hearing but before trial.

The Court also examined the child's statements and agreed that her previous disclosures were inherently trustworthy. The Court examined the factors under § 19.2-268.3(B)(1) and agreed that the evidence supported admitting the child's previous disclosures. The Court found that the evidence established the victim's "personal knowledge of the event" and that she provided detailed and largely consistent accounts of the assault to her parents, teacher, and the forensic interviewer.

Regarding the forensic interviewer's statements, the Court simply found that the Confrontation Clause did not apply to the interviewer's statements because they were not hearsay. The Court noted that, at trial, the Commonwealth did not offer the interviewer's statements for their truth, but solely to "provide context" for the jury to understand the victim's disclosures of sexual abuse. As non-hearsay, her statements did not implicate the Confrontation Clause.

Regarding the jury instructions, the Court ruled that the trial court correctly denied the defendant's proffered jury instructions because they created a risk of confusing or misleading the jury and the alternative instruction fairly covered the same issues. The Court found that the defendant's instructions would have advised the jury that the trial court had already determined that the victim was unable to discern the truth. Thus, the Court expressed that the proffered instructions might have confused the jury by suggesting that the trial court's competency ruling was a commentary on the victim's credibility.

Judge Lorish filed a dissent, contending that "out-of-court testimonial statements must be introduced by the Commonwealth at a prior hearing for a defendant to have a constitutionally adequate opportunity for cross-examination about those statements." The dissent focused on whether the prior opportunity to cross-examine required by the Confrontation Clause is statement or declarant specific.

The dissent concluded that the defendant "had no opportunity to cross-examine" the victim about her forensic interview statements because the Commonwealth did not introduce those statements or any testimony about them during the preliminary hearing.

The majority, however, rejected the dissent's argument because the defendant had not made that argument at trial. The majority did not reach the merits of that argument.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0904214.pdf

Khine v. Commonwealth: September 13, 2022
75 Va. App. 435, 877 S.E.2d 514 (2022)
Chesapeake: Defendant appeals his conviction for First Degree Murder on Hearsay and Insanity grounds.

Facts: The defendant strangled and beat his wife to death. Afterwards, the defendant claimed that he had heard voices "controlling his mind" that told him to kill the victim. The defendant later said that "the voice it was hurting me, it was telling me to go to work, the controller he attacked me. It was like I can't control my mind." The parties tried the matter to a judge, rather than a jury.

At trial, the Commonwealth introduced, over the defendant's objection, a witness's hearsay statement that the victim said the day before she was killed that she planned to tell the defendant that she wanted a divorce. The witness further testified that the victim told her that plan the day before the killing. The witness later saw the couple leaving a store together, with the defendant visibly upset.

The defendant offered expert testimony in favor of his insanity defense, claiming an "irresistible impulse." The defense expert opined that, at the time of the offense, the defendant "was responding to delusional thoughts and auditory hallucinations, resulting in his actions. That is, he was unable to rationally think through the reality of the situation, and assaulted his wife, following the directives of the voices he was hearing." The expert concluded that the defendant "was indeed suffering from the symptoms consistent with an acute episode of psychosis." "Additionally, . . . there is evidence to suggest that [the defendant] was experiencing symptoms to the extent of impairing his ability to resist the impulse to commit the offense."

After receiving all evidence and hearing closing arguments, the trial court granted the Commonwealth's motion to strike the defendant's insanity defense, finding as a matter of law that the defendant failed to show that he was "totally deprived of the mental power to control or restrain" his actions. The trial court complained that the defendant's expert had failed to testify that the defendant was "powerless to control himself."

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

Regarding the hearsay issue, the Court found no error in the evidentiary ruling because the statement about the victim's divorce plans was admissible under the state-of-mind exception to the hearsay rule. The Court ruled that this statement was admissible under the "*Hillmon* doctrine," referencing an 1892 case from the Virginia Supreme Court. The Court analogized this case to the 2006 *Hodges* case, where the Supreme Court held that the trial court properly admitted a witness's testimony

that, the day before she was killed, the victim said she was "going to meet" the defendant and "would be right back."

In this case, the Court noted that the victims' statement that she was going to "tell [the defendant] she wanted a divorce" was admissible as evidence that the victim acted in accordance with her plan. Taken together with the witness's personal observations, the evidence made it more probable than if there had been no such proof that the victim carried through with her stated intent.

However, the Court ruled that the trial court erred in striking the defendant's insanity defense because it failed to view the evidence in the light most favorable to the defendant. Under that standard, the Court found that the defendant had met his burden of production on his affirmative defense. The Court explained that the trial judge, sitting as the factfinder, should have instead determined whether the defendant carried his burden of persuasion to prove by a preponderance of the evidence that the defendant was totally deprived of the ability to resist the voices that he claims commanded him to kill his wife.

The Court acknowledged that the defense expert's testimony had some ambiguity, but found that, at a motion to strike, the evidence from the expert supported the defendant's affirmative defense that he was totally unable to resist the voice in his head that commanded him to kill his wife. Because the trial court failed to apply the correct legal standard, the Court ruled that the trial court erred in granting the Commonwealth's motion to strike.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0900211.pdf

Canada v. Commonwealth: August 30, 2022
75 Va. App. 367, 877 S.E.2d 146 (2022)
Campbell: Defendant appeals his convictions for Possession of a Firearm, Reckless Handling, and Discharging a Firearm on Authentication and Sixth Amendment Confrontation grounds.

Facts: The defendant, a convicted felon, shot a firearm outside his ex-girlfriend's home. The victim called 911, reported the offense, and provided a description of the defendant and his vehicle. Police responded and found a shell casing at the crime scene. They then located the defendant and his vehicle and recovered the firearm from his car.

At trial, the Commonwealth sought to introduce a recording of the 911 call along with a computer-aided dispatch document summarizing the call. To authenticate the documents, the Commonwealth called the custodian of records the 911 call center, who testified that the recording was a true and accurate copy of the original call. The Commonwealth also introduced a certificate of authenticity for the computer-aided dispatch document.

The defendant objected on the grounds that § 8.01-390(B) required that the recording of the phone call be accompanied by an affidavit and certificate that contained the date, time, and phone number of the call. He asserted that the certificate supplied by the Commonwealth did not include this information, but the trial court overruled the objection, concluding that the live testimony of the custodian was sufficient to authenticate the tape.

The defendant also objected to the introduction of the tape on hearsay and Confrontation Clause grounds. The defendant argued that the victim's statements on 911 were testimonial and that the Commonwealth was therefore required to call her to testify. The trial court ruled that the statements were excited utterances and were non-testimonial and overruled the defendant's objections. The victim later testified as a defense witness and recanted her earlier statements.

Held: Affirmed. The Court ruled that the 911 call center custodian's testimony complied with the authentication requirement of § 8.01-390(A), and the 911 call records were public records that were therefore "self-authenticating" under Rule 2:902. The Court ruled that § 8.01-390(B) is not the exclusive means of authenticating 911 records and the Commonwealth validly authenticated the call under § 8.01-390(A). The Court then held that the statements contained in the 911 call were nontestimonial and therefore not within the scope of the Confrontation Clause.

Regarding the authentication of the 911 call, the Court acknowledged that in general, in order for a public record to be properly authenticated, the proponent of such a record would need the custodian or custodian's supervisor to appear in court and testify to the record's authenticity so that the record can be "authenticated . . . by the custodian thereof." The Court explained that § 8.01-390(A), however, goes on to provide an alternative means to authenticate these documents: if a document is a "digitally certified copy," whether in electronic or print form, it shall be "deemed to be authenticated by the custodian of the record unless evidence is presented to the contrary."

In a footnote, the Court pointed out that, under § 2.2-3817, a "digitally certified copy" as "a copy of an electronic record created by an agency to which the agency has attached a digital signature." "[D]igital signature means an electronic sound, symbol, or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the document."

The Court rejected the defendant's argument that § 8.01-390(B) imposes a mandatory command on the proponent of the evidence. Instead, the Court explained that the statute simply provides an alternative avenue to authenticate 911 calls that does not require live custodian testimony. Accordingly, the Commonwealth had the option of authenticating the call through live testimony of the custodian, by a certificate of authenticity meeting the requirements of § 8.01-390(B), or by any other collection of direct and circumstantial evidence that supported a finding that the call was what the Commonwealth said it was, per Va. R. Evid 2:901.

In another footnote, the Court explained that, although § 8.01-390 is largely concerned with the public records hearsay exception, the plain language of the statute clearly states that evidence offered in compliance with the statute "shall be received as prima facie evidence." Accordingly, it is "one of the few statutes relating to document admissibility which satisfies the best evidence rule, the authentication requirement and the hearsay rule."

The Court then addressed the Sixth Amendment Confrontation Clause issue. The Court reviewed the factors under *Davis v. Washington*, but ultimately explained that "In the wake of *Bryant* and *Cody*, it is clear that although the *Davis* factors remain relevant to the primary purpose inquiry, courts should consider the totality of the circumstances when determining whether out-of-court statements are nontestimonial." In this case, the Court analogized this case to *Wilder* and found that the totality of the circumstances in this case made clear that the primary purpose for the out-of-court statements was not

to create a substitute for trial testimony. The Court also applied the four *Davis* factors and concluded that the primary purpose of the 911 call was to obtain assistance for an ongoing emergency.

The Court noted that the evidence established that the defendant was upset, was a felon and therefore prohibited from possessing a firearm, and that he had already shot the gun once in a dangerous and reckless manner. The questions from the 911 operator, and the victim's responses, were geared towards finding and disarming the defendant so that there would be no further harm. At the time of the call, the defendant's precise location and intentions were unknown, and the victim believed that he was armed with a weapon. Unlike the larceny in *Wilder*, the Court found that the crime in this case presented a threat of physical harm to both the victim and potential bystanders including the children in the victim's home. Furthermore, even though the defendant was not immediately threatening the victim, the emergency did not end until the defendant was apprehended.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1105213.pdf

Flannagan v. Commonwealth: August 16, 2022
75 Va. App. 349, 876 S.E.2d 706 (2022)
Louisa: Defendant appeals his conviction for First-Degree Murder on Exclusion of PBT results.

Facts: The defendant shot and killed a man after an argument. Officers responded and captured the defendant. During the arrest, officers administered a PBT to the defendant, resulting in a reading of .189.

The defendant sought to admit the results of the PBT at trial. He wished to introduce the PBT results and have an expert testify about what that level of intoxication would indicate, to challenge the premeditation element of the first-degree murder charge. The defendant proffered that if the results were admitted, the expert would testify what a blood alcohol content of .189 meant and how it would affect "judgment, attention, motor coordination, and reaction time." The defendant argued that the PBT was sufficiently reliable to admit the results because he proffered evidence that the device was recently calibrated.

The trial court denied the motion.

Held: Affirmed. The Court acknowledged that, while § 18.2-267 prohibits the use of PBT results in the guilt phase of DUI offenses, the question of whether a PBT is admissible in cases other than those specifically prohibited under § 18.2-267 has not been resolved. The Court noted that, in *Santen*, the Virginia Supreme Court concluded that the defendant had not laid a proper foundation because the accuracy of the machine was conditioned on regular calibration and there was no evidence that the machine used had been regularly calibrated.

The Court explained that the General Assembly considers PBTs reliable in the context of determining whether there is alcohol in the blood, but not so reliable when it comes to determining the level or amount of alcohol in the blood. In this case, the Court pointed out that the defendant had no one to say that a calibrated machine is reliable and accurate. Thus, even assuming without deciding that

PBT results are admissible in those cases where not specifically prohibited by statute, the Court concluded that the defendant's proffer was not sufficient to demonstrate that a properly calibrated machine was reliable to give an accurate BAC.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0923212.pdf

Virginia Court of Appeals
Unpublished

Snead v. Commonwealth: March 7, 2023

Pittsylvania: Defendant appeals his conviction for DUI Manslaughter on Admission of Hospital Records, Admission of Expert Testimony, and Sufficiency of the Evidence.

Facts: The defendant drove while intoxicated, failed to recognize a curve in the road, continued straight, struck two road signs, careened down an embankment, and crashed into a tree, killing his passenger. The defendant arrived at the emergency room, where staff collected a blood test. The defendant's "serum" BAC" was .20 %.

At trial, Dr. Trista Wright, a forensic toxicologist, testified that when she converted the defendant's "serum" blood alcohol test results to "whole blood" alcohol results, the "whole blood" BAC was between 0.16 and 0.18 at the time of testing. She also opined that the defendant's "whole blood" BAC at the time of the accident was 0.2. She testified that a 0.2 BAC level would negatively impact the defendant's ability to drive by interfering with "the critical judgment . . . and . . . the motor skills . . . needed to react to different stimuli[,] . . . stay into [sic] the lanes or react to the speed and the distance between objects." Dr. Wright also noted that, "at night, visual acuity m[ight] become an issue."

At trial, the defendant objected to admitting the blood alcohol results contained in his hospital records because he argued that there was insufficient evidence presented on the chain of custody of the blood test and therefore the evidence was unreliable. The trial court overruled his objection.

The defendant also argued Dr. Wright's opinion was too speculative to be admissible because the blood test results were unreliable due to the lack of chain of custody evidence. At trial, the defendant the defendant attempted to impeach the expert's opinion on that basis when he questioned both she and the custodian of the hospital records about their lack of knowledge on chain of custody issues. The trial court overruled the objection.

Regarding the sufficiency of the evidence, the defendant argued that his BAC test could have been compromised by the drugs administered to him after the accident, although he presented no evidence of that. The defendant also argued that the evidence was insufficient to demonstrate his intoxication caused the crash and insufficient to demonstrate that he had demonstrated criminal negligence.

Held: Affirmed.

The Court first addressed the admission of the hospital records. The Court ruled that the trial court did not abuse its discretion by admitting the blood test results and hospital records without further chain of custody foundation. The Court cited the 4th Circuit's ruling in *Thomas v. Hogan* that "there is good reason to treat a hospital record entry as trustworthy." The Court explained that "hospital records are deserving of a presumption of accuracy even more than other types of business entries." The Court cited *Stevens v. Commonwealth*, 46 Va. App. 234, 246 (2005), where the defendant had similarly argued that, though the rule against hearsay did not bar admission of a hospital toxicology report, the Commonwealth had laid insufficient foundation for its admission.

The Court then addressed the defendant's chain of custody objection and ruled that the blood tests upon which Dr. Wright's opinion rested were properly admitted into evidence. The Court found that the defendant's chain of custody concerns went to the weight of the expert's opinion, not its admissibility. The Court noted that the defendant produced no evidence suggesting that the analysis of the BAC in his blood samples was flawed or that any drugs he received altered his BAC readings. The Court found that the expert's opinion was based on assumptions that were either supported by the evidence or uncontested.

The Court then concluded that, based on the defendant's BAC test results and the expert's opinion that the BAC was 0.2 when the accident occurred, the evidence supported the trier of fact's rational conclusion that the defendant was intoxicated at the time of the crash. Regarding the defendant's claim that his BAC test could have been compromised by the drugs administered to him after the accident, the Court complained that the defendant cited no evidence supporting that theory.

Regarding causation, the Court examined the facts in detail. The Court found that the tire tracks in the snow demonstrated that the defendant made no attempt to correct his path or brake after leaving the road, despite the presence of a road sign marking the curve. Based on the extensive damage to the front of the car and the straight path from the road to the tree, the Court ruled that the evidence supported the trial court's finding that the defendant drove directly into the tree at a high rate of speed. The Court also noted that the expert testified that a BAC of 0.2 would interfere with a driver's "judgment" and reaction time as well as his ability to judge speed and his ability to stay in his lane of travel. Accordingly, the Court concluded that the record was sufficient to prove beyond a reasonable doubt that, as a result of driving under the influence of alcohol, the defendant caused his passenger's death.

Lastly, the Court examined the evidence of criminal negligence. The Court noted that it had already held that driving with a BAC of more than 0.25, standing alone, constitutes "a willful act" sufficiently "gross, wanton, and culpable" to prove a violation of § 18.2-36.1(B). In this case, though, the Court did not decide whether driving with a BAC of 0.2 was sufficient, standing alone, to establish the "gross, wanton, and culpable" conduct required to prove aggravated involuntary manslaughter. Instead, in this case, the Court ruled the BAC evidence proved that the defendant's level of intoxication was two and one-half times the legal limit, and therefore the defendant was substantially impaired by alcohol. The Court also found that the evidence supported the trial court's finding that, as a result of the level of intoxication, the defendant did not conform his driving to the weather and road conditions.

The Court wrote: "The evidence proved that, while he was extremely intoxicated, Snead chose to drive a curvy, dangerous road when the road and visibility conditions were poor. He failed to heed the road signs marking the curve, and instead, drove straight off the road at a high rate of speed directly

into a tree. Viewed as a whole and in combination, the circumstances here were sufficient to support the reasonable conclusion that Snead was criminally negligent when he chose to transport Adams down a treacherous stretch of road when the road conditions were deteriorating, all while his intellectual and motor skills were substantially impaired by alcohol."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0044223.pdf

Warren v. Commonwealth: February 21, 2023

Williamsburg: Defendant appeals his convictions for Attempted Murder and related offenses on Admission of Text Messages

Facts: The defendant, angry at the victim, shot into her bedroom, nearly striking her in her bed. Before the shooting, the defendant stated via text message that he was going to shoot and kill the victim. When the victim entered the home, the defendant reiterated that message. Witnesses and forensic analysis later connected him to the firearm and shell casing found at the scene. The defendant also later circled the bullet hole in the wall of the victim's home and painted, "this should have killed u."

After the incident, the defendant continued to text the victim and referred to the shooting. Further, the defendant disclosed to his daughter via text messages that he had shot at the victim, but missed, and wished he had killed her.

At trial, the Commonwealth introduced screenshots that showed the text messages. When asked if she had communicated with anyone else on this number, the victim testified that sometime in the past she had received text messages from "maybe his friend" texting from the defendant's number, stating the victim needed to pick him up. The victim testified that the defendant gave her this number to store in her phone, that she regularly communicated with the defendant on this number, and that every time someone called from this number it was the defendant with whom she speaks, and she recognized his voice.

Also, the trial court admitted Verizon business records into evidence, without objection, which showed the disputed text conversation between this same number and the defendant's phone number. The victim testified that the Verizon records showed the text conversations she had with the defendant.

The defendant's daughter testified to the phone number she used to communicate with the defendant, that the defendant gave her the number, that she communicated with the defendant on this number using text message and phone calls, and that she had saved this contact number as "Father." It was the same number the victim used to communicate with the defendant.

The defendant objected to the screenshots of the text messages coming into evidence; he asserted that they were hearsay. His stated reason for the objection was because the witness was "speculating as to who is sending the text message." The defendant argued that the trial court erred in admitting the screenshot of text messages because there was a lack of sufficient foundation that they included statements made by the defendant and were therefore inadmissible hearsay.

The trial court allowed the screenshots into evidence and said it would assign weight to the witness' testimony regarding communications with other people using the same number, and subject to cross-examination.

Held: Affirmed.

The Court ruled that the record supported the trial court's finding by a preponderance of the evidence that the phone number appearing in the screenshot of the victim's phone belonged to the defendant and that he authored and sent the text messages from that phone number. The Court concluded that the evidence satisfied the foundational requirement of proving by a preponderance of the evidence that the defendant authored and sent the challenged text messages from his cell phone. Thus, the trial court did not abuse its discretion in concluding that the Commonwealth sufficiently authenticated the text messages to render them admissible for consideration as a party admission.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0348221.pdf

Nutter v. Commonwealth: January 10, 2023

Roanoke: Defendant appeals his convictions for Rape, Sodomy, and Assault on Admission of Recent Complaint evidence.

Facts: The defendant sexually assaulted the victim and abandoned her at a convenience store afterward. The victim made an initial attempt to get help after the attack, by calling her boyfriend and another person, but that attempt failed. As she was walking away from the store, the victim encountered a police officer. He observed that she was bleeding, crying, and upset, and asked what happened. She responded that she had been beaten and raped.

At trial, the trial court admitted the officer's testimony about the victim's statement over the defendant's objection.

[*Great job to Beth Oates on prosecuting this case – EJC*].

Held: Affirmed.

The Court repeated that in a prosecution for criminal sexual assault, under § 19.2-268.2, "the fact that the person injured made a complaint of the offense recently after commission of the offense is admissible not as independent evidence of the offense, but for the purpose of corroborating the testimony of the complaining witness." In this case, the Court found that the victim's statement explained her physical condition and mental distress, and that the trial court did not abuse its discretion in admitting her statement to the officer as corroboration of her testimony.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1275213.pdf

Neenan v. Commonwealth: October 4, 2022

Spotsylvania: Defendant appeals his conviction for Grand Larceny with Intent to Sell on Admission of Business Records.

Facts: The defendant stole two chainsaws and one backpack blower from a store and less than thirty minutes later, sold the same items to the pawn shop. The theft was captured on video and the pawn shop kept records of the identification that the defendant presented.

At trial, the loss prevention officer testified that the HR and IT departments conduct daily tests to verify the accuracy of the surveillance system, and she verified that the tests had been run on the offense date. She further verified that the time and dates on the video were correct. The witness identified the defendant as the individual depicted in the video after having met him in person when he returned to the store and attempted to pay for the stolen merchandise. The witness downloaded the video files to her computer which only she could access and stored the files there until she copied them onto a disk to be used at court. The witness confirmed that the video had not been altered.

At trial, a pawn shop employee testified that all employees are required to scan a seller's identification at the time a purchase is made. The pawn tickets are made at the time of the transaction, and both the ticket and the copy of the identification were made and kept in the regular course of business. The witness testified that he knew how the records were created, had access to the records, and made use of the records as part of his duties.

The defendant objected to the admission of the store's video, photographs from the video, and the pawn records, but the trial court overruled the objection.

Held: Affirmed. The Court found no abuse of discretion with the trial court's decision to admit the store video, the store's photographs, and the pawn store ticket.

The Court found that the loss prevention officer's testimony sufficiently authenticated the video and photos taken from the video, and the record supported the trial court's decision to admit the video and photographs.

The Court also found that, as in *Melick*, the pawn shop employee was sufficiently familiar with the operations of the business and the policy regarding the creation of the records to satisfy the "another qualified witness" requirement of Rule 2:803(6)(D).

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1124212.pdf

Perry v. Commonwealth: September 13, 2022

Rockbridge: Defendant appeals her Probation Revocation on Hearsay grounds.

Facts: While on probation for Disorderly Conduct, the defendant had contact with the victim in violation of her probation using "social media diatribes." At multiple points throughout the trial, the defendant objected to the introduction of the Facebook social media posts on foundation, hearsay, and confrontation grounds. The defendant argued that "the trial court erred in admitting hearsay evidence of a social media post which lacked proper foundation" in violation of the defendant's limited rights of confrontation at a revocation hearing.

At trial, the victim explained that after she received the screenshots of these posts, she went to the defendant's Facebook page and viewed the posts there. The trial court overruled the defendant's objections and admitted the screenshots of the posts as exhibits.

Held: Affirmed. Because the Court concluded that the Facebook posts were not hearsay, the Court ruled that even the limited right of confrontation in revocation proceedings did not apply. The Court noted that the rule against hearsay does not exclude "[a] statement offered against a party that is . . . the party's own statement" under Va. R. Evid. 2:803(0).

The Court also rejected the defendant's argument that the Commonwealth did not lay a proper foundation or authenticate the Facebook posts and did not establish that the defendant authored the posts. The Court ruled that the evidence was sufficient, under the applicable "preponderance of the evidence" standard, to conclude that the defendant made the statements contained in the Facebook posts.

The Court noted that the Facebook account used the defendant's maiden name, and the victim testified that she was familiar with the Facebook account the defendant used. She had viewed it before, and she described it as "very active." There were also photographs of the defendant, the defendant's daughter, and her family on the account. Furthermore, the post itself contained personal information that could refer only to the defendant, the victim, and individuals close to them.

Because the record supported the trial court's finding that the defendant was the person who made the statements in the Facebook posts, the Court ruled that the posts were admissible as "the party's own statement." Va. R. Evid. 2:803(0). Accordingly, the Facebook posts were not excluded by the rule against hearsay, and they did not implicate the limited right of confrontation available in revocation proceedings.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0877213.pdf

Grant v. Commonwealth: August 30, 2022

Hampton: Defendant appeals his conviction for Possession of a Firearm on Admission of Video Evidence, Allowing Replay of Evidence, Striking a Juror for Cause, and Denial of a Mistrial.

Facts: The defendant, a convicted felon, carried a firearm to a gambling house. A surveillance camera recorded a security guard taking the firearm from the defendant. Once inside, the defendant then obtained another firearm from a friend. Later, several men entered and shot several people,

including the defendant. The defendant went to the hospital with another victim, but not before retrieving his original firearm from the security guard. The other victim died at the hospital.

Police interviewed the defendant and he confessed to carrying the firearm. He also identified himself and his firearm in the surveillance video. At trial, the defendant objected that the admission of the surveillance video violated the Confrontation Clause because the custodian of the video could not be confronted and cross-examined. The trial court overruled his objection.

During jury selection, one juror revealed that her brother had a felony conviction. She stated that there was nothing about that case that would prevent her from being a fair and impartial juror in the instant case. The Commonwealth then asked: "during the trial you may hear testimony that the Defendant was shot on the very same date that he allegedly committed this crime. Would the fact that the Defendant got shot make you feel sympathetic toward him?" The juror responded that it would. However, the juror denied that it would affect her judgment regarding guilt, innocence, or sentence.

The Commonwealth moved to strike the juror for cause based on her response that she would feel sympathetic toward the defendant if he was shot. Over the defendant's objection, the trial court granted the motion.

At trial, when the Commonwealth played the audio-recorded police interview for the jury, there was a problem with low volume. On the second day of trial, the Commonwealth replayed the final ten-to-twelve minutes of the recorded police interview for the jury over the defendant's objection. The defendant unsuccessfully argued that this replay prejudiced him by giving undue emphasis to this portion of the Commonwealth's evidence. The trial court found that when the recording was first played for the jury, the "audio quality was compromised at best, or it had some type of feedback." The trial court gave the jury an instruction that explained that the purpose of the replay was "so you can hear that evidence and evaluate that evidence."

At the end of the trial, the jury returned a verdict. The trial court assembled and polled the jurors. However, during polling, one of the jurors stated "no" to the question "is this your unanimous verdict." The trial court instructed the jurors to return to deliberations. The trial court instructed the jury:

> "to deliberate to make sure everyone's views are fully and fairly expressed in whatever verdict you have. If you are at an impasse and you have some interest in retiring for the night, that is fine. We will entertain that. Just let the deputies know. But I at least want to give the jury, out of my presence, out of the Court's presence, the opportunity to fully and fairly express their views and see where it goes from there. All right. So the Court does not find the verdict is unanimous at this time. I'm going to instruct you to retire to resume your deliberations, and we'll just stand by and let us know."

The trial court denied the defendant's motion for a mistrial. The jury later returned with a unanimous verdict.

Held: Affirmed.

The Court first addressed the video surveillance video and ruled that admission of the surveillance video did not violate the Confrontation Clause because the video served as a silent witness, not as the statement of a missing or unavailable witness. The Court then addressed the replay of the audio recording, and concluded that, since the purpose of the replay was not to emphasize the evidence

but to ensure that the jury had an opportunity to hear and consider the evidence, the trial court did not abuse its discretion in allowing the replay of a segment of the recorded police interview.

Regarding striking the juror for cause, the Court did not find manifest error in the trial court's finding of a high potential that the juror would not be impartial based on the totality of her answers.

Lastly, the Court ruled that the trial court did not err in denying the defendant's motion for a mistrial based on a polled juror's statement that the reported guilty verdict was not her verdict. The Court explained that, when the polling of the jury revealed that the guilty verdict was not unanimous, the trial court was authorized to direct the jury to resume deliberations. The Court pointed out that Rule 3A:17(D) provides that "[i]f upon the poll [of the jury], all jurors do not agree, the jury may be directed to retire for further deliberations or may be discharged."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0827211.pdf

Thomas v. Commonwealth: August 16, 2022

Augusta: Defendant appeals his convictions for Grand Larceny and Conspiracy on admission of Other Crimes evidence and Admission of Business Records

Facts: The defendant and his confederates stole numerous tractors and trucks throughout Virginia and Maryland. The thieves specifically targeted Kubota dealerships at night. GPS data placed the defendant's cell phone at thefts at dealerships in Augusta County, Hagerstown, and Hanover. The defendant's phone also searched for a dealership in Campbell County just before a theft there. In each theft, two men loaded skid steers onto trailers already located on-site and used stolen pickup trucks to haul the equipment to Maryland, paying cash for gas along the way. The thieves used the same pickup truck stolen from another location to perpetrate subsequent thefts in Hagerstown and Hanover.

At trial, the Commonwealth sought to introduce a "Certificate of Authenticity" and accompanying letter that Google provided in response to an officer's "secondary search warrant" requesting subscriber information for the two "suspicious device IDs" present at each theft. The defendant objected, arguing that the return was not admissible under the business records exception to hearsay because the documents lacked sufficient indicia of trustworthiness. The defendant argued that because neither document from Google explicitly referenced the two device IDs identified in the search warrant, there was "nothing on the Google response which would be a business record to connect it to the device."

Google's letter accompanying the records certification did not explicitly reference the two anonymized device IDs. It explained, however, that "the Device ID (or device tag) is not a valid target identifier that can otherwise be used to search for information." Rather, "[t]he Device ID is used only for distinguishing unique devices in a particular user's location history." Therefore, "Google has only provided basic subscriber information . . . for the requested devices."

Additionally, the "Certificate of Authenticity" expressly stated that the records were certified by a proper custodian, that "Google servers record this data automatically at the time, or reasonably soon

after, it is entered or transmitted by the user," and that "this data is kept in the course of this regularly conducted activity and was made by regularly conducted activity as a regular practice of Google." The certification also states that the record is a "true duplicate of original records that were generated by Google's electronic process or system that produces an accurate result" and that Google "regularly verifies" the "accuracy of its electronic process and system."

An officer also testified regarding the typical protocol for obtaining Google records, stating that "when police request information in reference to the anonymized device number, Google respond[s] back with the subscriber information for the device ID's that we requested." He confirmed that he received the letter and "Certificate" from Google in response to his search warrant. The trial court overruled the defendant's objection and admitted the records.

Held: Affirmed.

Regarding the "other crimes" evidence, that Court concluded that the thefts in this case shared a constellation of "idiosyncratic" features establishing a "common scheme." The Court also found that the evidence revealed a unique execution method. The Court agreed that the Commonwealth established that the "other crimes" evidence tended to prove relevant facts pertaining to the offense charged: namely, a common scheme and the perpetrator's identity.

Regarding the Google evidence, the Court examined Rule 2:803(6), which permits the introduction of business records at trial as an exception to hearsay. The Court repeated that the trustworthiness or reliability of the records is guaranteed by the regularity of their preparation and the fact that the records are relied upon in the transaction of business by the person or entities for which they are kept. In this case, the Court found nothing in the record that "indicate[s] a lack of trustworthiness" of the Google records, either regarding "the source of information" or "the method or circumstances of preparation."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0613213.pdf

Palmer v. Commonwealth: August 9, 2022

Hampton: Defendant appeals his conviction for Distribution of Cocaine on Sixth Amendment Confrontation and Speedy Trial grounds.

Facts: The defendant sold cocaine on six occasions to a police informant. Police arrested the defendant on the indictment on September 22, 2019. Between the arrest and his trial on June 14, 2021, 631 days elapsed. Twelve days passed between the defendant's arrest and the first hearing where he had counsel appointed. Then, the defendant's counsel concurred to an eleven-day continuance between October 4, 2019, and October 15, 2019. After new counsel was appointed, the defendant did not object to the thirteen-day continuance from October 15 to October 28, 2019. On November 6, 2019, the defendant and the Commonwealth set the trial for April 16, 2020, which was outside the statutory speedy trial period. The trial court then continued the matter due to the COVID pandemic.

Trial finally took place on June 14, 2021. During the trial, the informant testified about each controlled buy. The informant purchased drugs twice from the defendant directly in the first ten days before the third controlled buy, using a nearly identical process.

For the third buy, the defendant orchestrated and coordinated the buy with the informant, and he told the informant where to go. The defendant then texted the informant that his associate had arrived to sell the informant the cocaine. The informant refused to buy the cocaine from the defendant's associate at first. Instead, when the associate arrived at the location and approached the informant's vehicle, the informant told the associate "I don't know you and I'm not getting anything from you. Who are you?" The associate responded that the defendant sent her. The associate told the informant that the defendant "bagged [the cocaine] up." The informant then completed the transaction. A detective then saw the defendant and the associate meet up shortly after the sale.

The defendant objected to the testimony about the associate's statements, arguing it was testimonial hearsay and that the defendant had no opportunity to confront the associate about her statements.

Held: Affirmed. The Court held that the defendant's associate's statements were not testimonial hearsay because they were co-conspirator's statements made in furtherance of the conspiracy. The Court then held that the speedy trial deadline was either waived by the defendant or tolled by the judicial emergency.

The Court first addressed the defendant's argument that his associate's statements to the informant were inadmissible testimonial hearsay and his complaint that the defendant did not have an opportunity to confront the associate about them. The Court ruled that the statements were admissible as an exception to the hearsay rule allowing co-conspirator statements made in furtherance of a conspiracy and were not testimonial. Thus, the Court ruled that the Confrontation Clause's protections did not apply, and the trial court did not err in admitting the statements.

The Court acknowledged that the associate's statements alone did not prove the conspiracy existed. However, the circumstances showed that the defendant and his associate pursued the same object, cocaine distribution, and took steps to achieve it. As a result, the Court agreed that the Commonwealth sufficiently proved a prima facie case that a conspiracy between the two existed. Thus, the Court ruled that the associate's statements were admissible as co-conspirator statements in furtherance of a conspiracy and were, by nature, nontestimonial.

Regarding the defendant's speedy trial claim, the Court repeated that § 19.2-243's restrictions do not apply to speedy trial deadline calculations when a defendant or his counsel requests the continuance, concurs to the Commonwealth's continuance motion, or fails to timely object to that motion. The Court also noted that it charges to a defendant the delay between appointing new counsel for the defendant and the new trial date. Additionally, the Court repeated that it had recently concluded that the judicial emergency orders based on the COVID-19 pandemic tolled statutory speedy trial deadlines under § 19.2-243(7), beginning March 16, 2020, and continuing through June 22, 2022.

The Court noted that the defendant and the Commonwealth set the trial for April 16, 2020, which was outside the statutory speedy trial period. Under § 19.2-243(4) and *Hutchins*, the Court ruled that the defendant concurred to the 162-day continuance because his counsel concurred to a trial date outside the statutory speedy trial deadline.

For the period between April 16, 2020, and the final trial on June 14, 2021, the Court ruled that 424 days of the statutory speedy trial calculations were tolled by the judicial emergency. Thus, only twelve days were attributed to the Commonwealth between the arrest and the first hearing where the defendant had counsel appointed. The Court observed that the defendant then either agreed to or did not object to continuances for 195 days between the first hearing and the original trial date. For the remaining 424 days, the Court ruled that the Commonwealth proved that the delay was based on a reason outlined in Code § 19.2-243: the judicial emergency resulting from the COVID-19 pandemic.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0885211.pdf

Tyler v. Commonwealth: August 2, 2022

Norfolk: Defendant appeals his conviction for Strangulation on Admission of Victim's Prior Testimony

Facts: The defendant attacked and strangled his ex-girlfriend who was pregnant with their child. The victim testified under oath at preliminary hearing and was subject to cross-examination. At preliminary hearing, the victim also identified several photographs of texts from the defendant and authenticated several photos of her injuries.

However, prior to trial, the Commonwealth served the victim twice by posted service, only for the victim to not appear at trial. Despite repeated efforts, the Commonwealth was unable to contact her. The Commonwealth made several calls to her phone but only secured "a busy signal or a message that it was unable to receive the call." The Commonwealth sent police officers to her last known residence to attempt to see if she still lived there, called the phone number it previously used to communicate with her, reached out to victim's advocates for information on her whereabouts, and requested that investigators check their databases for any updated contact information—all to no avail.

Before final trial date, the Commonwealth filed a motion to admit the transcript of the victim's testimony from the preliminary hearing. The trial court granted the motion over the defendant's objection.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in concluding the Commonwealth exercised due diligence to locate the victim and secure her attendance at trial. Therefore, the Court concluded that the preliminary hearing transcript was admissible under Virginia Rule of Evidence 2:804 and not barred by the Confrontation Clause or Virginia Rule of Evidence 2:804(b)(1). Because the victim was present at the preliminary hearing and subject to cross-examination by the defendant's attorney, his right of confrontation was fully protected, and the Court found that "he cannot now complain because he wishes the attorney would have probed the defendant's testimony more thoroughly."

The Court likened this case to *Harris* and *Morgan* and distinguished it from cases like *Bennett* and *McDonnough.* The Court then ruled that the issuance of a subpoena to a witness's last known address which is later returned marked "not found" is sufficient to show due diligence if the party

seeking to introduce the hearsay takes whatever additional investigatory steps a reasonable and prudent person would take under the circumstances to secure the witness's attendance at trial. The Court held that the trial court did not abuse its discretion because "[d]ue diligence requires only a good faith, reasonable effort; it does not require that every possibility, no matter how remote, be exhausted."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0888211.pdf

Reyes Reyes v. Commonwealth: June 21, 2022

Fairfax: Defendant appeals his convictions for Murder, Street Gang Participation, and related charges on Jury Instruction, Admission of Social Media Evidence, Denial of Hearsay Testimony, and sufficiency grounds.

Facts: The defendant and another man beat a child to death. The defendant was member of MS-13 and had a high enough rank to give orders. The other men involved in the killing, were gang-affiliated; one was a lower-ranking gang member told to bury the body. At trial, that man testified that he acquiesced because the defendant was a higher-ranking gang member, and he was fearful that the defendant could retaliate if he did not comply.

Police later spoke with a witness to the incident. When police told her that the victim was dead and that they had located his grave, the witness allegedly stated "good." The defendant sought to admit that statement at trial, as an "excited utterance," but the trial court denied the defendant's request.

At trial, the witness stated that when the defendant and the other man beat the victim to death, they called him a "rival gang member" and discussed "revenge" for a prior stabbing of another person. The defendant also told the witness she was "in the gang now" after they killed the victim. At trial, a detective provided expert testimony that one goal of MS-13 is to commit violent acts to scare the community. At trial, the defendant himself admitted that the three men armed themselves and intended to beat the victim.

At trial, the Commonwealth introduced evidence from subpoena returns of the defendant's Facebook and Instagram account. A detective testified that he discovered information related to social media accounts possibly maintained by the defendant, and based on that information, he acquired a search warrant that yielded the information in the exhibits. The detective also testified that during the defendant's interview, the defendant identified multiple photos and posts from the two social media accounts and confirmed that the accounts belonged to him and that he was the person in the photos. The defendant objected that, that because the accounts were not registered in his name, the Commonwealth did not properly authenticate the exhibits. The defendant later testified that the accounts belonged to him.

The trial court denied the following instruction from the defendant: "if you find the defendant guilty of first degree felony murder in the commission of an abduction, then you must find him not guilty of the offense of abduction."

Held: Affirmed.

Regarding the social media evidence, the Court noted that Rule 2:901 applies to social media evidence. The Court agreed that the trial court properly determined that the Commonwealth proved, by a preponderance of the evidence, that the social media accounts were authenticated and admissible.

Regarding the witness's statement "Good" regarding the dead victim, the Court noted that the statement was elicited in the context of an extensive interview which, according to her own testimony, took place weeks after the witness watched the defendant kill the victim, so information that he was dead was not a surprise to her. The Court found that the witness' statement here was not an "instinctive reaction to a horrifying event."

Regarding the jury instruction, the Court repeated that, under *Spain*, "the purpose of references to felonies in the murder statutes is gradation and not prohibition of punishment for the underlying felonies." Therefore, multiple convictions in a single trial for murder committed during a felony and the underlying felony do not violate the constitutional protections against double jeopardy. Because the defendant's proposed instruction was an incorrect statement of law, the Court ruled that the trial court did not err in denying it.

Lastly, the Court found the evidence sufficient to convict the defendant.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0525214.pdf

Prior Bad Acts

Virginia Court of Appeals
Published

Vera v. Commonwealth: April 11, 2023

Northampton: Defendant appeals his conviction for PWID and Contributing on Denial of his Accommodation Defense and Admission of Prior Bad Acts.

Facts: The defendant provided GHB to two children at a party, causing both to lose consciousness and sending them to the hospital. At trial, both victims testified that they had never heard of GHB, did not request it from the defendant, and that he simply offered it to them at the party.

At trial, the defendant testified that he had no intention of sharing the GHB with the children because, at the time he decided to bring the GHB with him, he did not know he was going to see them that day. On cross-examination, over the defendant's objection, the Commonwealth confronted the defendant with an incident where he previously gave GHB to another child who also became sick after consumption. In addition, the Commonwealth introduced a handwritten letter, written by the defendant, admitting to the prior distribution and the adverse effect of GHB on the child.

At the conclusion of the trial, the defendant argued that he was only guilty of accommodation, contending that he neither received nor expected profit or consideration from the sharing of narcotics,

and he further made no attempts to persuade, coerce, or otherwise induce the victims to join them in taking the narcotics. The trial court rejected the defense.

Held: Affirmed. The Court held that the defendant failed to meet his burden showing, by a preponderance of the evidence, that his distribution of GHB to two minor girls was done as an accommodation. In addition, the Court held that the defendant failed to show the trial court abused its broad discretion when it admitted evidence of his prior bad acts involving GHB.

Regarding the defendant's accommodation defense, the Court examined the plain meaning of the word "induce," as it also did in the *Harper* case from the same week. The Court found that the defendant "brought about" or "called forth" the use of GHB, finding that without his influence or prompting, neither child would have consumed GHB at the party. The Court wrote: "It is difficult to imagine how [the defendant] could have accommodated K.C. and E.S. for something they did not know existed." The Court ruled that the absence of coercion did not reduce the act to accommodation.

Regarding the defendant's prior bad acts, the Court applied Rule of Evidence 2:404(b). The Court found that the evidence of the prior distribution of GHB, and his recognition in the letter of the effect of the drug on the earlier recipient, could have been considered by the court as evidence of the defendant's knowledge of the substance and its potential harmful effects, as well as of the absence of mistake or accident, each of which were relevant facts pertaining to the offense charged and perhaps more relevant to the accommodation defense put forward. The Court agreed that the purpose for the admission of the evidence was other than to show mere propensity to commit the crime.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1328212.pdf

Harvey v. Commonwealth: January 24, 2023

Richmond: Defendant appeals his convictions for Sexual Assault, Malicious Wounding, Burglary, and Unlawful Filming on Refusal to Strike a Juror, Fourth Amendment, Discovery of Jail Calls, and Admission of Prior Bad Acts.

Facts: In March 2018, the defendant pushed a woman to the ground and attempted to sexually assault her, while carrying a cellphone. Then, over a couple of days in May 2018, the defendant followed three college students back to their residences, where he broke into their apartments and sexually assaulted them while they were unconscious, filming the incidents on his phone. In the third case, which is the case charged in this incident, the victim woke up during the assault. The defendant struck her, breaking a bone in her face and knocking her out.

In September 2018, police investigated the defendant for assaults on other women where he lifted their clothes to photograph them. The defendant voluntarily surrendered his phone to police, who days later obtained a search warrant for the phone and an SD card in that phone, seeking data for six days during the September time frame only. In October, police obtained a second search warrant to

include evidence from May 2018. That warrant revealed videos that the defendant had taken of his sexual assaults in May.

DNA evidence linked the defendant to the two initial assaults. DNA evidence also linked the defendant to two crimes in 2015, including another burglary incident where the defendant entered an apartment and filmed a woman in the shower. The victim in this case identified the defendant at trial. The defendant also had two previous convictions for unlawful filming at the time of this trial. Police arrested the defendant, and he was held without bond.

In December 2019, the defendant moved to suppress the evidence from the second search warrant. In January 2020, the trial court granted that motion. Two weeks later, police obtained a third search warrant. The defendant again moved to suppress the evidence from that warrant, which the trial court granted again.

In July 2020, one day after the trial court suppressed the third warrant, police obtained a fourth search warrant. At that point, law enforcement had possessed the phone for almost two years. Unlike the second and third warrants, the fourth one included limitations on the time periods for which data was sought, covering one month in 2015 and six months in 2018, two periods during which several crimes had occurred that the defendant was suspected of committing. The affidavit was also much more detailed than the second and third warrants because it added information obtained in a separate search of the SD card from the defendant's phone.

The fourth search warrant also limited the examination of the phone itself to applications that could hold video or photographic data. Finally, the warrant restricted the search to files created between dates that were book-ended by the crimes of 2015 and those of 2018. The defendant moved to suppress the fourth search warrant, but the trial court denied the motion.

Prior to trial for this offense, the Commonwealth sought a ruling permitting it to introduce evidence of the offenses against the two other victims from earlier in May 2018. The defendant objected, arguing that the evidence was overly prejudicial and insufficiently related, as the defendant could simply have downloaded the video of the assault against this victim from the Internet. The trial court admitted the evidence over the defendant's objection, ruling that the acts themselves were "idiosyncratic enough" in terms of temporal and geographic proximity, the assault and how it "was done," and the fact that the acts were filmed. The trial court, however, agreed to instruct the jurors that they could consider evidence that the defendant committed a crime other than the one for which he was on trial only as evidence of his intent, identity, and "the unique nature of the method of committing the crime charged in connection with the crime for which he [was] on trial and for no other purpose."

At trial, during voir dire, the prosecutor asked the jurors whether they would be able to watch a video showing the rape of the unconscious victim. One juror said that she had a friend who was raped while unconscious. She initially stated that she would "be fine" considering the rape charge fairly "without a video" but that "with a video" and considering the defendant's purported defense of consent, she was "not sure she could do that fairly." In response to further questioning, the juror responded that she could evaluate evidence in addition to the video but would probably be "swayed" by the video. The juror also volunteered what she knew about the law of unconsciousness and consent.

The trial court then clarified that, after receiving the court's instructions on the law of consent, the juror would be free to consider all the evidence and would need merely to "be open to consider" the defense. The juror replied that she "would try to" and "thought" she could do so. The trial court again

instructed her that she would have to wait for the evidence and that the voir dire was just to "know" if she "could apply the law that the court would give her" After that further explanation by the court, the prosecutor again asked the juror whether she could consider evidence that the alleged victim consented and evidence that she did not consent. Both times the juror responded, "Yes," and "Absolutely." Following additional questioning, defense counsel objected to the seating of that juror. The trial court denied the motion to strike her for cause.

On the second day of trial, the Commonwealth introduced a jail phone call from two years before. On the call, the defendant asked a woman if she heard that there were "fractured faces involved." The defendant stated, "I don't know how I'm supposed to live with myself after that. I didn't realize there was that much damage done." The Commonwealth had told the defendant about the provided the call as discovery on the day before trial. The defendant asked the trial court to exclude the recording due to the alleged discovery violation. The trial court denied the motion and admitted the recording.

[*Great job to Josh Boyles and Sarah Heller, who tried this case for the Commonwealth – EJC*].

Held: Affirmed.

The Court first ruled that the trial court's denial of the defendant's motion to strike the juror was not error. The Court examined the record and was satisfied that the trial court was able to assess whether the juror was impermissibly biased or would be able to apply the law in the instructions after the presentation of all the evidence. To the extent the juror gave responses that were unclear, the Court noted that the trial court clarified them and confirmed that the juror could sit impartially. The Court found that the record revealed that the juror did not demonstrate a fixed bias and that the trial court's questioning and instruction constituted appropriate clarification, not improper rehabilitation.

The Court then affirmed the denial of the defendant's motion to suppress the fourth search warrant. The Court began by holding that the trial court did not err by concluding that the particularity requirement of the Fourth Amendment was satisfied. The Court found that the challenged search warrant satisfied the constitutional particularity requirement because it listed the specific crimes about which the evidence was sought and the specific places on the defendant's cell phone where the officers were authorized to look for that evidence.

The Court then concluded that, under the Fourth Amendment, there was proof of a constitutionally sufficient nexus between the phone and the crimes under investigation. The Court rejected the defendant's argument that evidence of a nexus between his cell phone and the nine crimes of which police suspected him was lacking because there was evidence in only one case that the assailant used a phone to record the potential crime, the 2015 incident in which a woman saw a cell phone that was possibly recording sticking through her shower curtain.

The Court examined the nine groups of offenses from 2015 and 2018, noting that video evidence was strongly suspected to be involved in 5 of those cases. Along with the defendant's two previous convictions for unlawful filming and the two videos discovered by law enforcement in the first search warrant, the Court found that the evidence provided "more than enough evidence" to support the trial court's finding that an adequate nexus existed for probable cause to search the defendant's phone for videos and photographs created during the two listed time frames.

The Court then turned to the defendant's argument that the search of his cell phone was unreasonable under the Fourth Amendment based on the length of time it took the Commonwealth to obtain a valid search warrant. The Court acknowledged that this was an issue of first impression in the Commonwealth. The Court repeated that a seizure that is lawful at its inception can nevertheless violate the Fourth Amendment if its manner of execution unreasonably infringes possessory interests protected by that amendment. The Court explained that assessing the reasonableness of the duration of the retention of the item seized includes factors such as (1) the significance of the interference with the person's possessory interest; (2) the duration of the delay; (3) the presence or absence of consent to the seizure; and (4) the government's legitimate interest in holding the property as evidence.

Regarding the defendant's interest in the phone, the Court noted that the defendant was incarcerated and could not lawfully possess the phone, and therefore the seizure did not deprive the defendant of any direct interest in possessing the phone. The Court also noted that defense counsel received a disk containing all the data on the phone during discovery. Lastly, the defendant did not request his phone back for almost two years. Consequently, the Court found that the degree of interference with his possessory interest before the police obtained a valid warrant related to the charges at issue was minimal.

The Court agreed that personal property without independent evidentiary value may not be kept indefinitely. Here, however, the Court noted that the Commonwealth repeatedly sought subsequent warrants to permit it to search the defendant's phone for evidence of specific additional crimes that he was suspected of committing, and it had a strong interest in retaining the property while doing so in as prompt a manner as possible. Lastly, the Court found that the officers involved therefore acted diligently, if imperfectly, to obtain a valid warrant permitting the search that is the subject of this appeal.

Regarding the jail phone call, the Court noted that defense counsel had at least a full business day to evaluate it before trial and did not request a continuance. The Court found that the defendant did not establish prejudice on appeal, and the trial court therefore did not abuse its discretion by admitting the recording of the phone call.

Lastly, the Court addressed the defendant's argument that the evidence of the two other offenses in May 2018 was inadmissible regarding this offense. The Court noted that the defendant took all three videos with a single phone and that the contents of the videos and the ways in which the two sets of crimes were committed involve distinct similarities. The Court explained that the defendant's theory that he downloaded the videos from the Internet did not render the evidence of the crimes against the two other victims inadmissible to prove identity in part through modus operandi.

In this case, the Court noted that both the burglary and aggravated sexual battery charges included the element of intent to commit rape or some other act of sexual abuse. The Court repeated that the prosecution is required to prove every element of its case and is entitled to do so by presenting relevant evidence in support of the offenses charged. The Court wrote that: "A defendant cannot prevent the prosecution from doing so simply because he takes the position that the offense did not occur or that someone else committed it and therefore intent is not genuinely in dispute."

Consequently, the Court ruled that other-crimes evidence was relevant to prove identity (both independently and through modus operandi) and intent. The Court found that the probative value of the evidence on the combination of elements for which it was offered—identity and intent—outweighed

the obvious yet incidental prejudice. Considering the record as a whole, the Court concluded that the trial court did not abuse its discretion by admitting the video and related evidence of the defendant's rape in the earlier part of May 2018. The Court also noted that the trial court limited the impact of the other-crimes evidence through a cautionary instruction directing the jury to consider the evidence for the limited purposes of his intent, identity, and modus operandi.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0723212.pdf

Osman v. Commonwealth: October 25, 2022

Fairfax: Defendant appeals his convictions for Abduction, Assault, and Violation of a Protective Order on Admission of Prior Bad Acts, Speedy Trial, and Sufficiency grounds.

Facts: The defendant, in violation of a protective order, attacked the mother of his child in a parking lot, beating her and dragging her into a truck he had rented. Prior to the assault, the J/Dr Court had issued a protective order prohibiting the defendant from having contact with his child. The victim was carrying their 2-year-old child in her arms, and the defendant had rigged a child seat inside the truck with zip-ties to restrain the child. An off-duty federal security officer confronted the defendant, but the defendant threatened him with a handgun. Nevertheless, other witnesses summoned the police and the defendant fled. He abandoned his rental truck and hid in New York for several months until his capture and extradition.

After a preliminary hearing in 2019, the defendant requested numerous continuances until the Supreme Court of Virginia issued its first emergency order relating to the COVID-19 pandemic on March 16, 2020.

Prior to trial, the defendant argued a statutory speedy trial motion. After hearing argument on the speedy trial issue, the trial court adjourned the case to the next week for a bench trial. Four days after that decision, the defendant agreed to a joint continuance and then also made subsequent agreements to additional adjournments totaling another 312 days. At one point, the parties agreed to a trial date, but the Commonwealth later discovered that a witness was not available for that trial date and requested and obtained a continuance over the defendant's objection.

Despite objecting to the Commonwealth's continuance request on that date, the defendant did not file another motion to dismiss on speedy trial grounds until July of 2021, the day before trial. Prior to trial, the defendant moved to dismiss the charges for violation of his Constitutional right to speedy trial. At that point, the total delay from his arrest until trial was 965 days. He claimed that, prior to the delay, his parents had been "set to testify in his defense to refute" the victim's allegations, but did not provide any details of that testimony and how it would have impacted his defense. The trial court denied the defendant's motion to dismiss.

Prior to trial, the Commonwealth moved to admit several of the defendant's prior bad acts, including the physical and verbal abuse the victim experienced from the defendant during their marriage. The trial court granted the motion, over the defendant's objection. The trial court also issued

a limiting instruction to the jury advising them that they could consider such testimony only for the permitted purposes of motive, intent, and prior relationship.

At trial, the defendant argued the abduction of the child was not a felony, but rather than a misdemeanor, under § 18.2-47(D), which makes a parent's abduction of their child punishable as a misdemeanor rather than a felony under certain circumstances.

Held: Affirmed in part; Reversed in part.

Regarding the prior bad acts, the Court ruled that the trial court did not abuse its discretion in admitting evidence of the defendant's prior bad acts. The Court agreed that the prior assaults against the victim had probative value to prove motive and intent and also a prior relationship in this particular case and that outweighed any prejudicial effect.

Regarding Speedy Trial, the Court rejected the defendant's Constitutional speedy trial challenge. The Court applied the four factors of the *Barker v. Wingo* test:

(1) the length of delay,

(2) the reasons for the delay,

(3) the defendant's assertion of his right, and

(4) prejudice to the defendant.

The Court first found that the delay of 965 days from the defendant's arrest until his trial were presumptively prejudicial under the first Barker factor, thus warranting consideration of the other three factors. The Court then noted that the majority of the delay—624 days—resulted from defendant's waivers of speedy trial, both explicitly and by operation of law. Conversely, only 341 days of delay are attributable to the Commonwealth, the vast majority of which is justified based on pandemic-related reasons or the ordinary administration of justice. The Court determined that 140 days were justified as pandemic-related delays.

The Court found that the Commonwealth acted negligently in selecting the June 28, 2021 trial date before confirming the availability of all necessary witnesses for that date. Nevertheless, the Court found no evidence in the record that the Commonwealth should be faulted for any period of delay other than the thirty days between which were the result of the Commonwealth's negligence in determining witness availability.

Regarding the defendant's claim of prejudice, the Court found that the defendant's "bare assertion" of prejudice was not sufficient on its own to establish that the defendant actually suffered any prejudice to his defense. The Court also explained that the defendant's continued acquiescence to adjournments limited the weight given to his assertion of his speedy trial right.

However, regarding the felony conviction for Abduction of the child, the Court reversed the conviction. The Court noted that the protective order in place was issued under § 16.1-253.2, which states that "a violation of a protective order issued under this statute "shall constitute contempt of court."" The Court further noted that § 16.1-253.2(A) explicitly states that "[i]n addition to any other penalty provided by law," a person who commits such violations "is guilty of a Class 1 misdemeanor."

The Court then examined subsections (C) and (D) of § 18.2-47 and found that those sections are mutually exclusive. In other words, a person who commits an abduction, as defined in subsection (A) of § 18.2-47, can only be charged with and convicted of a Class 5 felony—the default penalty provided by subsection (C) of § 18.2-47—if no other subsection providing a different penalty applies. Thus, where a

parent's abduction of their child qualifies as a Class 1 misdemeanor under subsection (D) of § 18.2-47, the same conduct cannot also constitute a Class 5 felony because the misdemeanor penalty replaces the statute's default felony penalty.

Accordingly, because the defendant's abduction of his child met the criteria of § 18.2-47(D)—as the defendant is a parent to the child and the abduction was punishable as contempt for violating the protective order —the Court ruled that the trial court erred in convicting the defendant of the felony abduction charge under § 18.2-47.8.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1416214.pdf

Virginia Court of Appeals
Unpublished

Martin v. Commonwealth: April 18, 2023

Scott: Defendant appeals his convictions for Murder and Use of a Firearm on Fifth Amendment *Miranda* grounds, Admission of Bad Acts, Denial of a Jury View, and Double Jeopardy grounds.

Facts: The defendant learned that his wife and the victim were having an extramarital affair. The defendant picked up the victim in Tennessee, transported him to Virginia, confronted him, and then killed him with a handgun. After the murder, the defendant returned to Tennessee and woke up his wife, brandishing a firearm and showing her a cell phone image of her deceased lover before saying "look what you made me do." He then confessed to the details of the murder and then told her he intended to finish his plan to kill her and himself. Next, the defendant zip-tied her hands and feet, although ultimately he did not kill her.

Police arrested the defendant, who invoked his *Miranda* rights. The defendant's parents then indicated that they wished to speak to him. A detective told the defendant's mother that he wished to speak to her son and that he gave her his contact information. The detective also testified that he might have told her that he would be able to talk to the Commonwealth's Attorney if the defendant cooperated. The defendant's father told the defendant that he should only speak to the police after he obtains a lawyer. After the defendant spoke to his mother, however, the defendant re-initiated contact with the police. Police re-read him his *Miranda* warnings and the defendant confessed, claiming that the shooting was accidental.

Prior to trial, the defendant moved to suppress his statements to police. He contended that law enforcement reinitiated interrogation after he asserted that he wished to speak to counsel when his mother became agents of the Commonwealth through their contact with the detective. Thus, any statement the detective made to the mother encourage him to speak with law enforcement constituted the Commonwealth improperly initiating contact with the defendant after he asserted his right to counsel under the Fifth Amendment. The trial court denied his motion.

At trial, the defendant admitted to killing the victim but claimed self-defense. The defendant objected to the Commonwealth admitting evidence of the defendant's kidnapping of his wife in Tennessee, but the trial court overruled his objection and admitted the evidence.

At trial, the defendant also asked the trial court to permit the jury to view the crime scene. The trial court denied the motion, instead admitting into evidence a video recording reflecting the entire length of the road including the area where the body was found and where the murder took place. The trial court also admitted relevant maps in evidence. In addition, photographs of the crime scene taken at the time of the homicide were admitted. The trial court explained that three years had passed since the event occurred creating the possibility that the scene would appear differently than it had at the time of the homicide.

Lastly, the defendant objected to instructing the jury on both Aggravated Malicious Wounding and First-Degree Murder, contending that that violated his Double Jeopardy protection. The trial court overruled his objection, and instead instructed the jury that if they convicted the defendant of first-degree murder, they were not to consider the aggravated malicious wounding charge. The verdict form also reflected the court's direction to the jury.

[*Good job to Special Prosecutors Zack Stoots and Jessica Jackson, Russell County – EJC*].

Held: Affirmed.

Regarding the *Miranda* issue, the Court ruled that the facts here do not support the defendant's contention that (1) his parents became agents of the Commonwealth or (2) that the detective unconstitutionally reinitiated an interrogation after the right to counsel was asserted. The Court applied the two-part test from *Mills* and *Sabo* to evaluate whether a private individual acted as a government agent. The first prong of that test is

(1) whether the government knew of and acquiesced in the search, and

(2) whether the search was conducted for the purpose of furthering the private party's ends.

The Court cautioned that these two criteria or factors should not be viewed as an exclusive list of relevant factors. In this case, the Court concluded that the defendant initiated contact with the detective and voluntarily provided a statement to him which was consistent with the theory he advanced at trial—that the shooting was accidental.

Regarding the defendant's other crimes, the Court applied Virginia Rule of Evidence 2:404(b). The Court ruled that the defendant's kidnapping of his wife demonstrated a common plan or scheme. The Court found that the entire exchange between the defendant and his wife was highly probative of the defendant's motive, as well as his intent and plan to kill the victim. The Court also concluded that the circumstances of the kidnapping also demonstrate that kidnapping the wife was part of a common scheme or plan and are therefore relevant connected facts. The Court noted that the relevance of this evidence was heightened by the defendant's self-defense argument. Lastly, the Court found that the evidence is also more probative than prejudicial.

Regarding the denial of the jury view, the Court did not disturb the trial court's conclusion that the maps, video, and pictures in evidence were both sufficient and better reflected the crime scene on the date of the homicide.

Lastly, regarding the defendant's double jeopardy claim, the Court found that, since the jury followed the trial court's instruction, the defendant was not subject to multiple punishments for

conviction on a single offense, and there was no error. In this case, the Court agreed that aggravated malicious wounding is a lesser-included offense of first-degree murder, and therefore a conviction on both indictments would violate the double jeopardy prohibition.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0757223.pdf

Andrade v. Commonwealth: April 11, 2023

Loudoun: Defendant appeals his convictions for Rape, Abduction, and related charges on Admission of Prior Bad Acts evidence.

Facts: The defendant locked his wife in a room and severely beat and raped her. At trial, the victim testified that she did not leave the bedroom during the assault because the defendant was in between the door and herself and she felt that he was not going to let her get out of the room. She explained that she wouldn't have been able to walk out of the room. She also testified that she engaged in sexual intercourse with the defendant solely because "saying no was [not] an option" and because he told her he was going to keep hitting her if she did not comply. The defendant contended that the victim was not only free to leave the bedroom at any time, but that she initiated the sexual contact and consented to sexual intercourse.

At trial, over the defendant's objection, the victim testified that the defendant physically abused her multiple times during the marriage resulting in past injuries. The victim repeatedly stated that she feared any refusal to comply with the defendant's demands for sexual intercourse would subject her to further bodily injury.

Held: Affirmed. The Court ruled that because the victim's testimony regarding the defendant's prior acts of physical violence within the marriage was relevant to prove her lack of consent to the sexual intercourse and her belief that she was not free to leave the bedroom, and because its probative effect was not outweighed by any unfair prejudice to the defense, the trial court did not abuse its discretion in allowing it.

The Court examined the evidence under Rule 2:403. The Court concluded that, under the facts, the evidence of the defendant's prior acts of physical violence toward the victim was probative of the victim's state of mind and explained the reason she remained in the bedroom to engage in sexual intercourse with the defendant against her will. The Court found that the victim's testimony proved that she was intimidated by his violence into doing "whatever [he] ask[ed] [her] to do." The Court agreed that the defendant's prior instances of violence established the nature of the relationship between the defendant and the victim and explained the fear she felt in their bedroom during the assault.

In this case, the Court explained that the victim's testimony did not touch on the specific details of the prior bad acts but only their occurrence, and therefore was unlikely to be unfairly prejudicial or inflammatory to the jury, eliciting a disproportionate emotional response. Rather, the Court found that

the evidence helped explain why the victim took the defendant "at his word when he said he would keep hitting her if she did not do what she was told."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0329224.pdf

Hetle v. Commonwealth: February 14, 2023

Fairfax: Defendant appeals his convictions for Murder and Use of a Firearm on Juror Misconduct and Admission of Prior Bad Acts.

Facts: After a series of disputes, the defendant shot his neighbor repeatedly, killing him.

During trial, a juror saw a trial spectator photograph some of the jurors outside the courthouse the day before. The juror informed the trial court that she did not communicate with anyone else about her reported observations. The trial court instructed the juror not to share her reported observations with anyone else.

At trial, over the defendant's objection, his son testified that the defendant had referred to the victim "in a racial derogatory manner." Specifically, the defendant's son testified that at least ten times, the defendant referred to the victim using racial slurs which the defendant's son identified.

At trial, the Commonwealth also introduced a defendant's recorded telephone call from jail to the defendant's wife. The defendant objected that because the call was an intended confidential spousal communication, the call was protected from disclosure under § 19.2-271.2 and inadmissible under Virginia Rule of Evidence 2:504(b). The defendant argued that his call from the jail to his wife was protected from disclosure as an intended confidential communication because the jail's telephone system provided his only means of communicating with his wife while he was incarcerated. The trial court overruled the defendant's objection.

Held: Affirmed. The Court held that the trial court did not err in refusing to remove the juror mid-trial when the juror assured the court that her observation of a trial spectator photographing jurors outside the courthouse would not affect her performance of her duties as a juror in accordance with her instructions and her oath. Additionally, the Court held that the trial court's contested evidentiary rulings did not constitute reversible error.

Regarding the juror, the Court found that, given the juror's assurances that:

(i) her observation of a trial spectator photographing jurors would not affect her ability to be fair and impartial and

(ii) she would not inform her fellow jurors about her observation,

the Court ruled that the trial court did not abuse its discretion by refusing to remove the juror. The Court agreed with the trial court that there was no basis for finding that the juror's reported observation would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath.

Regarding admission of the defendant's racial slurs, the Court held that the trial court did not err in admitting testimony about the defendant's use of racial slurs in reference to the victim. The Court held that the trial court did not abuse its discretion in finding that the danger of unfair prejudice did not substantially outweigh the probative value of the contested evidence. The Court reasoned that the defendant's use of racial slurs in reference to the victim related to the malice element of murder. The Court concluded that the trial court reasonably concluded that the evidence of the defendant's use of racial slurs did not invite the jury to decide the case based on an unrelated factor or on inflamed passions instead of probative evidence.

Regarding the jail call, the Court noted that both parties were advised that it might be recorded and subject to monitoring at any time. In addition to the automated message informing the defendant and his wife that the call was subject to monitoring and recording, the Court noted that the defendant told his wife that the call was being recorded and she replied, "I know." Under these circumstances, the Court found that the defendant's phone conversation did not qualify as a communication made privately between spouses.

The Court concluded that, even if the defendant had no means of having private, confidential communications while he was incarcerated, this circumstance would not protect his monitored communications from disclosure as if they were private, confidential communications. Thus, the Court ruled that the recorded call was not a confidential communication as defined in Rule 2:504(b)(2) and the trial court did not err in admitting the call into evidence.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0304224.pdf

Carolino v. Commonwealth: December 29, 2022

Virginia Beach: Defendant appeals his conviction for Strangulation on Admission of Prior Bad Acts.

Facts: The defendant strangled the victim, his girlfriend, injuring her. Although witnesses noticed the injuries, the victim did not report the incident until a month later. At trial, the defendant denied strangling the victim. On cross-examination, the following exchange took place:

> Q: [The victim]—have you ever—you said you didn't choke her. Have you ever been physical with her?
>
> A: Aggressively physical, no. Sexually, sure. Yes.
>
> Q: Okay. Never been aggressively physical with her?
>
> …. A: "I've never aggressively assaulted [the victim]. I've never—I've never done anything to [her] that she didn't ask me to do or did not want me to do."

On rebuttal, the Commonwealth recalled the victim, who testified that the defendant had whipped her several months before. The victim explained that she had first falsely claimed that the whipping was consensual, but only out of fear of the defendant. Over the defendant's objection, the trial court admitted several graphic photographs that depicted the victim's injuries from the whipping incident.

Held: Reversed. The Court ruled that, under *McGowan*, the trial court erred in admitting prior bad acts evidence in rebuttal solely to impeach the defendant's credibility regarding issues raised by the Commonwealth on cross-examination of the accused.

The Court examined whether, in this case, a prior alleged incident of physical abuse earlier in the relationship was admissible and relevant to shed light on the later attack. The Court reiterated the holding in *McGowan*, that when a defendant is cross-examined on collateral matters, the prosecution must accept the answer provided and cannot introduce extrinsic evidence to contradict the accused. In this case, the Court found that the trial court ran afoul of *McGowan* in admitting this propensity evidence for the sole purpose of attacking the defendant's credibility.

The Court also rejected a number of other grounds for admission that the Commonwealth argued on appeal. For example, the Commonwealth argued that the victim's delayed reporting of the whipping shed light on the victim's delayed reporting of the alleged choking. However, the Court noted that (1) the two incidents occurred many months apart and did not necessarily establish a "pattern," and (2) the victim's reporting as to the two incidents was inconsistent in various significant respects. The Court also argued that the Commonwealth's theory that the evidence was relevant as to the victim's "delayed reporting" of the whipping or "state of mind" was attenuated and offered negligible probative value, if any.

The Court found that the Commonwealth failed to present alternate grounds to support admission of the whipping incident. The Court also concluded that the disputed evidence was substantially more prejudicial than probative. The Court contended that the photos were "jarring and inflammatory, and they were introduced improperly."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1270211.pdf

Hirschberg v. Commonwealth: December 20, 2022

Gloucester: Defendant appeals his conviction for Possession of Methamphetamine on admission of Prior Bad Acts evidence.

Facts: The defendant sold methamphetamine to a police informant. A recording captured the audio of the conversation between the defendant and the informant. During the recording, the defendant made several statements, including: "They got my pistol," "My blue cooler, I had everything in there," and "They're charging her with my s&*$. I was driving." The voice also stated: "It was a Bulldog Short. I can't claim the gun."

Nine days before the controlled purchase, an officer had stopped a vehicle the defendant was driving for an expired registration. During a search of the vehicle, the officer saw a smoking device on the front passenger seat and found on the front passenger floorboard a blue cooler and a black zippered pouch containing a Target Bulldog .357 Magnum revolver. The officer also found drug paraphernalia in the cooler.

The Commonwealth then introduced evidence about the traffic stop involving the defendant that occurred nine days before the controlled purchase. The Commonwealth argued that the testimony was relevant to proving the defendant's identity as one of the voices on the recording. The defendant objected that "the issue of identity was not in question during trial," so the testimony had no probative value. The trial court overruled the defendant's objection and admitted the testimony. The trial court admonished the jury, however, that they must consider the testimony only for the purpose of determining the identity of the speaker on the recording.

Held: Affirmed. The Court concluded that the trial court did not abuse its discretion by concluding that the mitigated risk of unfair prejudice did not outweigh the testimony's probative value and admitting the testimony.

The Court rejected the defendant's objection that identity was not in question, noting that the defendant pled not guilty and therefore the Commonwealth bore the burden of proving every element of the offense beyond a reasonable doubt. The Court pointed out that the defense never conceded that it was the defendant's voice on the recording.

In this case, the Court found that testimony corroborated the identification of the voice on the recording as the defendant by linking the speaker's recorded statements about driving, the Bulldog pistol, and a blue cooler with the recent traffic stop where the officer seized those very items from a vehicle that the defendant was driving. Thus, the Court concluded that the testimony supported a reasonable inference that the speaker on the recording and the driver of the vehicle that the officer stopped were the same person and was probative as to the identity issue.

The Court repeated that the question "is not whether there was any risk of unfair prejudice, but whether that risk was so great it substantially outweighed the probative value of the evidence."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0203221.pdf

English v. Commonwealth: November 1, 2022

Roanoke: Defendant appeals his conviction for Rape and Sexual Assault of a Child Under 13, 2nd Offense, on Evidentiary Issues.

Facts: The defendant sexually began sexually assaulting a child soon after her fifth birthday. The defendant was in a relationship with the victim's mother and acted as a caretaker for the victim and her siblings. The victim testified that the defendant was a "father figure" to her. The victim was fourteen years old at the time she reported the abuse. At the time, the defendant had moved out because he was having a child with another woman. The other woman testified that she had been in an "on and off" relationship with the defendant for fifteen years, and at the time of the trial he was her boyfriend.

A SANE nurse, Melissa Harper, examined the victim, who disclosed that the defendant sexually assaulted her daily since sixth or seventh grade. The exam revealed the victim suffered from genital warts. The defendant was diagnosed and treated for genital warts in 2013 and in 2014, during which he

was sexually abusing the victim. At trial, a doctor testified that genital warts are "typically" transmitted through sexual contact.

The Commonwealth indicted the defendant for various offenses, alleging a three-year date range from shortly after the victim's tenth birthday. The defendant asked for a bill of particulars to state the dates, locations, and times of all offenses for which he was being charged. The defendant also objected to the requirement that he provide a notice of alibi based on the three-year date range in the indictment. The trial court denied the motion.

Prior to trial, filed a motion in limine seeking to exclude evidence of his prior adjudication of delinquency for the forcible sodomy of an eight-year-old when he was fifteen years old. The trial court denied that motion but gave three limiting instructions regarding the purpose for which the defendant's prior conviction could be considered; the jury was instructed not to consider it as evidence of guilt.

Prior to trial, the defendant sought to exclude evidence regarding his genital warts due to the number of years between the diagnoses and the lack of evidence conclusively establishing that the victim contracted the condition from him. The trial court denied his motion and permitted the Commonwealth to introduce that evidence at trial.

Prior to trial, the Commonwealth's moved to admit evidence of the defendant's prior sexual conduct with the victim prior to the indictment. The defendant sought to exclude evidence of his sexual acts with the victim such as "alleged play fighting, humping, and oral sex." He contended that, because these acts were not the basis of criminal charges, they were not admissible. The trial court ruled that it was relevant under Rule 2:404 (B) to establish the absence of a mistake or an accident.

At trial, the defendant also argued that the Commonwealth failed to establish that he and the victim were not married.

Held: Affirmed.

Regarding the defendant's argument that the Commonwealth failed to prove he and the victim were not married, the Court noted that it was reasonable for the jury to infer that the victim would not have been able to marry the defendant without parental consent. The Court examined the evidence about the defendant's romantic relationships with the victim's mother and the other woman and concluded that a juror could reasonably infer that the defendant was not married to the victim at the time of the offenses.

Regarding admission of the defendant's prior adjudication of delinquency, the Court repeated that, in a proceeding against a defendant under a recidivist statute, evidence of the prior offense is admissible, even when it goes only toward a sentencing enhancement. The Court then explained that a potential prejudice arising from the introduction of a defendant's prior convictions during the guilt phase can be solved by an appropriate limiting instruction to the jury.

Regarding the evidence of the defendant's genital warts, the Court agreed that the evidence was admissible to establish that the defendant began having sexual intercourse with the victim in the same time frame in which he had outbreaks of genital warts.

Regarding the evidence of the defendant's prior sexual acts with the victim, the Court noted that the Commonwealth was required to establish that he acted with "lascivious intent." Thus, the Court explained, the defendant's other sexual misconduct was relevant to establishing that he acted with lascivious intent and that his acts were accomplished knowingly and intentionally. The Court concluded

that the duration and escalation of the defendant's sexual contact with the victim before the indictment provided the jury with some evidence of the defendant's state of mind and intent when he committed the offenses after the move.

Regarding the defendant's request for a bill of particulars, the Court repeated that it is improper for a defendant to use a bill of particulars to expand the scope of discovery in a criminal case. The Court noted that under *Clinebell,* an extended period during which alleged sexual crimes occurred against a minor were sufficient to inform the defendant of the time of the offenses. In this case, the Court ruled that the time frames in the indictments and bill of particulars were sufficient to apprise the defendant of "the nature and character of the offenses."

The Court also noted that the defendant never offered any type of alibi defense. The Court ruled that the trial court did not abuse its discretion when it did not require the Commonwealth to provide more specific information about the date, time, and location of the offenses or by overruling the defendant's objection that the lack of more specific dates prevented him from providing an adequate notice of alibi defense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1065213.pdf

Thomas v. Commonwealth: August 16, 2022

Augusta: Defendant appeals his convictions for Grand Larceny and Conspiracy on admission of Other Crimes evidence and Admission of Business Records

Facts: The defendant and his confederates stole numerous tractors and trucks throughout Virginia and Maryland. The thieves specifically targeted Kubota dealerships at night. GPS data placed the defendant's cell phone at thefts at dealerships in Augusta County, Hagerstown, and Hanover. The defendant's phone also searched for a dealership in Campbell County just before a theft there. In each theft, two men loaded skid steers onto trailers already located on-site and used stolen pickup trucks to haul the equipment to Maryland, paying cash for gas along the way. The thieves used the same pickup truck stolen from another location to perpetrate subsequent thefts in Hagerstown and Hanover.

At trial, the Commonwealth sought to introduce a "Certificate of Authenticity" and accompanying letter that Google provided in response to an officer's "secondary search warrant" requesting subscriber information for the two "suspicious device IDs" present at each theft. The defendant objected, arguing that the return was not admissible under the business records exception to hearsay because the documents lacked sufficient indicia of trustworthiness. The defendant argued that because neither document from Google explicitly referenced the two device IDs identified in the search warrant, there was "nothing on the Google response which would be a business record to connect it to the device."

Google's letter accompanying the records certification did not explicitly reference the two anonymized device IDs. It explained, however, that "the Device ID (or device tag) is not a valid target identifier that can otherwise be used to search for information." Rather, "[t]he Device ID is used only for

distinguishing unique devices in a particular user's location history." Therefore, "Google has only provided basic subscriber information . . . for the requested devices."

Additionally, the "Certificate of Authenticity" expressly stated that the records were certified by a proper custodian, that "Google servers record this data automatically at the time, or reasonably soon after, it is entered or transmitted by the user," and that "this data is kept in the course of this regularly conducted activity and was made by regularly conducted activity as a regular practice of Google." The certification also states that the record is a "true duplicate of original records that were generated by Google's electronic process or system that produces an accurate result" and that Google "regularly verifies" the "accuracy of its electronic process and system."

An officer also testified regarding the typical protocol for obtaining Google records, stating that "when police request information in reference to the anonymized device number, Google respond[s] back with the subscriber information for the device ID's that we requested." He confirmed that he received the letter and "Certificate" from Google in response to his search warrant. The trial court overruled the defendant's objection and admitted the records.

Held: Affirmed.

Regarding the "other crimes" evidence, that Court concluded that the thefts in this case shared a constellation of "idiosyncratic" features establishing a "common scheme." The Court also found that the evidence revealed a unique execution method. The Court agreed that the Commonwealth established that the "other crimes" evidence tended to prove relevant facts pertaining to the offense charged: namely, a common scheme and the perpetrator's identity.

Regarding the Google evidence, the Court examined Rule 2:803(6), which permits the introduction of business records at trial as an exception to hearsay. The Court repeated that the trustworthiness or reliability of the records is guaranteed by the regularity of their preparation and the fact that the records are relied upon in the transaction of business by the person or entities for which they are kept. In this case, the Court found nothing in the record that "indicate[s] a lack of trustworthiness" of the Google records, either regarding "the source of information" or "the method or circumstances of preparation."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0613213.pdf

Wingfield v. Commonwealth: June 12, 2022

Stafford: Defendant appeals his convictions for Grand Larceny with Intent to Sell and related charges on admission of Other Bad Acts and Sufficiency grounds.

Facts: The defendant and his confederates entered a cellphone store and stole phones from their displays, fleeing from the stores with the items. Video and photographic evidence captured the offense. About twenty minutes later, the defendant and his confederates entered another AT&T store in Spotsylvania County and stole phones in the same manner. Both crimes involved three individuals

wearing the same clothes and having the same modus operandi of going into the store, grabbing as many cell phones from the display case as quickly as possible, and fleeing the store immediately after ripping the cell phones from their displays. A witness later identified the defendant as one of the perpetrators.

Prior to trial, the defendant moved to exclude any evidence of his other thefts from other jurisdictions. The defendant also had charges in Warren County and in Henrico County, and the trial court granted the motion in limine for "the unadjudicated bad acts" in those locations. However, the trial court denied his motion regarding the offense in Spotsylvania.

Held: Affirmed. Regarding admission of the other offense in the neighboring county, the Court agreed that the other offense bore a sufficient mark of similarity to make it admissible at trial.

Regarding sufficiency, the Court noted that five cell phones valued at about $3,800 were stolen from the AT&T store in this case. The Court wrote, "Given that the sheer number of cell phones stolen was plainly more than needed for [the defendant's] own personal use (or that of the other perpetrator), the jury could have reasonably inferred that [the defendant] intended to sell the cell phones for profit."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0892214.pdf

Prior Convictions

Virginia Court of Appeals
Published

Hargrove v. Commonwealth: May 2, 2023

King William: Defendant appeals his convictions for Murder, Robbery, and related offenses on issues of Joint Trial, Sixth Amendment confrontation, and Exclusion of Evidence.

Facts: The defendant and his confederate shot and killed an 8-year-old child while robbing the victim's family. The defendant and his confederate targeted the family after the father had posted on social media about recent lottery winnings. Over a week later, police arrested the defendant in Richmond in possession of a firearm. The defendant later pled no contest to possession of that firearm. Subsequently, DFS determined that the gun was used in the murder.

The police also seized a cell phone from the defendant during his arrest. The defendant admitted to police that it was his phone. A data extraction revealed "selfies" of the defendant, an associated email address, and several internet searches made the day after the crime, including searches for "crime reports for King William County, VA." The data extraction also revealed that prior to the robbery and murder, the defendant and his co-defendant exchanged several text messages about meeting that night and had discussed a planned "lick" or robbery. FBI Special Agent Jeremy D'Errico also

later testified about how he used cell site records to track the defendant and his confederates' movements.

Prior to trial, the Commonwealth moved in limine to admit the evidence of the firearm and the defendant's conviction. The defendant objected, but the trial court overruled his objection. The trial court also granted a joint trial of the defendant and his co-defendant, over the defendant's objection.

At trial, three different witnesses, two friends and an inmate, testified that the co-defendant confessed to them after the murder. The defendant objected to that evidence on *Crawford* confrontation grounds, but the trial court overruled his objection.

The defendant introduced testimony from his girlfriend at trial. The court sustained the Commonwealth's objection to questions about the defendant's financial stability as not relevant to robbery. The defendant later proffered that the girlfriend would have testified that the defendant made thousands of dollars a night running card games and was doing well financially. The defendant also sought to introduce testimony from the girlfriend that he "often" left his phone at his residence and that "several times" in the past, another person answered when she called the defendant's phone. The court excluded the evidence because the girlfriend could not testify to the whereabouts of the phone on the day of the murder.

Held: Affirmed.

The Court first held that the admission of the co-defendant's confessions did not violate the defendant's Confrontation Clause rights. The Court first examined the "*Bruton*" doctrine, which states that at a joint trial, the admission into evidence of a non-testifying co-defendant's out-of-court confession violates the Confrontation Clause if the confession incriminates the other defendant. The Court concluded that, because *Crawford* limited the scope of the Confrontation Clause to testimonial statements, and the *Bruton* doctrine depends on the Confrontation Clause, it therefore follows that *Crawford* limited *Bruton's* protections to those statements that implicate the Confrontation Clause— to wit: testimonial statements. In this case, the Court ruled that *Bruton* did not apply because the defendant could not show that the confessions he challenged were "testimonial" statements.

The Court pointed out that out-of-court statements are "testimonial" if, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. In this case, the Court found that the three confessions were non-testimonial. The Court reasoned that when the co-defendant confessed, a reasonable person would not have intended to create a statement "for use in an investigation or prosecution of a crime;" Instead, a reasonable person in the co-defendant's position was likely to confide in people he was close to, whom he did not anticipate would participate in his prosecution.

Regarding the joint trial, the Court acknowledged that prejudice may result if evidence against a defendant, if tried alone, is admitted against a co-defendant in a joint trial. In this case, the Court concluded that the evidence admitted specifically against the defendant failed to establish a sufficient basis for concluding the jury was prevented from making a reliable judgment about his guilt or innocence.

Regarding admission of the prior conviction, the Court noted that, in pleading no contest to a charge as set forth in the indictment, the defendant agreed to or admitted that the facts set forth in the indictment were true. Further, the Court rejected the defendant's contention that nothing in the guilty

plea admitted a connection to the particular firearm. The Court concluded that the conviction was highly relevant to prove the defendant's identity, presence, and involvement in the crimes, and therefore the court did not err in admitting the evidence.

Regarding the defendant's girlfriend's excluded testimony, the Court found that the proposed testimony was irrelevant. Regarding the witness' testimony about the defendant's income, the Court repeated that although lack of motive is generally admissible to prove lack of a reason or intent to commit an offense, the proffered evidence would not have established that "logical tendency." Regarding the witness' testimony about the defendant's phone, the Court observed that the defendant was attempting to establish that he was not in possession of the cell phone on the night of the murder. The witness, however, was unable to testify as to the location of the cell phone that night. Therefore, the Court found no abuse of discretion in the court's determination that the proffered testimony about the cell phone lacked relevance and was therefore inadmissible.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1351212.pdf

Yemel'Yanov v. Commonwealth: January 10, 2023

Henrico: Defendant appeals his conviction for DUI, 3rd offense, on Admission of his Prior Conviction

Facts: The defendant drove while intoxicated after committing two previous DUI offenses. The defendant committed his first DUI offense in 2019, and was convicted in February, 2020. He committed his second DUI offense on December 2, 2020, and was convicted on July 14, 2021. The trial court suspended execution of the sentence for the second conviction for ninety days on August 30, 2021, so that the defendant could note his appeal to the Court of Appeals.

The defendant committed his third DUI offense on December 17, 2020. At trial, the trial court rejected his argument that the Commonwealth could not use his second DUI conviction because the court had suspended execution of sentence and the case was on appeal.

Held: Affirmed. The Court held that the trial court did not err in allowing the defendant's second DUI conviction to be used as a predicate conviction in finding him guilty of DUI, third conviction within five years, even though that second DUI conviction was then still on appeal.

The Court pointed to § 24.2-231 and concluded that the General Assembly has shown that it knows how to a requirement in a statute that all appeals must have expired, and could have included similar language regarding appeals in § 18.2-270 but did not do so, thus evincing the legislature's intent that a conviction for purposes of § 18.2-270 is a final judgment, even if pending on appeal.

Regarding the suspended execution of sentence, the Court agreed that § 19.2-319 allows a trial court to postpone the execution of a defendant's sentence if he indicates his intention to note an appeal. However, the Court explained that well-settled precedent from both the Court of Appeals and the Supreme Court have given approval to the use of prior convictions as predicate offenses even though execution of the sentence (or judgment) was suspended or the conviction was pending on

appeal. Consequently, the Court ruled that the trial court did not err in this case in finding that the second DUI conviction was a final judgment that could be used as a predicate conviction, even though execution of the sentence had been suspended for ninety days and the conviction was pending on appeal at the time of appellant's trial on his third DUI offense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0450222.pdf

Virginia Court of Appeals
Unpublished

Jackson v. Commonwealth: April 25, 2023

Amelia: Defendant appeals his conviction for Distribution, Second Offense on Jury Instruction, Juror Selection and Misconduct issues, Admission of a Prior Conviction, and denial of a Continuance at Sentencing.

Facts: The defendant distributed cocaine after having previous convictions for that offense. During voir dire, a juror stated that she knew the defendant because she "know[s] a lot of people in Amelia County." She said she "never spent time with" the defendant and further explained, "I know his wife more than I know him. I don't spend time with her either, but I know her." Despite this, she maintained that her knowledge of the defendant would not impact her ability to judge the case fairly and impartially. No one moved to strike the juror and she sat on the panel at trial.

At trial, the Commonwealth introduced the defendant's prior conviction and sentencing order from the same jurisdiction involving a defendant with the same name and birth date as the defendant. The defendant objected, arguing that the Commonwealth did not establish that the defendant was the person named in the order, but the trial court overruled the objection.

At trial, a cooperating witness testified for the Commonwealth. The defendant requested a jury instruction based on U.S. v. Luck, but the trial court denied it. The instruction would have stated: "The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant."

At sentencing, the defendant informed the court that he was not ready to proceed with sentencing as scheduled because he still wished to file a motion to set aside the verdict; in addition, believing the trial court would grant the motion for transcripts, he had informed three of his sentencing witnesses that they did not need to appear for the hearing. The trial court denied the continuance.

After trial, the defendant filed a motion to set aside the verdict, asserting that several years earlier, the same juror who had denied knowing the defendant had a conversation with the defendant's wife, in which the juror made comments about the defendant's previous infidelity to his wife. After the trial, the wife alleged that the juror approached her stating, "I'm so sorry." The defendant argued that

the juror misrepresented her impartiality under oath during voir dire because she minimized the extent to which she knew the defendant and how that prior knowledge affected her opinion of him. He asserted that the conversation with the wife, despite being nearly a decade old at the time of trial, demonstrated that the juror "held a poor opinion" of the defendant's character and thus secretly harbored bias towards him. The trial court denied the motion and refused to hold an evidentiary hearing regarding the allegation.

Held: Affirmed.

Regarding the prior conviction, the Court repeated that the Identity of names carries with it a presumption of identity of person, the strength of which will vary according to the circumstances. The Court ruled that the trial court did not err in admitting the prior conviction order and allowing the jury to determine if the defendant was the same person named in the order.

Regarding the rejected jury instruction, the Court found that under Lovitt, "the law of this Commonwealth does not require a fact finder to give different consideration to the testimony of a government informant than to the testimony of other witnesses."

Regarding the juror, the Court pointed out that the juror affirmed during voir dire that she could make an impartial decision based on the evidence at trial. The Court also noted that, when she acknowledged during voir dire that she knew the defendant, the defendant did not question her about any specifics of that relationship or what opinion she held of the defendant. The Court ruled that the trial court reasonably determined that the defendant had not presented credible allegations of bias that undermined the prior determination of impartiality reached by the court at the conclusion of the voir dire process.

Regarding the defendant's request to continue sentencing, the Court ruled that the defendant failed to demonstrate prejudice from the denial of the continuance. The Court agreed that the defendant released his sentencing witnesses at his own peril based on a mere assumption that the court would grant the continuance.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0437222.pdf

English v. Commonwealth: November 1, 2022

Roanoke: Defendant appeals his conviction for Rape and Sexual Assault of a Child Under 13, 2nd Offense, on Evidentiary Issues.

Facts: The defendant sexually began sexually assaulting a child soon after her fifth birthday. The defendant was in a relationship with the victim's mother and acted as a caretaker for the victim and her siblings. The victim testified that the defendant was a "father figure" to her. The victim was fourteen years old at the time she reported the abuse. At the time, the defendant had moved out because he was having a child with another woman. The other woman testified that she had been in an "on and off" relationship with the defendant for fifteen years, and at the time of the trial he was her boyfriend.

A SANE nurse, Melissa Harper, examined the victim, who disclosed that the defendant sexually assaulted her daily since sixth or seventh grade. The exam revealed the victim suffered from genital warts. The defendant was diagnosed and treated for genital warts in 2013 and in 2014, during which he was sexually abusing the victim. At trial, a doctor testified that genital warts are "typically" transmitted through sexual contact.

The Commonwealth indicted the defendant for various offenses, alleging a three-year date range from shortly after the victim's tenth birthday. The defendant asked for a bill of particulars to state the dates, locations, and times of all offenses for which he was being charged. The defendant also objected to the requirement that he provide a notice of alibi based on the three-year date range in the indictment. The trial court denied the motion.

Prior to trial, filed a motion in limine seeking to exclude evidence of his prior adjudication of delinquency for the forcible sodomy of an eight-year-old when he was fifteen years old. The trial court denied that motion but gave three limiting instructions regarding the purpose for which the defendant's prior conviction could be considered; the jury was instructed not to consider it as evidence of guilt.

Prior to trial, the defendant sought to exclude evidence regarding his genital warts due to the number of years between the diagnoses and the lack of evidence conclusively establishing that the victim contracted the condition from him. The trial court denied his motion and permitted the Commonwealth to introduce that evidence at trial.

Prior to trial, the Commonwealth's moved to admit evidence of the defendant's prior sexual conduct with the victim prior to the indictment. The defendant sought to exclude evidence of his sexual acts with the victim such as "alleged play fighting, humping, and oral sex." He contended that, because these acts were not the basis of criminal charges, they were not admissible. The trial court ruled that it was relevant under Rule 2:404 (B) to establish the absence of a mistake or an accident.

At trial, the defendant also argued that the Commonwealth failed to establish that he and the victim were not married.

Held: Affirmed.

Regarding the defendant's argument that the Commonwealth failed to prove he and the victim were not married, the Court noted that it was reasonable for the jury to infer that the victim would not have been able to marry the defendant without parental consent. The Court examined the evidence about the defendant's romantic relationships with the victim's mother and the other woman and concluded that a juror could reasonably infer that the defendant was not married to the victim at the time of the offenses.

Regarding admission of the defendant's prior adjudication of delinquency, the Court repeated that, in a proceeding against a defendant under a recidivist statute, evidence of the prior offense is admissible, even when it goes only toward a sentencing enhancement. The Court then explained that a potential prejudice arising from the introduction of a defendant's prior convictions during the guilt phase can be solved by an appropriate limiting instruction to the jury.

Regarding the evidence of the defendant's genital warts, the Court agreed that the evidence was admissible to establish that the defendant began having sexual intercourse with the victim in the same time frame in which he had outbreaks of genital warts.

Regarding the evidence of the defendant's prior sexual acts with the victim, the Court noted that the Commonwealth was required to establish that he acted with "lascivious intent." Thus, the Court explained, the defendant's other sexual misconduct was relevant to establishing that he acted with lascivious intent and that his acts were accomplished knowingly and intentionally. The Court concluded that the duration and escalation of the defendant's sexual contact with the victim before the indictment provided the jury with some evidence of the defendant's state of mind and intent when he committed the offenses after the move.

Regarding the defendant's request for a bill of particulars, the Court repeated that it is improper for a defendant to use a bill of particulars to expand the scope of discovery in a criminal case. The Court noted that under *Clinebell,* an extended period during which alleged sexual crimes occurred against a minor were sufficient to inform the defendant of the time of the offenses. In this case, the Court ruled that the time frames in the indictments and bill of particulars were sufficient to apprise the defendant of "the nature and character of the offenses."

The Court also noted that the defendant never offered any type of alibi defense. The Court ruled that the trial court did not abuse its discretion when it did not require the Commonwealth to provide more specific information about the date, time, and location of the offenses or by overruling the defendant's objection that the lack of more specific dates prevented him from providing an adequate notice of alibi defense.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1065213.pdf

Forness v. Commonwealth: June 28, 2022

Arlington: The defendant appeals his conviction for DUI, 2nd Offense, on admission of Field Sobriety Tests, a Prior Conviction, the Certificate of Analysis, and denial of a Jury Instruction.

Facts: The defendant drove a vehicle while intoxicated after having previously been convicted of that offense. Officers obtained a search warrant for the defendant's blood and sent the blood to the Department of Forensic Science, which determined that the defendant's BAC was .198.

Prior to trial, the defendant moved to dismiss the prosecution, alleging that videos from other officers on the scene had been destroyed. The defendant also moved to exclude the results of the blood test, arguing that the officers' only authority to conduct a blood draw came from Virginia's implied consent statute, not from obtaining a search warrant.

At trial, the defendant also moved to exclude evidence of his field sobriety tests, contending that evidence of a person's performance on a field sobriety test cannot serve as evidence of intoxication in determining his guilt. He also contended that the Commonwealth did not adequately establish a chain of custody for the certificate of analysis. Lastly, he argued that the Court should not allow the Commonwealth to admit his prior conviction during its case-in-chief.

The trial court rejected the defendant's proposed jury instruction, which stated: "The admission of the blood or breath test results in this case is not determinative of guilt" and that the jury must "make [its] determination from all the evidence presented."

Held: Affirmed.

Regarding the field-sobriety tests, the Court reasoned that a field sobriety test provides police officers with an opportunity to observe a driver's behavior, coordination, and movement. Therefore, the Court explained, officers may later testify about those observations as circumstantial evidence of the driver's level of physical and mental impairment, which directly translate to a driver's ability to operate a car safely. The Court also rejected the defendant's contention that FSTs are "scientific" evidence, subject to special rules, as baseless.

The Court then rejected the defendant's argument that the Commonwealth could not admit the results of blood obtained from a search warrant. The Court found that, because the police obtained a warrant, the implied consent statute was irrelevant to this case. The Court concluded that, although § 18.2-268.2 sets out the procedure for implied consent, many of the other adjacent statutory procedures governing blood draws apply to all offenses in Title 18.2, including DUI. Thus, even when the Commonwealth secures a warrant for a blood draw, it would still, for example, need a certificate of blood withdrawal and a statutorily qualified person to perform the blood draw.

The Court also repeated that the defendant's claims regarding authentication of the certificate of blood withdrawal (required by § 18.2-268.6) and the blood sample's chain of custody only went to the weight of the evidence, not its admissibility.

The Court rejected the defendant's argument that the Commonwealth could have destroyed video evidence of his arrest. The Court concluded that nothing in the record suggested that the videos he claimed that the Commonwealth had destroyed or hidden ever existed.

The Court also agreed that the Court properly admitted the defendant's prior conviction in its case-in-chief. The Court repeated that, as "with all elements of a crime, the burden is on the Commonwealth to prove the prior [DUI] conviction beyond a reasonable doubt."

Lastly, the Court found that the defendant's proposed jury instruction would have been duplicative of the other, standard instructions in this case.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1029214.pdf

Miscellaneous Evidentiary Issues

Virginia Court of Appeals
Published

Hargrove v. Commonwealth: May 2, 2023

King William: Defendant appeals his convictions for Murder, Robbery, and related offenses on issues of Joint Trial, Sixth Amendment confrontation, and Exclusion of Evidence.

Facts: The defendant and his confederate shot and killed an 8-year-old child while robbing the victim's family. The defendant and his confederate targeted the family after the father had posted on social media about recent lottery winnings. Over a week later, police arrested the defendant in Richmond in possession of a firearm. The defendant later pled no contest to possession of that firearm. Subsequently, DFS determined that the gun was used in the murder.

The police also seized a cell phone from the defendant during his arrest. The defendant admitted to police that it was his phone. A data extraction revealed "selfies" of the defendant, an associated email address, and several internet searches made the day after the crime, including searches for "crime reports for King William County, VA." The data extraction also revealed that prior to the robbery and murder, the defendant and his co-defendant exchanged several text messages about meeting that night and had discussed a planned "lick" or robbery. FBI Special Agent Jeremy D'Errico also later testified about how he used cell site records to track the defendant and his confederates' movements.

Prior to trial, the Commonwealth moved in limine to admit the evidence of the firearm and the defendant's conviction. The defendant objected, but the trial court overruled his objection. The trial court also granted a joint trial of the defendant and his co-defendant, over the defendant's objection.

At trial, three different witnesses, two friends and an inmate, testified that the co-defendant confessed to them after the murder. The defendant objected to that evidence on *Crawford* confrontation grounds, but the trial court overruled his objection.

The defendant introduced testimony from his girlfriend at trial. The court sustained the Commonwealth's objection to questions about the defendant's financial stability as not relevant to robbery. The defendant later proffered that the girlfriend would have testified that the defendant made thousands of dollars a night running card games and was doing well financially. The defendant also sought to introduce testimony from the girlfriend that he "often" left his phone at his residence and that "several times" in the past, another person answered when she called the defendant's phone. The court excluded the evidence because the girlfriend could not testify to the whereabouts of the phone on the day of the murder.

Held: Affirmed.

The Court first held that the admission of the co-defendant's confessions did not violate the defendant's Confrontation Clause rights. The Court first examined the "*Bruton*" doctrine, which states that at a joint trial, the admission into evidence of a non-testifying co-defendant's out-of-court confession violates the Confrontation Clause if the confession incriminates the other defendant. The Court concluded that, because *Crawford* limited the scope of the Confrontation Clause to testimonial statements, and the *Bruton* doctrine depends on the Confrontation Clause, it therefore follows that *Crawford* limited *Bruton's* protections to those statements that implicate the Confrontation Clause— to wit: testimonial statements. In this case, the Court ruled that *Bruton* did not apply because the defendant could not show that the confessions he challenged were "testimonial" statements.

The Court pointed out that out-of-court statements are "testimonial" if, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. In this case, the Court found that the three confessions were non-testimonial. The Court reasoned that when the co-defendant confessed, a reasonable person would not have intended to create a statement "for use in an investigation or prosecution of a crime;" Instead, a reasonable person in the co-defendant's position was likely to confide in people he was close to, whom he did not anticipate would participate in his prosecution.

Regarding the joint trial, the Court acknowledged that prejudice may result if evidence against a defendant, if tried alone, is admitted against a co-defendant in a joint trial. In this case, the Court concluded that the evidence admitted specifically against the defendant failed to establish a sufficient basis for concluding the jury was prevented from making a reliable judgment about his guilt or innocence.

Regarding admission of the prior conviction, the Court noted that, in pleading no contest to a charge as set forth in the indictment, the defendant agreed to or admitted that the facts set forth in the indictment were true. Further, the Court rejected the defendant's contention that nothing in the guilty plea admitted a connection to the particular firearm. The Court concluded that the conviction was highly relevant to prove the defendant's identity, presence, and involvement in the crimes, and therefore the court did not err in admitting the evidence.

Regarding the defendant's girlfriend's excluded testimony, the Court found that the proposed testimony was irrelevant. Regarding the witness' testimony about the defendant's income, the Court repeated that although lack of motive is generally admissible to prove lack of a reason or intent to commit an offense, the proffered evidence would not have established that "logical tendency." Regarding the witness' testimony about the defendant's phone, the Court observed that the defendant was attempting to establish that he was not in possession of the cell phone on the night of the murder. The witness, however, was unable to testify as to the location of the cell phone that night. Therefore, the Court found no abuse of discretion in the court's determination that the proffered testimony about the cell phone lacked relevance and was therefore inadmissible.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1351212.pdf

Shahan v. Commonwealth: December 13, 2022

Norfolk: Defendant appeals his conviction for Murder, Robbery, and Use of a Firearm on Exclusion of Evidence of a Civil Suit.

Facts: The defendant shot, robbed, and killed a man. After the murder, the defendant filed a civil lawsuit against the city and the police officers in which he asserted claims for defamation, false imprisonment, and intentional infliction of emotional distress, claiming that the officers had unlawfully arrested, detained, and interrogated him as part of their investigation of the crimes.

Prior to trial, the Commonwealth filed a motion in limine to prohibit the defendant from introducing evidence of the civil lawsuit. The defendant contended that the evidence of his civil suit was relevant for two reasons. First, he argued that it showed police "investigatory bias" toward him because it was only after the defendant sued them that he was charged with the crimes. Second, he argued that the lawsuit bolstered his claim of innocence because a guilty person would likely avoid confrontation with the police and not confront them with a lawsuit. The trial court excluded the evidence of the civil lawsuit.

Held: Affirmed. The Court held that the trial court did not err in excluding evidence of the existence of a civil lawsuit. The Court found that the defendant's proposed inferences were so attenuated from the basic fact that the defendant filed a civil lawsuit against the police that the Court found them purely speculative and thus "irrational." The Court noted that the defendant could have filed the civil suit "fraudulently, in bad faith, knowing full well that he's guilty of the offense." Therefore, the Court ruled that the mere filing of the civil lawsuit was irrelevant and not admissible.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1098211.pdf

Virginia Court of Appeals
Unpublished

Cook v. Commonwealth: March 21, 2023

Henrico: Defendant appeals his conviction for Murder on Admission of Victim Photos and Denial of a Competency Evaluation.

Facts: The defendant shot and killed the victim. Later, the defendant confessed to the murder to police. Prior to trial, the defendant filed a motion in limine to exclude pictures and videos of the victim's treatment at the crime scene because he argued that their probative value was significantly outweighed by the risk of unfair prejudice. The defendant argued that the graphic nature of the images warranted their exclusion. He also argued that, because they were presented through the Commonwealth's first witness, the images "predisposed the jury to view the remaining evidence in a distorted and unfavorable way" to the defendant. The trial court overruled the objection.

Approximately one week before the scheduled jury trial, the defendant moved for a mental competency evaluation. At the hearing, the defendant's attorney proffered that "the major things" the defendant "misunderstood" were "the different verdicts that the jury could reach in his case" and the trial court's "discretion in sentencing him based on those verdicts." The defendant "knew the names of his charges and the lesser possible verdicts"; but he could not "explain the elements of those charges and how they differed from one another."

Defense counsel proffered that the defendant understood "defense counsel's role," he "had difficulty . . . explaining the roles of the judge, jury, and the prosecutor," as well as "sentencing concepts

and the discretionary aspect of the sentencing guidelines." Defense counsel stated that the defendant did not understand that the trial court had the discretion to exceed "the high end of the sentencing guidelines." Defense counsel expressed doubt that the defendant "fully understood" his explanation of these concepts and suggested that the defendant had previously "downplay[ed] his inability to understand" the information provided to him and believed that the defendant's pre-trial time in jail had deteriorated his mental state.

In response to defense counsel's proffer, the trial court questioned the defendant extensively about his understanding of the trial process. The trial court found that the defendant understood the proceedings and could assist his attorney in his defense. Accordingly, it held that the defendant had failed to establish probable cause for a competency evaluation.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in denying the defendant's motion in limine and acted within its discretion in finding there to be no probable cause to order a competency evaluation.

Regarding the photos, the Court repeated that, even when the cause of death is not in dispute or has been stipulated, crime scene photographs may be admitted. In this case, the Court found that the images of the defendant immediately after the shooting accurately portrayed the scene and provided evidence of the severity, location, and scope of his wounds, all of which were probative of the defendant's state of mind when he shot the victim, and whether he acted with malice. The Court also concluded that the images assisted the fact finder in determining the victim's location relative to the location of the cartridge casings, and by extension, the defendant's location when he fired at the victim.

Regarding the defendant's request for a competency evaluation, the Court agreed that during the trial court's colloquy, the defendant demonstrated that he understood the distinctions between the possible verdicts, the role of the jury and the judge, and the potential sentencing outcomes.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0253222.pdf

Jung v. Commonwealth: March 21, 2023

Fauquier: Defendant appeals his conviction for Murder on Exclusion of Previous Prosecutor's Decisions, Mentioning Hearsay in Opening, Admission of Photos, and Jury Instruction Issues.

Facts: In 2008, the defendant stabbed a Buddhist monk to death. Police identified the defendant as the killer and in 2010, police interviewed the defendant. He told police that when he discovered the victim's body, he decided to "run away" and immediately drove to New York. The defendant told police that he "must have killed" the victim, although he could not remember doing so. The Commonwealth charged the defendant with the murder in 2020.

The Commonwealth filed a pretrial motion in limine to bar the defense from eliciting testimony about whether the prosecution had been "previously declined or refused." The defendant argued he should be able to show that he was not "fleeing from prosecution because there hadn't been a

prosecution that had been initiated." The Commonwealth granted the motion in part but allowed the defendant to "show that there was no outstanding warrant" between 2008 and 2020. The trial court emphasized that the parties were not permitted to discuss "whether the Commonwealth had agreed to prosecute or not prosecute or how many Commonwealth's attorneys were involved."

In its opening statement, the Commonwealth referred to expected testimony from a witness that the victim feared the defendant after the victim removed him as a temple director. The defendant objected that the statement would be hearsay. The trial court overruled the objection. During the witness' testimony, the defendant again objected based on hearsay, arguing that the witness could not testify about anything that the victim said. The trial court sustained the objection. The witness testified that the victim was "paranoid" after the defendant was removed as a director and wanted the witness to be present at the temple when the defendant was there. He did not repeat specific statements that the victim made to him.

At trial, the Commonwealth, over the defendant's objection, introduced six photographs of the defendant's former residence. The photos were taken in 2008 when the police searched the house, within weeks of the murder. They showed that the house was vacant. The defendant argued that the photos were not relevant. The trial court admitted the photographs into evidence.

At trial, the Commonwealth presented evidence that the defendant wrote a bad check, drank alcohol excessively, and gambled. During the jury instruction phase, the Commonwealth offered an instruction that the jury could "consider the character of [the defendant] when proven by the evidence, whether good or bad, along with the other facts and circumstances in the case in determining his guilt or innocence." The defendant objected to the instruction, but the trial court overruled the objection.

Held: Affirmed.

Regarding the decisions of the three prior prosecutors not to charge the defendant, the Court held that the trial court properly granted the Commonwealth's motion in limine. The Court agreed that the decisions made by prior prosecutors about the defendant's case, rooted in prosecutorial discretion, were not relevant to the jury's determination of guilt or innocence based on the evidence presented at trial in 2021. The Court found that informing the jury that prior Commonwealth's Attorneys had elected not to prosecute the case would have impermissibly colored the jury's interpretation of the evidence. The Court agreed that the trial court correctly excluded "improper and confusing evidence." The Court noted that the trial court permitted proper information for the jury to consider that supported the defendant's factual point that the lengthy delay was not due to him absconding.

Regarding the Commonwealth's reference to hearsay in opening statement, the Court observed that, during the witness' testimony, he did not repeat what the victim had told him, but instead he said that the victim became "paranoid" after the defendant was removed as a director of the temple. The witness also stated that the victim asked him to be at the temple whenever the defendant was there. The Court concluded that his testimony supported the prosecutor's opening remark in sum and substance that the victim feared the defendant and it was relevant to explain the relationship between the two men. The Court also pointed out that the trial court specifically instructed the jury prior to opening statements that they are "what [the attorneys] expect the evidence to be" but are "not evidence and you must not consider [them] evidence."

Regarding the photos of the vacant house, the Court ruled that the challenged photographs were relevant to the defendant's consciousness of guilt. The photos were relevant to support the Commonwealth's theory that the defendant did not intend to return after fleeing to New York.

Lastly, regarding the jury instruction, the Court ruled that, although the character instruction was based on Virginia Criminal Model Jury Instruction 2.200 and was a correct statement of the law, the trial court abused its discretion in giving the instruction because it applies only when "the defendant has offered character evidence." The Court pointed out that the defendant did not testify or offer evidence of his good character, and consequently the instruction did not apply.

However, although the Court held that giving the instruction in this case was error, the Court then ruled that the error was harmless.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0529224.pdf

Hetle v. Commonwealth: February 14, 2023

Fairfax: Defendant appeals his convictions for Murder and Use of a Firearm on Juror Misconduct and Admission of Prior Bad Acts.

Facts: After a series of disputes, the defendant shot his neighbor repeatedly, killing him.

During trial, a juror saw a trial spectator photograph some of the jurors outside the courthouse the day before. The juror informed the trial court that she did not communicate with anyone else about her reported observations. The trial court instructed the juror not to share her reported observations with anyone else.

At trial, over the defendant's objection, his son testified that the defendant had referred to the victim "in a racial derogatory manner." Specifically, the defendant's son testified that at least ten times, the defendant referred to the victim using racial slurs which the defendant's son identified.

At trial, the Commonwealth also introduced a defendant's recorded telephone call from jail to the defendant's wife. The defendant objected that because the call was an intended confidential spousal communication, the call was protected from disclosure under § 19.2-271.2 and inadmissible under Virginia Rule of Evidence 2:504(b). The defendant argued that his call from the jail to his wife was protected from disclosure as an intended confidential communication because the jail's telephone system provided his only means of communicating with his wife while he was incarcerated. The trial court overruled the defendant's objection.

Held: Affirmed. The Court held that the trial court did not err in refusing to remove the juror mid-trial when the juror assured the court that her observation of a trial spectator photographing jurors outside the courthouse would not affect her performance of her duties as a juror in accordance with her instructions and her oath. Additionally, the Court held that the trial court's contested evidentiary rulings did not constitute reversible error.

Regarding the juror, the Court found that, given the juror's assurances that

(i) her observation of a trial spectator photographing jurors would not affect her ability to be fair and impartial and

(ii) she would not inform her fellow jurors about her observation,

the Court ruled that the trial court did not abuse its discretion by refusing to remove the juror. The Court agreed with the trial court that there was no basis for finding that the juror's reported observation would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath.

Regarding admission of the defendant's racial slurs, the Court held that the trial court did not err in admitting testimony about the defendant's use of racial slurs in reference to the victim. The Court held that the trial court did not abuse its discretion in finding that the danger of unfair prejudice did not substantially outweigh the probative value of the contested evidence. The Court reasoned that the defendant's use of racial slurs in reference to the victim related to the malice element of murder. The Court concluded that the trial court reasonably concluded that the evidence of the defendant's use of racial slurs did not invite the jury to decide the case based on an unrelated factor or on inflamed passions instead of probative evidence.

Regarding the jail call, the Court noted that both parties were advised that it might be recorded and subject to monitoring at any time. In addition to the automated message informing the defendant and his wife that the call was subject to monitoring and recording, the Court noted that the defendant told his wife that the call was being recorded and she replied, "I know." Under these circumstances, the Court found that the defendant's phone conversation did not qualify as a communication made privately between spouses.

The Court concluded that, even if the defendant had no means of having private, confidential communications while he was incarcerated, this circumstance would not protect his monitored communications from disclosure as if they were private, confidential communications. Thus, the Court ruled that the recorded call was not a confidential communication as defined in Rule 2:504(b)(2) and the trial court did not err in admitting the call into evidence.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0304224.pdf

Cage v. Commonwealth: December 13, 2022

Virginia Beach: Defendant appeals his 141 convictions related to Attempted Murder and Malicious Wounding of Police Officers and Possession of Child Pornography on Joinder and Exclusion of Evidence grounds.

Facts: The defendant opened fire on a team of police officers—wounding a detective—as they entered his apartment to serve a search warrant for child pornography. After an extended standoff, as the defendant walked out of the apartment, he did not obey the officers' commands and a police dog broke loose from its handler, rushed the defendant, and bit the upper part of his back leg. Police

recovered over 14,000 images of child pornography on the various computers and external drives in the defendant's residence.

Before trial, the Commonwealth filed a motion for joinder, pursuant to Rule 3A:10, as to the child-pornography charges and shooting charges, asking for a single trial for all the charges against the defendant. The trial court joined the offenses over the defendant's objection.

The Commonwealth also filed a motion in limine to exclude any evidence of the police dog attacking the defendant. The defendant contended that the dog bite was relevant to the credibility of the testifying police officers—including whether they announced their presence and whether the defendant or the police fired first. He also contended the evidence would have established the police used "aggressive tactics" during the raid. None of the officers who testified at trial witnessed the dog bite take place. The trial court excluded the evidence.

A jury convicted the defendant on all 144 charges related to both the shooting and the recovered child pornography.

Held: Affirmed.

Regarding the joinder issue, assuming without deciding the trial court erred in joining the offenses for a single trial, the Court concluded that the overwhelming evidence of the defendant's guilt rendered that putative error harmless. The Court noted that some evidence relating to the child pornography charges would be admissible in a separate trial on the shooting charges, and vice versa, to prove motive, intent, and lack of mistake. However, rather than examining the evidence in detail, the Court simply concluded that the evidence in this case was so overwhelming as to each charge that admitting all the evidence would be harmless in any event.

Regarding the issue of the police dog attack, the Court ruled that the trial court did not err in excluding the evidence of the police-dog attack. The Court observed that the dog bite did not affect the likelihood that the testifying officers were truthful when recounting their initial confrontation with the defendant or whether they knocked and announced themselves. Finding so would impute any possible bias from the dog's handler to the other officers on the scene that day. Because a reasonable jurist could conclude the evidence was not relevant, the Court ruled that the trial court did not abuse its discretion.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0978211.pdf

Mayberry v. Commonwealth: October 18, 2022

Appomattox: Defendant appeals his convictions for Child Sexual Assault on use of Closed-Circuit Testimony and sufficiency of the evidence.

Facts: The defendant repeatedly sexually assaulted his girlfriend's seven-year-old daughter.

Prior to trial, the Commonwealth moved to present the victim's testimony by Closed-Circuit video. The Commonwealth presented testimony from the child's treatment provider, who was also an

expert on child trauma. She opined that if compelled to testify in front of the defendant, the victim's "PTSD would get significantly worse" because "seeing [the defendant] in person would" cause her to become "terrified" and reexperience her trauma. The victim's reexperienced trauma, according to the expert, likely would manifest in "increased anger outbursts and defiance" at home and school, and her PTSD symptoms could escalate into a "crisis situation" involving "anger outbursts," physical aggression, and even suicide. The expert emphasized that the risk of suicide was not mere speculation because she was aware of suicide by children as young as eight years old. Moreover, she expressly distinguished the victim's likely trauma if compelled to testify in front of the defendant from generalized courtroom anxiety. The Court granted the Commonwealth's motion, over the defendant's objection.

In one of the defendant's sexual assaults, the defendant sexually battered the victim by touching her genitals. The trial court convicted the defendant of Indecent Liberties in violation of § 18.2-67.3 for that incident, based on the Commonwealth's argument that "by reaching out his hand" to touch the victim's genitals, the defendant tacitly communicated a proposal to touch her genitals.

Held: Affirmed in Part, Reversed in Part.

Regarding the closed-circuit testimony, the Court found no error in the trial court's ruling that, by finding a substantial likelihood, based on expert testimony, the victim would suffer severe emotional trauma if forced to testify against the defendant in open court. Although the expert, at times, opined that testifying in the defendant's presence "would potentially" cause a "crisis situation," and the victim "could" suffer emotional outbursts, the Court found that this testimony did not render the trial court's finding plainly wrong or without evidentiary support.

Regarding the conviction for Indecent Liberties for touching the victim, the Court found that a plain reading of §18.2-370(A)(3) demonstrates that the word "propose" does not include touching a child's genitals. Thus, in this case, the evidence that the defendant touched the victim's genitals was insufficient to prove that he "proposed" to do so. The Court reversed that conviction, although it affirmed the other convictions in this case.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1380212.pdf

Digital, Photo & Video Evidence

Virginia Court of Appeals
Unpublished

Pittman v. Commonwealth: April 25, 2023

Southampton: Defendant appeals his convictions for False Pretense and Conspiracy on Admission of Video Evidence.

Facts: The defendant used a false ID and stolen credit card number to purchase a motorcycle from a store. The defendant's co-conspirator arrived to collect the motorcycle at the store. The next

day, the manager received a tip from an unknown woman that the motorcycle sale was a scam. The woman sent a video that depicted the defendant, sitting on top of the motorcycle, bragging about committing felonies every day, and how he and his partner got away with it. Further, the video showed the U-Haul truck with the same red straps that the manager had helped to securely strap the motorcycle with. The manager contacted the police. Upon being confronted by a police officer, the co-conspirator admitted, "I give up. You got me."

At trial, the Commonwealth elicited the testimony noted above from the manager and the officer regarding what the video depicted. This testimony was offered prior to the Commonwealth offering the video itself into evidence. The defendant objected only to the admissibility of the video itself. He argued that neither witness had "firsthand knowledge" of the video because neither created the video, nor did they observe the contents of the video when it was being recorded.

The trial court overruled the defendant's objection, stating that any issues regarding lack of firsthand knowledge of the contents of the video "[go] to the weight" of the testimony, not admissibility. Later, the trial court agreed that the video was not properly authenticated pursuant to Rule 2:901, and therefore was not admissible, stating that the Commonwealth had not laid adequate foundation to admit the video into evidence. The trial court noted that neither witness could testify as to whether the video fairly and accurately depicted the scene because neither was present when the video was made. In doing so, the trial court acknowledged that its two rulings "sound[] like an illogical set of rulings." The trial court only permitted the witnesses to testify to what they saw in the video, but did not admit the video itself.

At trial, the manager witness testified that: (1) he recognized the motorcycle as his and that the certificate of origin and bill of sale were depicted in the video, (2) he recognized the short wheel-base GMC U-Haul and his red ratchet straps still attached to the wall of the cargo bay as those used by the defendant's co-conspirator the day before, and (3) he identified the defendant, depicted in the video, as the person driving the U-Haul when the co-conspirator came to pick up the second motorcycle.

At trial, the officer also testified to what he saw in the video, noting that: (1) he recognized the defendant in the video as the driver of the U-Haul, (2) the defendant made statements to the general effect that they scam people all the time, (3) the motorcycle was the motorcycle in the video, and (4) the defendant was referred to as "Quad" and shown riding the motorcycle.

Held: Affirmed. The Court held that the trial court did not err in admitting the testimony at issue. Although a video does not need to be admitted into evidence in order for a witness to testify about it, the Court acknowledged that once the trial court excluded the offered video evidence on the basis of authenticity, thereby ruling that the video itself was not reliable and therefore not relevant to this offense, its previous ruling that the witnesses were allowed to testify as to the contents of that video might be viewed as internally inconsistent. In this case, the Court held that the trial court did not err in admitting the limited testimony about the video, as the Commonwealth proved through the witnesses' testimony sufficient indicia of reliability to prove the relevance and probative value of their testimony regarding specific portions of the video.

Though the trial court ruled that the video in its entirety was not admissible, the Court of Appeals determined that the trial court could have admitted the video, based upon existing case law. The Court concluded that the trial court in fact found sufficient indicia of reliability in the video to allow the witnesses to testify to what they recognized and what they saw. Thus, the Court ruled that the trial court did not err in allowing the manager witness to testify to the contents of the video, notwithstanding the fact that the trial court excluded the video itself.

The Court explained that Virginia case law on this point allows a witness to authenticate the contents of a video— notwithstanding the fact that he was not present when the video was recorded— simply based on the fact that he recognized certain key components of a video, thus establishing the

requisite indicia of reliability to satisfy the requirements of Rule 2:901. In this case, the Court found that the manager witness' familiarity with the defendant himself, the motorcycle, the red ratchet straps, and the paperwork associated with the "sale" which took place within less than twenty-four hours of his receipt of the video, the manager witness could provide sufficient testimony to satisfy the authentication requirements contained in 2:901.

The Court also noted that there was no evidence of or contention that would call into question the veracity of the video or the possibility of a "deep fake." The Court also reiterated that, where there is "mere speculation that contamination or tampering could have occurred, it is not an abuse of discretion to admit the evidence and let what doubt there may be go to the weight to be given the evidence."

Judge Huff filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0681221.pdf

Vazquez v. Commonwealth: February 14, 2023

Henry: Defendant appeals his convictions for Possession with Intent to Distribute on Fourth Amendment and Admission of Video Evidence grounds.

Facts: The defendant possessed methamphetamine and marijuana in his residence with the intent to distribute. Police intercepted a package of drugs at a shipping facility bound for the defendant's residence. Police obtained an anticipatory search warrant for the defendant's residence, intending to make a controlled delivery of the package. Police placed a tracker inside the package under the authority of the search warrant. The tracker was equipped with a light sensor, which alerted when the package was opened. This allowed law enforcement to time their entry into the home.

After the controlled delivery, police executed the warrant. Police found cocaine and ten pounds of marijuana in plain view. Police also found ledgers indicating sales, ten thousand dollars, and nearly four kilograms of methamphetamine hidden in a sofa.

The defendant moved to suppress the evidence from the search warrant, arguing that the use of the light tracker was unlawful, but the trial court denied the motion.

Police also recovered a cellphone during the search. It was the only such device found in the residence and only the defendant appeared to reside there. A forensic analyst examined the phone using Cellebrite. The analyst found a video showing baggies of methamphetamine, taken the same day as the search warrant. The analyst also found "selfie" photographs that the defendant had taken of himself.

Prior to trial, the defendant filed a motion in limine to exclude video evidence found on the cell phone. A police forensic analyst testified regarding his extraction of the cell phone's data. The analyst explained the software he used to extract the data and his training and experience in using the program. The analyst testified that the program, Cellebrite, examines the path of the photos or videos to determine whether they were created by the phone. He testified that Cellebrite does not add any photos or videos to the cell phone. Finally, the analyst testified that the Cellebrite program accurately

processed the video and that the video remained unaltered. The trial court admitted the video over the defendant's objection.

Held: Affirmed.

Regarding the search warrant, assuming without deciding that the use of a GPS equipped with a light sensor was an illegal search, the Court ruled that the inevitable discovery doctrine applied in this situation. Regardless of whether the devices operated as anticipated, the Court reasoned that the police would have executed their valid search warrant for the home. Thus, the alert from the GPS and light sensor affected the timing of the entry to the house but was not a necessary prerequisite for execution of the search warrant. Therefore, the Court found that it need not determine the legality of the placement of the GPS and light sensor into the package.

In this case, the Court found a reasonable probability that the evidence in question would have been discovered by lawful means because a valid search warrant existed for the residence, which specifically authorized law enforcement to enter the premises and seize drug-related items. Thus, the search warrant for the home would have been executed regardless of the light sensor's indication. The Court rejected the defendant's contention that there was a possibility that the officers would not have executed the valid search warrant they obtained. The Court wrote: "While anything is possible, the inevitable discovery doctrine does not require the proponent of the evidence to show that under any and all circumstances the evidence would have been found. It only requires the Commonwealth show a reasonable probability that the evidence would have been lawfully discovered."

Regarding the video, the Court repeated that a video may be authenticated if it is either a fair and accurate depiction of what a witness observed, or if there has been an adequate foundation laid as to the "accuracy of the process producing it," which renders the video a "silent witness." Under *Ferguson* and *Brooks*, the test to authenticate a video as a silent witness is "whether the evidence is sufficient to provide an adequate foundation assuring the accuracy of the process producing it." Similar to *Brooks*, the Court noted that the Commonwealth provided testimony to support the reliability and source of the video derived from the cell phone, including the information that the video at issue was taken on the same day as the search and seizure and that the selfie was taken the night prior to the search.

In this case, the Court ruled that the video was relevant because it tended to make a fact—namely the defendant's knowledge of the narcotics—more probable. While the Court agreed that no evidence was introduced showing that the defendant took the video, spoke in the video, or was aware of the video, the Court found that the Commonwealth introduced sufficient evidence showing that the cell phone seized was the defendant's cell phone. Specifically, the cell phone contained multiple self-taken photographs of the defendant, it was found among the defendant's possessions, and it was the only phone found in the house while the defendant was the sole occupant. Therefore, the Court ruled that the factfinder could make reasonable inferences that the cell phone was the defendant's and that the defendant had knowledge of the video contained on his cell phone.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0356223.pdf

Tipton v. Commonwealth: December 6, 2022

Pittsylvania: Defendant appeals her conviction for Felony Homicide on admission of Photos and Videos at trial.

Facts: The defendant neglected the victim, her maternal grandmother, until she was admitted to the hospital with severe wounds and injuries. She was "frail and thin," had multiple "pressure ulcers" on her body, and smelled of decomposition. The victim was transferred to a rehabilitation center for further care and remained there until her death in July 2020 from bacteremia, dehydration, and chronic malnutrition.

The defendant had been paid to take care of the victim as part of a self-directed home care program. After discovering the victim, but before the victim's death, investigators executed a search warrant of their residence. At trial, the Commonwealth introduced testimony about the condition of the house based on investigators' observations during execution of the search warrant. The Commonwealth also introduced bodycam footage from the search and photos taken during the execution of the search warrant. The evidence demonstrated the condition of the home. [*Note: The details of the condition of the home are graphic and not set forth here – EJC*].

At trial, the defendant objected to that evidence, arguing that this evidence "was not relevant" because it related to the house's condition "outside the time of the alleged offense." She also alleged that the bodycam footage and photos of areas of the house besides the victim's bedroom was irrelevant and should not have been admitted because there was no evidence that the victim had been to that area or that that area would have in some way had an effect upon her. The trial court overruled the defendant's objection.

At trial, the prosecution sought to introduce photos that the APS worker took of the victim's wounds. The APS worker, who took the photographs, confirmed that the photographs accurately represented the wounds. The defendant objected that the photos were not properly authenticated. She argued that because the investigator could not verify the color of the victim's wounds from the photographs, her testimony failed to establish that the photographs were a fair and accurate depiction of the victim's injuries. The trial court overruled the defendant's objection.

At trial, the prosecution also sought to introduce other pictures of the victim's wounds that they alleged the victim's mother had sent to one of the investigators. The defendant objected to the admission of the photos, arguing that the investigator could not authenticate the photos since she did not take the photos and that no evidence showed that the defendant had ever seen the photos. To authenticate the pictures, the prosecution played a video from one of the investigator's bodycam footage. In the footage, the victim's mother says to the investigator, "the pictures I sent you, that was [sic] the sores she had." At trial, the investigator confirmed that the photos were the ones sent to her by the victim's mother. The photographs were admitted over the defendant's objection.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in admitting the photographs of the wounds and the statements, video footage, and photographs related to the condition of the house.

The Court first ruled that the trial court did not err in admitting the photographs taken by the APS worker because the photographs were properly authenticated. The Court agreed that the investigator properly authenticated the photographs, and the trial court did not abuse its discretion in admitting them. Although the APS worker conceded that she could not say whether the colors in the photos were accurate, because the photographs were properly authenticated, any suggestion that the color of the wounds was inaccurate went to the weight of the evidence, rather than to its admissibility.

The Court then ruled that the photos authenticated by the victim's mother were also properly authenticated and could serve as "an independent silent witness of matters revealed by the photograph."

Lastly, regarding the photos and video depicting the condition of the house, the Court noted that even though the evidence was about the condition of the house in June 2020, about a month after the victim had last been in the home, that was a short enough time that it is was likely that the condition of the house in June 2020 reflected the condition of the house when the victim lived there. Therefore, the evidence about the condition of the house in June 2020 was relevant to show the condition of the house when the victim lived in the home.

Additionally, the Court found that evidence relating to the description of parts of the home besides the victim's room was relevant for showing the cause of her bacteremia. The Court also pointed out that the defendant lived in the house, and the jury could infer that the defendant's neglectful actions led to the condition of the home and that this condition contributed to the victim's death, a material issue in the case. Thus, the Court held that all of the evidence was relevant, and the trial court did not err in admitting all of it.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0635213.pdf

James v. Commonwealth: December 6, 2022

Richmond: Defendant appeals his convictions for Murder and Use of a Firearm on Admission of Video Evidence.

Facts: The defendant shot and murdered his uncle, in view of two witnesses. The defendant shot the victim repeatedly, chasing him down and shooting him as he fled. A video recording captured the defendant fleeing the scene. The defendant fled for several days, until police arrested him. Police in Chesterfield County found the murder weapon on the floorboard of a car in which the defendant had been sitting. However, a trial for felony possession of a firearm in Chesterfield County resulted in an acquittal.

At trial for murder in Richmond, the defendant objected to the admission of evidence of the firearm found on the car floorboard by the seat he occupied at the time of his arrest in Chesterfield County. Citing collateral estoppel, he contended that the Chesterfield acquittal prevented the Commonwealth from relitigating his knowing possession of the firearm in his Richmond trial and rendered the related evidence inadmissible in that trial. The prosecutor noted that the proffered order

did not explain on which element or elements the jury found the evidence insufficient, and he refused to stipulate to what had occurred in that Chesterfield court. The trial court overruled the defendant's objection.

The defendant also sought to exclude a surveillance camera video purporting to show the Richmond murder. A witness testified that the video and its contents, although not entirely clear, showed "exactly what happened" when the defendant shot the victim. The trial court overruled the defendant's objection. Although the video was a bit "blurry," the trial court found that the video was of adequate quality to aid the finder of fact at trial.

Held: Affirmed.

Regarding the evidence of the firearm, the Court held that the trial court's admission of the firearm and body camera footage showing the gun and its seizure from the car floorboard at the time of the defendant's arrest was not an abuse of discretion because the defendant did not establish that collateral estoppel principles applied. The Court noted that the defendant did not offer any additional evidence to permit the trial court to determine the basis on which the Chesterfield jury acquitted him. Thus, the Court agreed that the record supported the trial court's ruling that the defendant failed to establish that the precise fact relevant to the admissibility issue in his Richmond murder trial (whether the defendant possessed the firearm found in the car at the time of his arrest in Chesterfield) was resolved by his acquittal on the Chesterfield felon-in-possession-of-a-gun charge.

Regarding the video evidence, the Court repeated that videos are generally admitted under one of two theories: "either to illustrate a witness'[s] testimony or to serve as an 'independent silent witness' of matters depicted in the video." However, when someone who witnessed the events in a video testifies that it accurately represents what took place, it is not admitted under a silent witness theory, and the testimony of its maker is not required. In those circumstances, no testimony from "anybody who downloaded the video" or "who might have carried the video from one place to another" was needed.

Regarding the video quality, the Court noted that once the threshold for proving admissibility has been met, any claimed deficiencies in the evidence are for the finder of fact to resolve in determining what weight to give that evidence.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0896212.pdf

Owens v. Commonwealth: October 11, 2022

Newport News: Defendant appeals his convictions for Malicious Wounding and Use of a Firearm on Admission of a Photograph.

Facts: The defendant and another man shot one victim, wounding him, and shot and killed another victim. At trial, a witness testified that the defendant was "a light-skinned Black male wearing a hooded blue jacket." At trial, the Commonwealth offered a photograph of the defendant depicting "a

lighter-skinned Black male wearing a blue jacket with a hood." The defendant objected that the Commonwealth failed to establish when the photograph was taken and that it was taken on or near the date of the shooting. The trial court admitted the photo over the defendant's objection.

Held: Affirmed. The Court concluded that the gaps in the evidence went to the weight of the photographic evidence, not to its admissibility. The Court contended that the photograph was relevant because proof that the defendant at some point wore a hooded blue jacket increased the probability—however slightly—that the defendant was the shooter in the hooded blue jacket. Although uncertainty about the timing of the photograph decreased the photograph's slight effect on the probability that the defendant was the shooter in the hooded blue jacket, such uncertainty did not render the photograph irrelevant to this fact-in-issue. Because the photograph of the defendant was relevant and the defendant did not object that its admission was more prejudicial than probative, the Court ruled that the trial court did not abuse its discretion in admitting the photograph.

Judge Lorish filed a concurring opinion, arguing that it was error to admit the photograph, but acknowledging that the error was harmless.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1055211.pdf

MISCELLANEOUS

Appeals

Virginia Court of Appeals
Unpublished

Commonwealth v. Spivey: June 14, 2022

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

Facts: An officer stepped out of his patrol car and approached the defendant on the street and asked: "What's going on, man?" The officer asked if he could see the defendant's identification card and asked the defendant and his companion to step to the side of the road, out of traffic. When they arrived, the officer asked for the defendant's identification a second time to write down his information.

While the officer was still holding onto the defendant's identification, writing down his information, the defendant said, "Look like somebody wanted, man, for you to do all that." The officer replied, "I'm just asking for your information, that's all man." The officer then returned his identification and asked how to pronounce the defendant's name and whether he had anything illegal on him. The defendant said no, and then said, "Why you tryin' to search me?" The officer said that he was only asking whether the defendant had anything illegal on him, and the defendant said no.

The officer persisted and said: "The cigarette box you put in your pocket, there's nothing in there?" The officer explained to the defendant that he saw him put the box in his pocket when he first pulled over. In response to the question, the defendant answered no, while feeling around his pockets without locating the cigarette box. The officer continued to insist, three times, that the defendant had a cigarette box in his pocket, despite the defendant's repeated denials. Another officer arrived, immediately parked, and walked up directly behind the defendant.

The defendant finally pulled out the box, with the second officer standing right behind him, hand on his firearm, while the officer simultaneously reached for the box asking, "May I see it?" The defendant finally agreed, revealing heroin. He later admitted he regularly sold heroin.

Prior to trial, the defendant moved to suppress the search. The trial court granted the motion to suppress. The trial court explained that the encounter was at first consensual, but that the nature of the interaction shifted once the defendant asked why the officer wanted to search him and the officer made the "pointing motion" to show that "what he was interested in was that cigarette package." Under the "totality of the circumstances," the court found "there was a detention without reasonable articulable suspicion" and granted the motion to suppress.

Held: Affirmed, motion properly granted. The Court wrote: "We cannot say the trial court's factual findings were plainly wrong or without evidence to support them, or that the court's ultimate conclusion was in error." The Court acknowledged that when an officer merely asks for a person's identification, even for investigatory purposes, that is not enough to show the person was seized

without more. On the other hand, the Court explained that when an officer explicitly tells the defendant that he is suspected of a crime, that is strong reason to believe that a reasonable person would not have felt free to go on his way. The Court pointed out that the officer did not tell the defendant he was free to go, but otherwise did not give any further explanation about why the encounter was not a consensual encounter.

The Court refused to consider the Commonwealth's argument that the trial court made an error of law by applying a subjective standard, in that it focused on whether the defendant felt free to terminate the encounter, rather than consider whether a "reasonable person" would have felt free to decline the request. The Court ruled that the Commonwealth procedurally defaulted that argument.

The Court also rejected the defendant's argument that the Commonwealth petitioned for pretrial appeal too soon, only four days after it filed the notice of transcript in the trial court under § 19.2-402(B). The Court ruled that this provision does not require the Commonwealth to wait a certain period after providing notice about the transcript before the Commonwealth may file its petition for appeal.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0082221.pdf

Asset Forfeiture

Virginia Court of Appeals
Unpublished

Salahuddin v. Commonwealth: January 31, 2023

Spotsylvania: Defendant appeals a Civil Forfeiture by Default Judgment.

Facts: The defendant sold illegal drugs. The Commonwealth personally served the defendant with a notice of seizure and information informing him that law enforcement had seized $5,635 in 2015, and that he was a party defendant. It also instructed him that failure to file a written answer in circuit court within thirty days of service could result in the forfeiture of his claim to the seized property.

The Commonwealth requested that the seized funds be forfeited and asked the court to notify interested parties to appear in October 2015 to show cause why their interests in the property should not be forfeited. On that date, the trial court entered an order stating that the defendant had been personally served with the notice of seizure and the Information. The order stated that the defendant had not appeared, but that the proceedings were continued to November on the Commonwealth's motion. In November, the defendant appeared in person before the trial court to be arraigned on several drug-related charges. The order reflecting the arraignment also stated that the defendant had "a forfeiture case to be set along with these felony cases."

In 2016, the defendant was convicted of possession of a controlled substance with the intent to distribute, second or subsequent offense.

After several years of no action on the forfeiture case, in 2022, the Commonwealth moved for summary judgment. The motion alleged that the defendant's related criminal case had concluded in 2016 with his conviction for possession of a controlled substance with the intent to distribute. It also asserted that the defendant was personally served with notice of the forfeiture proceedings in October 2015 and had never filed responsive pleadings. Attached to the motion were copies of the order convicting the defendant, and the notice of seizure confirming personal service in 2015. The Commonwealth asked the trial court to enter a default forfeiture order in its favor and mailed a copy of its motion to the defendant.

The trial court entered an order of forfeiture. It found that the Information had not been contested and its allegations were thereby admitted. The trial court found that the $5,635 had been "used in substantial connection with the illegal sale or distribution of controlled substances in violation of § 18.2-248."

The defendant then filed a motion for "non-suit" in which he denied that the seized funds had been used in substantial connection with the illegal sale or distribution of controlled substances in violation of §18.2-248. He also asserted that the Commonwealth had presented no evidence that he was served with the notice of seizure and Information. The trial court denied the motion.

Held: Affirmed.

The Court found that the defendant was personally served with notice of the forfeiture proceedings. The Court observed that the notice of seizure informed the defendant that he was a party defendant, that $5,635 had been seized, and that failure to file a written answer in circuit court within thirty days of service could result in the forfeiture of his claim to the seized property. Despite more orders reflecting the defendant's personal appearance in court in connection with the forfeiture proceedings and pending criminal charges, the Court noted that the defendant never filed an answer or any other responsive pleading to the forfeiture proceedings. The Court also pointed out that the Commonwealth waited more than six years after the defendant's default to seek entry of a default forfeiture order. The Court found that there was no genuine dispute over service; thus, the record supported the trial court's decision to grant summary judgment and enter an order of forfeiture.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0705222.pdf

ECO and TDO

Virginia Court of Appeals
Unpublished

Temple v. Commonwealth: October 4, 2022

Virginia Beach: Defendant appeals her conviction for Assault on Law Enforcement on Sufficiency of the Evidence.

Facts: The defendant bit and kicked several police officers. A neighbor had called 911 after hearing the defendant banging on the wall of her apartment screaming "help me, help me." Officers found the defendant alone, naked, and screaming in a house that was "trashed." The defendant told the officers that invisible bugs were biting her, that her mother was paying them to take her into custody, that a man conspired to have her arrested, and that this entire interaction was being posted to Facebook.

At first, the defendant agreed to allow EMS to check on her, but then she changed her mind. At that point, an officer found that the criteria for an emergency custody order (ECO) had been met, concluding that there was probable cause the defendant had a mental illness, a substantial likelihood that the illness would cause serious physical harm to herself or others, and that she needed hospitalization or treatment but was unable or unwilling to voluntarily get that treatment. The defendant continued to refuse to be taken for medical care pursuant to the ECO. As two officers tried to forcefully remove her from her apartment, she bit one on the arm and kicked at the other. After she was ultimately placed in wrap restraints, the officers concluded she had committed multiple criminal offenses which superseded the ECO. Therefore, they took the defendant to jail.

At trial, the defendant argued that the trial court erred in convicting her because her mental health crisis, as evidenced by the ECO, negated the intent necessary to commit the offenses. The Commonwealth asserted that the defendant's argument was foreclosed because she failed to follow the procedural requirements in § 19.2-271.6, which permits a defendant to offer certain evidence "concerning the defendant's mental condition at the time of the alleged offense." However, the defendant never argued in the trial court that § 19.2-271.6 applied to her case. Instead, she argued that the ECO was determinative and that once the officers determined under § 37.2-808 that there was probable cause to believe the defendant had a mental illness that may lead to imminent harm to herself, or others, she could not have specifically intended to commit the offense.

Held: Affirmed.

The Court examined the new "diminished capacity" code section, § 19.2-271.6. The Court found that the General Assembly intended to partially abrogate the common law rule that all mental state evidence was inadmissible and irrelevant to a defendant's intent, unless the defendant pursued a defense of insanity, by allowing the defendant to present evidence of "the defendant's mental condition" as set out in Code. The Court concluded that § 19.2-271.6 permits a defendant to argue that she lacked the requisite intent by presenting evidence that she has one of the three specific categories of mental conditions under § 19.2-271.6(B) and is not raising an insanity defense under *Stamper* and its progeny.

The Court then concluded that § 19.2-271.6 does not set out an affirmative defense. The Court looked to cases from Texas and Massachusetts, which have similar rules of evidence. The Court also found that both expert and non-expert testimony may be introduced as to a defendant's mental condition. The Court observed that the statute permits the admission of evidence relevant to whether a defendant has a "mental illness," defined as "a disorder of thought, mood, perception, or orientation that significantly impairs judgment or capacity to recognize reality," or a "developmental disability or

intellectual disability," relying on definitions from § 37.2-100. The Court noted that neither definition identifies specific conditions.

The Court then reasoned that the statute "contemplates the admission of a wide berth of potential evidence relevant to whether a defendant has a qualifying mental condition and whether that condition tends to 'show the defendant did not have the intent required for the offense charged.'"

In this case, though, the Court found that any error by the trial court in failing to enforce the procedural requirements of § 19.2-271.6 were harmless, because the evidence demonstrated that the defendant had the requisite intent. Because § 19.2-271.6 does not set out an affirmative defense, the Court explained that the Commonwealth had the burden of both production and persuasion in showing that the defendant had the requisite intent for each offense, and the factfinder was entitled to make that determination after weighing all the evidence presented. The Court noted that the defendant knew that the officers were police officers, as she repeatedly said that they were arresting her and questioned why they were arresting her; that the defendant had the presence of mind to request permission to call her mother prior to being removed from her apartment, and the officers allowed her to do so; and that she bit and kicked the officers while repeatedly saying, "I'll fight you," and yelling at them to leave her home.

The Court ruled that issuance of an ECO, along with the condition of the defendant's apartment and her irrational statements and actions, collectively constituted evidence that may be relevant as to whether she had a mental illness when offered under § 19.2-271.6, although the defendant did not raise that defense in this case. However, in a footnote, the Court rejected the defendant's argument that that the issuance of an ECO alone establishes that a person under the ECO can never have the requisite intent for any criminal action. "Probable cause to believe a person is acting under any mental illness or incapacity does not by itself prove that a person could not form the intent to commit a criminal offense."

In a concurrence, Judge Ortiz wrote separately "to address the failure of our community to properly respond to the mental health crisis, and the officers' hasty decision to take Temple to jail instead of the hospital." He wrote, "Unfortunately, neither Code § 37.2-808 nor any other statute provides a remedy for law enforcement officers' failure to perform their duty under Code § 37.2-808(G). While I join the Court's decision because the trial court has broad discretion in weighing existing evidence, I am skeptical that the officers' actions complied with Code § 37.2-808(G) when no change of circumstances negated the initial probable cause that supported the ECO."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1172211.pdf

Expungement

Virginia Supreme Court

Forness v. Commonwealth: January 19, 2023

Arlington: Defendant appeals the denial of his Expungement petition.

Facts: The defendant was arrested and charged with a felony violation of § 18.2-266 for driving while intoxicated "after having committed a previous violation of § 18.2-36.1, 18.2-51.4, 18.2-51.5, or a felony violation of § 18.2-266." However, the defendant did not have a prior felony driving while intoxicated conviction. The Commonwealth amended the arrest warrant to charge him with a misdemeanor violation of § 18.2-266 for driving while intoxicated, second offense within ten years ("DWI Second"). The General District Court convicted the defendant of that offense. The defendant appealed his conviction to the circuit court. While his appeal to the circuit court was pending, the defendant filed a petition seeking to expunge the Felony DWI charge from his record.

The trial court denied the petition.

Held: Affirmed. The Court found that the amendment did not render the Felony DWI charge "otherwise dismissed" for the purposes of § 19.2-392.2. Therefore, the Court ruled that the trial court properly dismissed the defendant's expungement petition.

The Court observed that the defendant was not acquitted of the DWI after a prior felony conviction charge, nor was a nolle prosequi taken. Thus, the question before the Court was whether amending the Felony DWI charge to DWI Second equated to the Felony DWI charge being "otherwise dismissed." The Court repeated that a charge is not "otherwise dismissed" when, for example, it is reduced to a lesser included offense. A crime is a lesser included offense of another crime when all the elements of the lesser crime are subsumed by the greater crime. Conversely, the Court also repeated that a charge is "otherwise dismissed" when the original charge is amended to a "completely separate and unrelated charge."

In this case, the Court found that Felony DWI and DWI Second involve the same offense but with different sentencing enhancements. In other words, the difference between the two charges is one of degree and not of kind. Thus, in this case, the amendment to the arrest warrant related only to the sentencing enhancement sought to be imposed, not the underlying offense. The Court wrote: "Given that the actual offense that Forness was charged with remained the same, it simply cannot be said that the amendment resulted in a completely separate and unrelated charge."

Justice Mann filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1210893.pdf

Virginia Court of Appeals
Published

Obregon v. Commonwealth: October 11, 2022
75 Va. App. 582, 878 S.E.2d 418 (2022)
Montgomery: Defendant appeals the denial of her Expungement.

Facts: The trial court dismissed two charges against the defendant for underage possession of alcohol and fraudulent use of identification to obtain alcohol. The next year, the district court also dismissed a charge against the defendant for hit & run. The defendant filed a petition to expunge the three dismissed charges, but the Commonwealth objected.

At the hearing, the defendant testified that she was doing well in college, working part time, and hoping to study children's behavioral psychology in graduate school. She believed that disclosure of her criminal charges would negatively affect her career because internships in her preferred field required background checks. She further testified that various prospective employers had already denied her applications or withdrawn offers for delivery, warehouse, and youth lacrosse instructor positions after conducting private background checks on her. On cross-examination, the Commonwealth asked whether the defendant was aware that the charges for which she sought expungement do not appear on her VCIN. The defendant responded that she was not aware, but that prospective employers had specifically used these charges to deny her employment.

The Commonwealth pointed out that the defendant had an extensive criminal record, which included a felony charge for shoplifting, later reduced to a lesser-included misdemeanor conviction for petit larceny, and two nolle-prosequid charges from another jurisdiction for DUI and Domestic Assault and Battery.

The trial court denied the petition, finding that the petitioner did not prove that there was a "manifest injustice" to her if these three misdemeanors were not expunged.

Held: Reversed. The Court held that the trial court incorrectly applied the law by requiring the defendant to establish actual manifest injustice, when § 19.2-392.2(F) only requires a reasonable possibility of such injustice. The Court explained that the trial court applied the law incorrectly when it required the expungement petitioner to prove actual manifest injustice, rather than a reasonable possibility of manifest injustice.

The Court found that the defendant established that the three dismissed charges, if not expunged, could be a "hindrance" on her ability to obtain employment and education. The Court also concluded that expungement of the three dismissed charges is likely to yield "tangible benefit" to the defendant, considering the nature of the charged offenses.

The Court also found that the Commonwealth's evidence and argument failed to negate the reasonable possibility of manifest injustice. The Court rejected the Commonwealth's argument that an unexpunged misdemeanor arrest is less likely to result in manifest injustice than an unexpunged felony arrest. Instead, the Court contended that § 19.2-392.2(F) sets a more permissive standard for expunging misdemeanor arrests than expunging felony arrests, where the petitioner has no prior criminal record.

The Court acknowledged that the Supreme Court's ruling in *A.R.A.* had stated that a "person with a lengthy unexpungeable criminal record will generally stand on a different footing with respect to showing a possible 'manifest injustice.'" In this case, however, the Court argued that the defendant's "unexpungeable" criminal record was far from "lengthy." The Court found that a single conviction for larceny was, "by definition," not lengthy.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0019223.pdf

Extraordinary Writs

Virginia Supreme Court

In Re: Biberaj: December 8, 2022

Loudoun: The Commonwealth's Attorney seeks a Writ of Mandamus and Writ of Prohibition to annul the trial court's order removing the prosecutor.

Facts: A criminal defendant committed numerous charges in multiple counties, including Loudoun County. In Loudoun, the defendant was charged with a series of offenses. In August 2021, the defendant accepted a plea agreement under which he would plead guilty to several charges. The defendant signed and filed a plea agreement, and the parties also submitted a statement of facts to the trial court.

After accepting the defendant's guilty pleas and finding him guilty, the trial court questioned the prosecutor on several portions of the facts that he suggested were incomplete or misleading. The trial court stated the answers to his questions would have "some impact" on whether he accepted the plea agreement and commented that the prosecutor may have to supply those answers. Ultimately, the trial court deferred accepting the plea agreement so the parties could address his concerns at the sentencing hearing.

At the sentencing hearing, another prosecutor appeared and attempted to address the trial court's concerns regarding the facts and plea agreement. However, the trial court remained unconvinced, and he continued the matter "to further consider whether the plea [was] going to be accepted or some other action [was] going to be taken."

After the hearing, the trial court entered an order without notice to the prosecutor's office. The order characterized portions of the facts and the prosecutors' defense of the plea agreement as misleading and inaccurate and stated that the trial court could "only conclude" the Commonwealth either negotiated the plea agreement without a "full review of the facts" and "due diligence" or was intentionally misleading the court and the public to "sell" the plea agreement for "some reason that has yet to be explained."

The trial court determined that the statement of facts and prosecutors' response to his concerns demonstrated that the Commonwealth's Attorney's office could not prosecute the defendant "with the detail and attention required of a criminal prosecutor and consistent with professional standards and obligations of a prosecutor." The trial court, citing its "inherent authority," removed and disqualified the entire Commonwealth's Attorney's office "from further prosecution as counsel of record" in the case. The trial court rejected the plea agreement, recused itself from further proceedings in the case, and appointed the Commonwealth's Attorney for Fauquier County to proceed with prosecuting the case.

The Commonwealth sought a writ of mandamus and prohibition to annul the trial court's order that disqualified the Loudoun County Commonwealth's Attorney's Office from representing the Commonwealth in the prosecution.

Held: Granted in part and dismissed in part; order of disqualification is annulled. The Court granted the Commonwealth's Attorney a writ of Mandamus directing the Loudoun County Circuit Court to annul the disqualification order to the extent it removes the Commonwealth's Attorney's office from representing the Commonwealth in this prosecution and appointed the Commonwealth's Attorney for Fauquier County.

The Court first agreed that Prohibition does not lie to contest the disqualification order. The Court explained that Prohibition is an extraordinary remedy that issues from a superior court to an inferior one to prevent the latter from acting on matters over which it lacks jurisdiction. Here, the Court found that the trial court has jurisdiction to adjudicate criminal proceedings such as this one and, in some circumstances, to regulate which attorneys may appear in those proceedings on the Commonwealth's behalf. Accordingly, the Court found that Prohibition cannot test the trial court's conclusion that such circumstances justified the disqualification of the Commonwealth's Attorney's office.

Turning to Mandamus, the Court also agreed with the trial court that the petition should be dismissed as to him because he has recused himself from presiding over the defendant's prosecution and cannot take further action.

Nevertheless, as against the Loudoun County Circuit Court, the Court ruled that the Commonwealth's Attorney is entitled to a writ of Mandamus because the trial court disqualified the office without affording her or her subordinates adequate notice or opportunity to be heard. First, the Court found that Mandamus is available to resolve whether the trial court failed to provide the Commonwealth with sufficient process before he divested her of her constitutional authority to prosecute this case. Additionally, the Court found that the Commonwealth was entitled to notice and an opportunity to respond before the trial court publicly relieved her of that authority.

The Court noted that, although the trial court made statements that he believed the statement of facts was misleading or incomplete, it never notified anyone in the Commonwealth's office that he was contemplating finding that anyone in that office had committed professional misconduct or was unfit to continue prosecuting the defendant's case. Further, the trial court never provided notice that it might discipline the Commonwealths' Attorney or her subordinates, whether by disqualification or otherwise, based on such findings.

In a footnote, the Court wrote: "In reaching this conclusion, we offer no opinion on any other issue relevant to the disqualification" of the Commonwealth's Attorney and her office.

Full Case At:
https://virginiagov.box.com/s/jfhrl8foptfonm8svetxrm4m3m0pagoe
(*Note: this opinion is not yet available online; the link above is to CASC's internal copy*)

Virginia Court of Appeals
Published

Dobson v. Commonwealth: February 7, 2023

Petersburg: Defendant appeals his convictions for Murder and Firearms offenses on Refusal to Vacate his Sentence.

Facts: The defendant committed a murder. In 1998, a jury convicted the defendant and sentenced him. In 2021, the defendant moved to vacate or reduce his sentence, arguing in part that his sentence should be reduced, as provided in § 19.2-303.01, because he assisted the Commonwealth with a criminal investigation. The defendant filed the motion himself and the Commonwealth's Attorney opposed the motion.

The trial court denied his motion.

Held: Affirmed. The Court found that while Rule 1:1, §§ 19.2-303 and -303.01 provide limited exceptions to that 21-day rule, neither statute applied here.

The Court noted that under the 2021 amendment to § 19.2-303, which included the clause extending the trial court's jurisdiction for 60 days after such transfer, the defendant bears the burden of establishing the jurisdictional facts to invoke the extended-jurisdiction provisions of that provision. In this case, the Court found that the defendant failed to establish that the circuit court retained jurisdiction to consider his motion to vacate or modify his sentence.

Regarding the "substantial assistance" provisions in § 19.2-303.01, the Court repeated that "notwithstanding clause means what it says." The Court explained that § 19.2-303.01 empowered the circuit court there to reduce the defendant's sentence to less than the mandatory-minimum sentence mandated by a different statute and the "notwithstanding" clause likewise overrides the 21-day limitation in Rule 1:1(a). Nonetheless, the Court concluded that the defendant was not entitled to the benefit of this statute because the motion to reduce the defendant's sentence was not filed by "the attorney for the Commonwealth" per § 19.2-303.01.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0302222.pdf

Hood v. Commonwealth: August 23, 2022
75 Va. App. 358, 876 S.E.2d 710 (2022)
Richmond: Defendant seeks a Writ of Actual Innocence

Facts: The defendant was convicted of being an accessory after the fact to abduction and of first-degree murder as a principal in the second degree. The defendant's convictions, however, were vacated following a successful petition for a writ of habeas corpus based on a claim of ineffective assistance of counsel. After the convictions were vacated, the defendant agreed to plead guilty to the amended charge of attempted abduction in exchange for an eight-year sentence, which was the time he served during his post-conviction proceedings.

Several years later, the defendant filed a petition for a Writ of Actual Innocence regarding his original murder conviction.

Held: Petition Dismissed. The Court held that it does not have subject matter jurisdiction to consider a petition for a writ of actual innocence for convictions that have been vacated. The Court acknowledged that there is no clear Virginia case law on whether a vacated conviction is a legal nullity. In this case, the Court concluded that, although it is a historical fact that the defendant was convicted of murder, the writ of habeas corpus vacated that conviction, and therefore, as a matter of law, his conviction was a legal nullity and "no conviction at all." The Court found that Virginia law is clear that legal nullities should be treated as though they never occurred. Thus, the defendant's vacated convictions are legal nullities, and the defendant was therefore not "convicted of a felony" under § 19.2-327.10.

In a footnote, the Court also noted that it lacked jurisdiction over the defendant's petition regarding his "accessory after the fact" conviction because, under the statute, the Court can only adjudicate petitions for writs of actual innocence where the crime of conviction is a felony. On the date of the defendant's conviction, under § 18.2-19, the crime of being an accessory after the fact to abduction was a misdemeanor.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0732212.pdf

Richardson v. Commonwealth: June 21, 2022
75 Va. App. 120, 873 S.E.2d 692 (2022)
Sussex: Defendant seeks a Writ of Actual Innocence on the offense of Involuntary Manslaughter

Facts: The defendant and another man killed a police officer during a struggle. The defendant pled guilty to Involuntary Manslaughter pursuant to a plea agreement in which he admitted his guilt.

Later, a Federal grand jury indicted the defendant for conspiracy to distribute a controlled substance, using a firearm to commit murder while drug trafficking, and murder of a law enforcement officer while drug trafficking. Following a trial, a jury convicted the defendant of the drug trafficking conspiracy but acquitted him of the other two charges.

After his conviction, the defendant claimed that he discovered two new pieces of evidence. First, the defendant located a nine-year-old child who stated that she saw the perpetrator flee the scene and made a statement to investigators that she saw a "man with dreads" running away from the scene. The defendant stated, "I wore my hair in cornrows at the time." The defendant then learned that the witness had identified another man in a photo array that showed the silhouettes of apparently twelve people's heads and upper torsos, although their faces were not visible in the array. The Commonwealth had subpoenaed that child as a witness for trial, before the guilty plea.

The second piece of evidence was a message on the State Police answering machine with a tip that identified the person whom the child identified as a person involved and that this person "had since cut his dreads." The 911 message was transcribed by an unidentified individual.

The defendant sought a writ of actual innocence. The Attorney General initially agreed with the request, but later sought leave to amend its pleadings and opposed the request.

Held: Writ denied. Because the defendant failed to prove that the photo array "could not, by the exercise of diligence, have been discovered" before his conviction became final, the Court ruled that the photo array failed to satisfy one of the necessary statutory preconditions to the issuance of a writ of actual innocence. The Court also rejected the defendant's claim that his federal acquittal and the 911 call merited a writ as well.

Regarding the child witness, the Court noted that the subpoena for the witness put the defendant on notice that the witness had information about the offense. "The discovery that the Commonwealth intended to call her as a witness certainly would have prompted a person of reasonable diligence to ascertain any relevant information" that she possessed, including any statements she made about what she saw. The Court explained that, because "we have concluded that the exercise of diligence would have revealed [the child's] role as a witness in this case, we similarly conclude that the exercise of diligence for purposes of § 19.2-327.11(A)(vi)(a) would have revealed the purported photo identification of a possible alternate suspect made by the very same witness later in the day of" the murder.

Regarding the 911 call, the Court complained that the defendant provided no information concerning the origin of the 911 message, the identity of the caller, or the identity of the person who transcribed it. Thus, the Court ruled that the defendant failed to show by a preponderance of the evidence that the 911 message was "material" within the meaning of § 19.2-327.11(A)(vii), because he has not shown that the content of the message is true.

Lastly, regarding the acquittal in Federal Court, the Court pointed out that the charges in Federal Court of which the defendant was acquitted required proof of intentional killing and malice aforethought. In contrast, the defendant pled guilty to involuntary manslaughter in state court. The Court concluded, therefore, that the elements of the crimes were different and that the federal jury's verdict that the defendant was not guilty of an intentional killing or a killing with malice aforethought did not prove that the defendant was actually innocent of the accidental killing to which he pled guilty in state court.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0361212.pdf

Virginia Court of Appeals
Unpublished

Whitfield v. Commonwealth: May 9, 2023

Portsmouth: Defendant appeals the denial of his Motion to Vacate his Murder conviction.

Facts: The defendant killed a man in 1999 and was convicted in 2001. At trial, the medical examiner testified that she was "the assistant chief medical examiner for the Commonwealth of Virginia

in the Tidewater district." The autopsy report, admitted into evidence as a Commonwealth's Exhibit, stated that the murder victim's autopsy was conducted in Norfolk.

In 2021, the defendant filed a motion to vacate his convictions as void. He argued that the record failed to establish the trial court's jurisdiction because no evidence showed that the offenses occurred in Virginia. The trial court denied his motion.

Held: Affirmed. The Court ruled that there was evidence in the record from which a reasonable fact finder could find that the offenses occurred in Virginia, within the trial court's jurisdiction. Accordingly, the Court rejected the defendant's claim that the convictions were void ab initio and ruled that the trial court was without jurisdiction to grant him the requested relief years after his convictions became final.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1248221.pdf

Coward v. Commonwealth: February 14, 2023

Henrico: Defendant appeals the dismissal of his Motion to Declare his Conviction Void due to Alleged Fraud.

Facts: The defendant was convicted in 1994 of abduction, robbery, and two counts of use of a firearm. The defendant attempted to have those convictions overturned in 2005 and 2016, alleging fraud on the court. The defendant claimed that the incident report was a forgery. In 2022, the defendant again filed an "Independent Action" to vacate his convictions, alleging that his convictions were void as obtained by extrinsic fraud and that the trial court had the authority under §8.01-428(D) to vacate them. The trial court denied the motion.

Held: Affirmed. The Court reasoned that, even if it were to accept the defendant's allegations as true, they would only demonstrate intrinsic fraud, which would render the verdict voidable, not void ab initio. Therefore, the trial court did not have jurisdiction to hear the defendant's motion.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0720222.pdf

Martin v. Commonwealth: January 24, 2023

Alexandria: Defendant appeals the denial of his Motion to Vacate his Murder Conviction.

Facts: The defendant murdered a taxicab driver, shooting him in the head, robbing him, and leaving him for dead in his vehicle. In 2006, the trial court convicted the defendant of murder, attempted robbery, and use of a firearm.

In 2021, the defendant moved to vacate his conviction under § 8.01-428(D) because he argued that the convictions were obtained by fraud. He argued that his murder conviction was predicated on attempted robbery, which he argued is not a lesser-included offense of robbery. He further alleged that the trial court lacked subject matter jurisdiction because the record showed that the charged crimes and incidents occurred in the state of Maryland.

The trial court denied the motion.

Held: Affirmed. The Court noted that the defendant made only legal arguments in challenging his convictions, not facts or circumstances to demonstrate that the convictions were obtained through fraud. Because the defendant failed to raise these issues in the trial court and upon direct appeal of his convictions, by operation of Rule 1:1(a), the Court found that he waived these arguments.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0334224.pdf

Carter v. Commonwealth: January 24, 2023

Westmoreland: Defendant appeals the denial his Motion to Vacate his Murder conviction.

Facts: In 2022, the trial court convicted the defendant of murder, use of a firearm, and robbery. In 2022, the defendant asked the trial court to vacate his convictions under § 8.01-428. The defendant claimed that his trial counsel advised him to plead guilty to first-degree murder out of concern that he would receive a death sentence if he went to trial for capital murder. The defendant argued that his trial counsel knew at the time that the Commonwealth was unable to prove a capital murder charge because the prosecution could not definitively show whether the defendant or his co-defendant shot the victim. He, therefore, concluded that "a fraud was committed upon the court in obtaining the guilty plea based upon a false representation."

The trial court denied his motion.

Held: Affirmed. The Court ruled that the defendant did not show that the acceptance of his guilty pleas to the crimes in which he was involved resulted from extrinsic fraud perpetrated upon the court. Rather, the Court found that his motion served as an impermissible collateral attack upon the trial court's judgment and an attempt to circumvent the finality of the trial court's acceptance of his guilty pleas.

The Court explained that, under § 8.01-428(D), a defendant must prove each of the following five elements:

(1) a judgment which ought not, in equity and good conscience, to be enforced;

(2) a good defense to the alleged cause of action on which the judgment is founded;

(3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense;

(4) the absence of fault or negligence on the part of the defendant; and

(5) the absence of any adequate remedy at law.

The Court examined the defendant's claim and noted that, even if the Commonwealth's evidence was insufficient to prove capital murder, nothing in the record indicates that the defendant did not commit first-degree murder. Instead, his involvement in the commission of the offenses was firmly established, even if the Commonwealth could not prove whether it was the defendant or his co-defendant who actually pulled the trigger. The Court also found that the defendant did not prove that a false representation of a material fact was made intentionally and knowingly with the intent to mislead the trial court or that was relied upon by the trial court, resulting in damage to the trial court.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0955222.pdf

Hunter v. Commonwealth: November 15, 2022

King George: Defendant appeals the denial of his Motion to Vacate his conviction for Manufacturing Methamphetamine.

Facts: In 2017, the defendant pled guilty under a plea agreement to Manufacturing Methamphetamine. The trial court conducted a full plea colloquy and then found the defendant guilty.

In 2021, the defendant filed a *pro se* motion to vacate his conviction under § 8.01-428. The defendant contended that he could challenge the validity of his conviction at any time because, he argued, it was procured by "extrinsic fraud." Specifically, he argued that the search warrant was issued in part on an allegedly false statement and was therefore invalid. He further reasoned that his guilty plea was therefore obtained by a fraud on the court. He also alleged that the prosecutor in his case falsely told his defense attorney that the substance was field tested as methamphetamine and that he had made an hour-long confession.

The trial court denied the motion.

Held: Affirmed. The Court held that trial court did not err in finding that it lacked jurisdiction to entertain the defendant's motion to vacate, which was filed long after the conviction became final in the trial court.

The Court reaffirmed that "extrinsic fraud" is fraud which occurs outside the judicial process and 'consists of conduct which prevents a fair submission of the controversy to the court. The Court also repeated that the judgment of a court, procured by extrinsic fraud, is void and subject to attack, direct or collateral, at any time. In contrast, the Court explained, a judgment obtained by intrinsic fraud, i.e., by perjury, forged documents, or other incidents of trial related to issues material to the judgment, is voidable by direct attack at any time before the judgment becomes final.

In this case, the Court found that the defendant's allegations of fraud, even if true, demonstrated only intrinsic fraud, thus rendering the verdict voidable rather than void ab initio. The Court then noted that over three years had passed since the final judgment was entered, and the time to challenge a voidable judgment had long since expired. For this reason, and because the defendant did not advance a claim that would prove the judgment was void ab initio, the Court ruled that the trial court properly concluded it lacked jurisdiction to consider the defendant's motion to vacate.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0109222.pdf

Rock v. Commonwealth: October 4, 2022

Prince George: Defendant appeals the denial of his Motion to Vacate his convictions for Carnal Knowledge.

Facts: In 2016, the defendant was convicted of Carnal Knowledge of a Child. In 2020, five years after his convictions, the defendant filed a motion to vacate his convictions, arguing that they were void ab initio because the trial court "never established" jurisdiction. Specifically, the defendant alleged that he was never properly indicted by a grand jury by entry of an order proving that the indictments were presented in open court. He argued that the failure to comply with the proper grand jury indictment requirements was a fatal defect that rendered his convictions void ab initio.

The defendant also argued that his sentence violated the cruel and unusual punishment clause of the Eighth Amendment because of prosecutorial misconduct and "obvious perjured testimony."

The trial court denied the motions.

Held: Affirmed.

The Court agreed that a court order may be attacked after twenty-one days when it is void *ab initio*. The Court repeated that a judgment may be void *ab initio* if

(1) it was procured by fraud,

(2) the court lacked subject-matter jurisdiction,

(3) the court lacked jurisdiction over the parties,

(4) the judgment is of a character that the court lacked power to render, or

(5) the court adopted an unlawful procedure.

Regarding the defendant's argument that the trial court lacked subject-matter jurisdiction to convict him because the record lacks an indictment order, the Court repeated that there is no constitutional requirement that prosecutions for felony be by indictment at all. Thus, any challenge to the form of an indictment is waived unless raised at least seven days before trial, per Rule 3A:9(b)(1).

Regarding the defendant's argument that his disproportionate sentence on the underlying offenses violated his right to be free from cruel and unusual punishment, the Court noted that, although the defendant couched his argument as a constitutional challenge, he specifically argued that his sentence was disproportionate because of "prosecutorial misconduct" and "obvious perjury [by] the

Commonwealth's sole substantive witness." The Court noted that he presented the same witness credibility arguments which the Court and the Supreme Court had rejected on direct appeal to argue that his right "to be free from cruel and unusual punishments" was violated.

The Court repeated that "Virginia law does not permit a motion to vacate that is filed in a trial court long after the court lost active jurisdiction over the criminal case to serve as an all-purpose pleading for collateral review of criminal convictions." "Just as habeas corpus cannot be used as a substitute for direct appeal, a motion to vacate cannot be used as a substitute for a habeas corpus petition." In this case, the Court found that the defendant's allegations of prosecutorial misconduct and perjured testimony demonstrated, at most, intrinsic fraud as they are "means of obscuring facts presented before the court," and were thus not properly collaterally attacked in a motion to vacate.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/1119212.pdf

Firearms Restoration

Virginia Court of Appeals
Published

Focke v. Commonwealth: April 25, 2023

Norfolk: Petitioner appeals the denial of the Restoration of her Firearms Rights

Facts: Petitioner was convicted in 2017 of felony bankruptcy fraud by the United States District Court for the Eastern District of Virginia in Norfolk. Because of her federal conviction, federal law and Virginia law restrict her firearm rights. Federal law also provides that a person who is prohibited from possessing firearms or ammunition may apply to the Attorney General for relief from that prohibition pursuant to 18 U.S.C. § 925(c). However, Congress has consistently prohibited using federal funds to investigate or process applications to restore firearm rights.

The petitioner currently resides in North Carolina and seeks to have her gun rights restored so that she can possess a firearm there. The petitioner filed a petition pursuant to § 18.2-308.2 in the City of Norfolk seeking the restoration of her firearm rights. The trial court agreed with the petitioner that she had shown "good cause" to have her firearm rights restored, but it agreed with the Commonwealth that the court lacked subject-matter jurisdiction to consider the petition and denied the petition.

Held: Reversed. The Court concluded that petitioner could not be granted an order permitting her to unconditionally possess firearms in Virginia, given the firearms disability resulting from her federal felony conviction. Thus, the Court ruled that, rather than dismissing the petition for lack of jurisdiction, the trial court should have denied it on the merits because the court could not grant relief under the statute. The Court reversed the order dismissing the petition for lack of subject-matter

jurisdiction and remanded this case with instructions to deny the petition because petitioner is not entitled under § 18.2-308.2(C) to have her firearm rights "unconditionally" restored.

The Court noted that Federal law is clear that State courts cannot remove the federal disability to possess a firearm that results from a federal felony conviction. The Court then found that the plain language of § 18.2-308.2(C) did not authorize the circuit court to grant the petitioner a restoration order that unconditionally authorizes possessing, transporting, or carrying a firearm, ammunition for a firearm, or a stun weapon. Because the petitioner's federal felony conviction prevents her from possessing any firearm or ammunition, under 18 U.S.C. § 922(g)(1), the Court agreed that the trial court could not "unconditionally" authorize her to possess a gun in Virginia.

In a footnote, the Court pointed out that the General Assembly could properly empower a trial court to restore a petitioner's Virginia gun rights independently from removing the petitioner's federal firearm disability that results from a federal felony conviction. However, the Court noted that the statute speaks of a restoration order that "unconditionally authorizes" possessing firearms and ammunition, under § 18.2-308.2(C), not "unconditionally" restoring the petitioner's Virginia gun rights.

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0573221.pdf

Second Amendment

U.S. Supreme Court

NY State Rifle-Pistol Ass'n v. Bruen: June 23, 2022
597 U.S. ___ , 142 S.Ct. 2111 (2022)
Certiorari to the Second Circuit Court of Appeals: Plaintiffs appeal the denial of their lawsuit on Second Amendment grounds.

Facts: The plaintiffs applied for a New York State license to carry a handgun. However, New York issues public-carry licenses only when an applicant demonstrates a "special need" for self-defense. The state found that the plaintiffs had not demonstrated a "special need" and denied their applications. The plaintiffs sued, but both the district court and the Second Circuit dismissed their claims.

Held: Reversed. The Court held that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home. Extending its ruling in *Heller*, the Court concluded that nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms. The Court ruled that New York's "proper-cause" requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.

The Court repeated that the Second Amendment guaranteed to all Americans the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions. The Court pointed to historically lawful restrictions, for example, that limited the intent for which one could carry

arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials.

The Court held that, when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The Court wrote that, "To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command.""

The Court did not reject all potential firearms regulation. For example, the Court wrote that, "although the historical record yields relatively few 18th- and 19th-century "sensitive places" where weapons were altogether prohibited—e.g., legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions…. We therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of "sensitive places" to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible."

However, the Court rejected the New York's assertion that the entirety of the City of New York was a "sensitive place." The Court wrote that "expanding the category of "sensitive places" simply to all places of public congregation that are not isolated from law enforcement defines the category of "sensitive places" far too broadly. Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below … Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a "sensitive place" simply because it is crowded and protected generally by the New York City Police Department."

The Court then rejected New York's argument that it could require a non-speculative need for armed self-defense to issue a permit. The Court wrote: "We know of no other constitutional right that an individual may exercise only after demonstrating to government officials some special need."

Justices Alito, Kavanaugh, and Barrett filed concurring opinions. Justice Alito noted that "Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess … All that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense and that the Sullivan Law, which makes that virtually impossible for most New Yorkers, is unconstitutional."

Justice Kavanaugh, in his concurrence, also noted that the Court's ruling does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense or a variety of other gun regulations. Instead, he wrote, the Court's decision "addresses only the unusual discretionary licensing regimes, known as "may-issue" regimes, that are employed by 6 States including New York… Going forward, therefore, the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so."

Justice Breyer filed a dissenting opinion, in which Justices Sotomayor and Kagan joined.

Full Case At:
https://www.supremecourt.gov/opinions/21pdf/20-843_7j80.pdf

Malicious Prosecution - Liability

Fourth Circuit Court of Appeals

Brown v. Lott: June 10, 2022
Unpublished
S.C.: Plaintiff appeals the dismissal of her lawsuit for False Arrest and Malicious Prosecution.

Facts: The plaintiff and another person engaged in a fight. An officer who investigated heard conflicting statements at the scene. The alleged victim had a history of physical altercations and threatening behavior against the plaintiff. The officer arrested the plaintiff for battery. Ultimately, the state court dismissed the charge on self-defense grounds.

The plaintiff sued the officer for False Arrest and Malicious Prosecution. The plaintiff asserted that there was no prosecutor assigned to the case until trial and that therefore the officer was acting as the prosecutor. The district court granted summary judgment to the officer.

Held: Affirmed. The Court ruled that the district court properly granted summary judgment on each of the plaintiff's claims that required a showing of a lack of probable cause, including her Fourth Amendment claim for unlawful arrest.

The Court ruled that the officer did not violate a duty to investigate, explaining that "probable cause, as probable cause deals with probabilities, not certainty." The Court wrote that probable cause does "not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands." The Court found that the officer did not ignore any exculpatory evidence as the existence of other witnesses was, at most, an exculpatory lead. Instead, the Court agreed that the officer could reasonably have believed that other witnesses would not add anything relevant to his investigation.

The Court repeated its rule that "[a]lthough an officer may not disregard readily available exculpatory evidence of which he is aware, the failure to pursue a potentially exculpatory lead is not sufficient to negate probable cause." The Court reasoned that, even had the officer obtained the statements of the other witnesses, he would still have been faced with conflicting statements, and the alleged victim and her son's statement would have still supported probable cause. The Court rejected the plaintiff's argument that the victim's history of physical altercations and threatening behavior should have defeated probable cause.

Regarding the plaintiff's claim for malicious prosecution, the Court repeated that a malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort. To state such a claim, a plaintiff must allege that the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process

unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor. Thus, given that the Court found probable cause existed to arrest the plaintiff, this claim failed as well.

However, the Court concluded that the plaintiff's state claims were not adequately reviewed by the district court, for gross negligence and recklessness, intentional infliction of emotional distress, state malicious prosecution, defamation, and negligent hiring, training, retention, and supervision. The Court remanded the case for consideration of those claims.

Full Case At:
https://www.ca4.uscourts.gov/opinions/216928.U.pdf

Police Use of Force & Liability

U.S. Supreme Court

Vega v. Tekoh: June 23, 2022
597 U.S. ___, 142 S.Ct. 2095 (2022)
Certiorari to the Ninth Circuit Court of Appeals: Plaintiff appeals the dismissal of his lawsuit against a Law Enforcement Officer on Fifth Amendment grounds.

Facts: During an interview at a hospital where the plaintiff worked, the plaintiff confessed to a police officer that he had "inappropriately" touched a patient's genitals. The state prosecuted the defendant for sexual assault. At the first trial, the judge held that the officer had not violated *Miranda* because the plaintiff was not in custody when he provided the statement, but the trial resulted in a mistrial. At a second trial, a second judge again denied the plaintiff's request to exclude the confession under *Miranda*. That trial resulted in acquittal.

The plaintiff then brought a lawsuit under 42 U. S. C. §1983 against the officer and several other defendants seeking damages for alleged violations of his constitutional rights, including his Fifth Amendment right against compelled self-incrimination. At the first trial under §1983, the jury returned a verdict in favor of the police officer, but the judge concluded that he had given an improper jury instruction and thus granted a new trial.

Before the second trial, the plaintiff asked the court to instruct the jury that it was required to find that the officer violated the Fifth Amendment right against compelled self-incrimination if it determined that he took a statement from the plaintiff in violation of *Miranda* and that the statement was then improperly used against the plaintiff at his criminal trial. The trial court refused, and instead instructed the jury to determine, based on the totality of all the surrounding circumstances, whether the officers had "improperly coerced or compelled" the statements. The jury again found in the officer's favor, and the plaintiff appealed.

A Ninth Circuit panel reversed, holding that the "use of an un-Mirandized statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a §1983 claim" against the officer who obtained the statement.

Held: Reversed, Dismissal Re-instated. In a 6-3 ruling, the Court held that, because a violation of *Miranda* is not itself a violation of the Fifth Amendment, and because it saw no justification for expanding *Miranda* to confer a right to sue under §1983, such a violation would support a lawsuit for deprivation of a Constitutional right under §1983.

The Court explained that *Miranda* rests on a pragmatic judgment about what is needed to stop the violation at trial of the Fifth Amendment right against compelled self-incrimination. "That prophylactic purpose is served by the suppression at trial of statements obtained in violation of Miranda and by the application of that decision in other recognized contexts. Allowing the victim of a Miranda violation to sue a police officer for damages under §1983 would have little additional deterrent value and permitting such claims would cause many problems."

Instead, the Court found that *Miranda, Dickerson*, and the other cases in that line provide sufficient protection for the Fifth Amendment right against compelled self-incrimination.

Justice Kagan filed a dissent, in which Breyer and Sotomayor joined.

Full Case At:
https://www.supremecourt.gov/opinions/21pdf/21-499_gfbh.pdf

Fourth Circuit Court of Appeals

Howard v. Durham: May 30, 2023

N.C.: Plaintiff appeals the dismissal of his lawsuit for Suppression of Exculpatory Evidence.

Facts: In 1991, a woman and her child were sexually assaulted, murdered, and then burned in their home. Police identified the plaintiff as a suspect and arrested him for the offense. Later, however, DNA found in the mother indicated that someone else's sperm was present, rather than the defendant's.

At trial, several witnesses testified, including an individual who testified that she overheard the plaintiff threaten to kill the victim and then saw him leaving the victim's apartment a few minutes before the fire with a television. However, the plaintiff did not know that the witness had been a confidential informant for the police and a member of a violent criminal street gang that had been linked to the murder. [*Note: Michael Nifong was the prosecutor in this case – EJC*]. The plaintiff was convicted and sentenced to 80 years in prison.

In 2010, the DNA was re-tested and this time, evidence from the child indicated that one person's DNA was in the child's body and another person's DNA was in the mother's body. The DNA from the mother's body belonged to a member of the same violent street gang that the witness had belonged to. The defendant filed an innocence petition. In 2011, a court ordered the police and the District Attorney to share with the plaintiff's attorneys any information that they had regarding alternative suspects. The order was served only on the prosecutor, and the parties dispute whether any police officers ever saw it.

Police then assigned new investigators. Those officers interviewed the gang member implicated by DNA evidence, and he made several inconsistent and incriminating statements. However, those officers never sent their reports to the prosecutor and thus, the plaintiff did not receive the reports for another five years.

During his innocence proceedings, the plaintiff investigated why the police had not revealed that the trial witness was a police informant. A witness testified that the department's Organized Crime Division handled the identities of confidential informants, explaining that "confidential informants' identities are kept secret and known only to the registering officers working with them (and possibly the registering officers' partners in limited, need-to-know circumstances). Confidential informants' identities are not revealed to other officers, whether in the [Organized Crime Division] or other DPD divisions." A police commander further opined that it would be impractical to compare informants' identities with prosecution witness lists.

In 2016, a court vacated the plaintiff's conviction. In 2021, the Governor granted the plaintiff a pardon of innocence. The plaintiff filed a lawsuit against the case detective, the investigators from the 2010 investigation, and the City. The district court granted summary judgment to the new investigators on the plaintiff's 42 U.S.C. § 1983 due process claim for intentionally suppressing exculpatory evidence during the post-conviction innocence proceedings. The district court also granted summary judgment to the City on the plaintiff's *Monell* claim, which was that the City had an official policy or custom of withholding *Brady* evidence by keeping secret the identities of confidential informants.

The case against the case detective proceeded to trial. A jury found for the plaintiff and awarded him $6 million.

Held: Affirmed in Part, Reversed in Part. The Court affirmed the district court's grant of summary judgment to the City, but reversed the grant of summary judgment to the new investigators and remanded the case to the district court.

The Court began by repeating that although a police officer generally does not owe a duty to disclose exculpatory evidence post-conviction, in this case, such a duty became essential to realizing the plaintiff's rights to demonstrate his innocence under state-created procedures. The Court then explained that, to determine whether a plaintiff has stated a claim against an officer for suppressing exculpatory evidence due under state law post-conviction, the plaintiff must ultimately prove that (1) the evidence at issue was favorable to him; (2) the officers suppressed the evidence in bad faith; and (3) prejudice ensued.

In this case, the Court recognized that the key factual dispute in this case was whether the new investigators knew about the 2011 Order. The Court reasoned that, if they did know about the order, a reasonable factfinder could conclude that intentionally withholding the interview notwithstanding the order would be in bad faith. The Court explained that a jury could find that, by not turning over the video of an alternative suspect making incriminating statements or their notes related to that interview, the new investigators intentionally hid evidence from the plaintiff in his innocence proceedings—evidence that cast serious doubts on his conviction and, potentially, on the police's underlying investigation.

In a footnote, the Court rejected the officer's appeal to Qualified Immunity, writing that: "no reasonable officer in 2011 could conclude that intentionally ignoring a court order to disclose evidence, even if in a post-conviction setting, was not a constitutional violation clearly established by law."

The Court affirmed the dismissal of the plaintiff's claim against the City, however. The Court complained that the plaintiff offered evidence of only a single incident of unconstitutional activity, to wit: the incident in this case. The Court repeated that proof of a single incident of the unconstitutional activity charged is not sufficient to prove the existence of a municipal custom. The Court also rejected the plaintiff's reliance on the Organized Crime Division's custom of keeping confidential informants secret dated back to at least 1990. The Court found that, even if the City was aware of that custom, to be liable under *Monell*, the City must have had knowledge of the unconstitutional behavior, not simply the police department's general secrecy regarding confidential informants.

Judge Quattlebaum dissented from the reversal regarding the new investigators.

Full Case At:
https://www.ca4.uscourts.gov/opinions/221684.P.pdf

Putman v. Harris: April 19, 2023

W.D.Va: Defendants appeal denial of Qualified Immunity in lawsuit for Police Use of Force.

Facts: The plaintiff several texts to his wife, threatening self- harm and suicide. One message read that the plaintiff had "a gun in [his] mouth," and warned her to not "come to the house … I'd rather someone else find me." The wife called 911 and when police arrived, she shared the texts. She also told police that the plaintiff regularly drank alcohol and that he owned several firearms, though she couldn't say if the plaintiff had a gun with him. She consented to a search of the property.

Officers didn't find the plaintiff in the house, though they did find a rifle. Because the property was surrounded by woods, the officers used a K-9 unit to search it. Finding the plaintiff, they did not see any firearms, but noted that he appeared intoxicated. They ordered him to stand up and lift his hands. The plaintiff refused, stating that it was his property, and he would neither get up nor lift his hands. At gunpoint, officers continued to argue with the plaintiff. The plaintiff spoke aggressively, flung his arms about wildly, and refused to turn around to show the back of his waistband.

Officers warned the plaintiff that the dog would bite him if he didn't comply. The plaintiff demanded to see a warrant. The officers informed the plaintiff they didn't need one and repeated an order that the plaintiff turn around, to which the plaintiff challenged, "For what? What have I done wrong?" The officers asked, "Did you say you're gonna kill yourself?" but the plaintiff denied that and countered, "Where's the gun? Show me the f%&$ing gun," while lifting his shirt to show he had nothing in his waistband, although the officers couldn't see his back. The plaintiff refused to turn around, stating "I'm not," again lifting his shirt, but only showing the front and sides of his body. The officers again warned the plaintiff that he would be bit by the dog, but the plaintiff demanded "For What?" The officers released the dog, which bit the plaintiff until the officers could subdue him.

The plaintiff suffered a serious injury and sued the officers. The defendant officers moved to dismiss but the trial court denied the motion. The district court emphasized a difference between "immediate danger" and "imminent danger," noting that only the former justifies force that risks serious injury. Since the plaintiff's initial resistance was non-violent— limited to abrasive language and refusing to comply with orders—the district court concluded that he didn't pose an "immediate" threat.

Held: Reversed, Lawsuit Dismissed.

The Court first found that the officers had probable cause for a mental-health seizure and a reasonable belief that the plaintiff posed an immediate threat. The Court explained that, once the officers made the "fair call" that the plaintiff posed a danger to himself, they were "not required to walk away from the situation" merely because he denied he was suicidal. The Court concluded that a reasonable officer could have believed that the plaintiff was armed and thus posed an immediate threat, and since this immediate safety risk was reasonably likely to be cured by using the dog, the deployment was justified.

The Court then observed that, although the officers could not see a firearm and the plaintiff denied having a firearm, the officers could not confirm that because the plaintiff refused to turn around to show his entire waistband. The Court acknowledged that, under *Young, "*just because a person is armed doesn't give the officers carte blanche to use any force." The Court distinguished this case from *Young*, though, noting that the plaintiff wasn't complying with commands and the officer fairly believed the plaintiff was armed. While the district court focused on the plaintiff's non-violent resistance, the Court explained that as long as there are facts from which an officer could reasonably conclude that the resistance presents some immediate danger despite its non-violent character, such force is warranted.

In this case, based on the texts that the plaintiff sent, the fact that he owned firearms, the heated argument, the plaintiff's erratic arm movements, and his refusal to face away from the officers, the Court agreed that the officers could reasonably fear that the plaintiff might pull a hidden gun.

Full Case At:
https://www.ca4.uscourts.gov/opinions/221360.P.pdf

Franklin v. Charlotte: April 4, 2023

N.C.: Plaintiff appeals the dismissal of his lawsuit against Police for Use of Force on Fourth Amendment grounds.

Facts: Officers responded to a call that the plaintiff was threatening patrons and staff with a firearm. Before they arrived, the plaintiff exited the restaurant and crouched down next to the passenger side of a car parked in the restaurant parking lot. When the officers arrived, both officers exited their vehicles, weapons drawn. Immediately, each officer shouted, "Let me see your hands," and "Let me see your hands, now!." The lead officer saw the plaintiff crouching directly in front of her but facing the open passenger side of the car with his left shoulder in full view of the officers. He was on the balls of his feet, about one foot away from a passenger who had been trying to calm the plaintiff down.

The plaintiff's hands appeared to be clasped together between his legs. The officers repeatedly yelled at the plaintiff "Drop the gun!" "Drop it!" "Drop the weapon!" "I said drop it!" "Put it on the Ground!" The officers gave a total of twenty-one commands to the plaintiff to drop his firearm, although in fact, the gun was concealed under his jacket, not in his hands.

The plaintiff did not move for a while, but soon, without moving his head or legs, the plaintiff slowly reached into the right side of his jacket and retrieved a black handgun with his right hand. When the gun was in the lead officer's view, her body camera shows that it was not in a firing grip; the plaintiff held it by the top of the barrel slide with the grip-side closest to the officers and the muzzle pointed away from them. Immediately, the lead officer shot the plaintiff twice, killing him. As he fell to the ground, the plaintiff looked in the officers' direction with a face of shock and stated: "You told me to."

The officers recounted that they gave, and the plaintiff ignored, repeated commands to show his hands and indicated that the plaintiff brandished a gun pointed in their direction. During her interview, the lead officer told investigators that the plaintiff ignored her commands, retrieved the gun, and turned toward her just before she shot him. An independent review board did not find fault with the officers for the shooting and the City Manager concurred with the finding.

The plaintiff filed a lawsuit against the officers for the shotting, as well as the city for not finding fault with the shooting. The plaintiff also sought damages for negligent training by the city. The district court granted summary judgment for the defendants after concluding that the officer was entitled to qualified immunity and the city was not responsible for the officer's conduct under federal or state law.

Held: Affirmed in Part and Reversed in Part. The Court began by stating: "When an officer issues a clear command to an armed suspect to do one thing and that person does another, we seldom question the officer's use of force. But when the officer's abstruse commands require the suspect to divine their meaning, the law cannot be so forgiving. In those circumstances, courts are duty-bound to engage in a searching examination of an officer's resort to deadly violence."

Regarding the officers' own liability, the Court agreed that, under the facts, a jury could find that the officer violated the Fourth Amendment. The Court described that "despite receiving 911 accounts of a man terrorizing people at a fast-food restaurant, the officers arrived at a very different scene than the one described in those reports. [The plaintiff] was no longer inside the restaurant, nor was he aggressive or outwardly threatening when Officer Kerl approached him. He also made no attempt to resist the officers or flee the area."

The Court focused on the plaintiff's dilemma: that the only way for him to obey the officers' commands to drop the gun was to reach into his jacket to retrieve it. The Court repeated that carrying a weapon, without more, does not justify an officer's choice to shoot. The Court explicitly blamed the officers for the intensity of the situation, writing: "one cannot help noticing that the intensity of the situation emanated not from [the plaintiff], but from the volume and vigor of the officer's commands."

The Court citing previous cases where Courts had ruled that people who defied clear commands provoked lawful deadly force. In this case, however, the Court concluded that the officers' "commands simply were too ambiguous to transform [the plaintiff's] hesitation into recalcitrance." The Court also found it unreasonable under these circumstances to assume that the plaintiff must have been holding a weapon in his hands "without leaving any daylight for the possibility that he was not." The Court wrote:

"Viewing the non-threatening way [the plaintiff] handled the weapon once he retrieved it, a jury may conclude that this was not a menacing act, but mere compliance with orders."

However, the Court affirmed the dismissal of the plaintiff's claim against the city. The Court repeated that a municipality cannot properly be held liable unless the "injury was inflicted by [its] 'lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'" In this case, the Court ruled that the city manager's post-facto approval of an internal shooting investigation cannot possibly have caused the constitutional violation.

The Court also affirmed the dismissal of the plaintiff's claim against the city for negligent training claim because the plaintiff failed to show evidence of "inherent unfitness or previous specific acts of negligence" or that the city "had any actual or constructive notice of any unfitness or incompetence by" the officer.

The Court concluded: "Unlike us, Officer Kerl could not press pause or rewind before determining whether Franklin posed an imminent threat. Still, we remain resolute that qualified immunity is not appropriate for the disposition of this case. The officers rushed headlong onto a scene that had subsided, established no dialogue, and shouted at Franklin loudly enough that they did not hear him try to communicate back. In their zeal to disarm Franklin, it hardly occurred to the officers that their commands defied reality. As a result, Franklin faced a catch 22: obey and risk death or disobey and risk death. These facts entitle a jury of community members to decide whether Officer Kerl shot Franklin unlawfully."

Judge Wilkinson filed a concurrence.

Full Case At:
https://www.ca4.uscourts.gov/opinions/212402.P.pdf

Decina v. Horry County: February 22, 2023

S.C.: Plaintiff appeals the dismissal of her lawsuit against police for False Arrest and Malicious Prosecution.

Facts: Police responded to plaintiff's residence for a report of a domestic assault. The parties reported some common facts but largely conveyed different accounts of what happened. The plaintiff reported that her ex-boyfriend had assaulted her and damaged her vehicle. The ex-boyfriend denied that and reported that the plaintiff had assaulted him.

South Carolina law requires an officer to determine a "primary physical aggressor" unless an officer is unable to do so. The officer decided to present the domestic violence case to the magistrate judge because he said it was difficult to identify the primary aggressor based on the conflicting versions of the event. The officer was not scheduled to work the following day but knew that the case needed to be presented to a magistrate judge the next day in accordance with a Domestic Violence Policy that requires domestic violence cases "be presented to a magistrate within 24 hours." In this jurisdiction, officers routinely present warrants on behalf of off- duty officers and make warrant presentations to include warrant request forms and supplemental case reports. Therefore, per the standard practice,

another officer presented the officer's warrant requests, incident report, and supplemental case reports to the magistrate judge while under oath.

The magistrate judge found probable cause and issued warrants seeking the arrest of both the plaintiff and her ex-boyfriend. The plaintiff turned herself in and was booked and released within hours. Later, her case was dismissed at her preliminary hearing when the solicitor took "no position on this case." Thereafter, the plaintiff filed this action under 42 U.S.C. § 1983 contending that she was arrested and prosecuted without probable cause. The plaintiff argued that the officer omitted facts from his case report. The plaintiff also argued that the officer's act of emailing an unsworn report with additional facts to a general inbox for the magistrate court, coupled with delegating another officer to appear on his behalf with no personal knowledge of the case, was insufficient since the magistrate judge could not legally rely on that unsworn information.

The district court determined the plaintiff failed to establish a violation of her constitutional rights, that the officer had probable cause to arrest her, and was otherwise entitled to qualified immunity.

Held: Affirmed.

The Court noted that the additional facts that the officer did not include would not have defeated probable cause. The Court also rejected the plaintiff's argument that there was no probable cause to arrest her because the officer failed to make a primary aggressor assessment. In investigating the incident, the Court noted that the officer considered the relevant statutory factors and later testified that he could not determine who the primary aggressor was because he received conflicting statements. The Court pointed out that South Carolina allows for officers to submit applications for arrest warrants for both parties in such circumstances, which is what took place in this case.

The Court also found that, even when viewing the evidence in the light most favorable to the plaintiff, the officer did not violate the plaintiff's constitutional rights and that he performed the discretionary functions of his official duties in an objectively reasonable fashion, and thus was entitled to qualified immunity.

Full Case At:
https://www.ca4.uscourts.gov/opinions/212171.U.pdf

Sharpe v. Winterville Police: February 7, 2023

N.C.: Plaintiff appeals the dismissal of his lawsuit on First Amendment grounds.

Facts: The plaintiff was the passenger in a vehicle that police stopped due to a traffic violation. At the beginning of the traffic stop, the plaintiff turned on the video recording function of his smartphone and began livestreaming — broadcasting in real-time — via Facebook Live to his Facebook account, which reached a live audience and provoked live responses. In response, the officer told the plaintiff "We ain't gonna do Facebook Live, because that's an officer safety issue." At the same time, he

attempted to grab the plaintiff's phone, but the plaintiff moved it further inside the vehicle, out of the officer's reach, and stated, apparently to his Facebook Live audience.

The officer then told the plaintiff "If you were recording, that is just fine. . . . We record, too," but "in the future, if you're on Facebook Live, your phone is gonna be taken from you, . . . [a]nd if you don't want to give up your phone, you'll go to jail."

The plaintiff sued under 42 U.S.C. § 1983. He sued the officers in their official capacities—effectively suing the Town —for allegedly having a policy that prohibits recording and livestreaming public police interactions in violation of the First Amendment. He also sued the officer in his individual capacity. The Town countered that livestreaming a traffic stop endangers officers because viewers can locate the officers and intervene in the encounter.

The district court dismissed the lawsuit on the pleadings.

Held: Affirmed in Part, Reversed in Part.

The Court examined two questions in this case. First, whether a town's alleged policy that bans video livestreaming certain interactions with law enforcement violates the First Amendment. Second, whether a police officer who, during a traffic stop, attempted to stop a passenger from livestreaming the encounter may be successfully sued under § 1983 for violating the passenger's First Amendment rights.

Regarding the first question, the Court noted that the plaintiff need only plausibly allege (1) that the Town has a policy preventing a passenger from livestreaming their traffic stop and (2) that such a policy violates his First Amendment rights. The Court repeated that, under *Monell*, when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts an injury, the government as an entity is responsible under § 1983.

The Court then held that livestreaming a police traffic stop is speech protected by the First Amendment. As a result, the Court explained, if the policy in fact exists to prohibit livestreaming, that regulation only survives First Amendment scrutiny if the Town demonstrates that: (1) the Town has weighty enough interests at stake; (2) the policy furthers those interest; and (3) the policy is sufficiently tailored to furthering those interests.

In this case, the Court acknowledged that officer-safety interest might be enough to sustain the policy but found that the record in this case did not sufficiently establish that to be true. Therefore, the Court held that the plaintiff had plausibly alleged that the Town adopted a livestreaming policy that violates the First Amendment.

The Court then ruled that the officer, in his individual capacity, was protected by Qualified Immunity. The Court observed that there was no "controlling authority" in the 4th Circuit that establishes the plaintiff had the right to livestream his own traffic stop when his car was pulled over. The Court distinguished cases from other jurisdictions that concerned recording, rather than livestreaming, a traffic stop.

The Court wrote: "A different balance is struck when an officer prevents a bystander from recording someone else's traffic stop than when the officer prevents a passenger from livestreaming their own stop… Without a consensus of cases barring the latter, Sharpe cannot show that a reasonable official in Officer Helms's shoes would understand that his actions violated the First Amendment. …

Qualified immunity protects Officer Helms unless it was clearly established at the time of the traffic stop that forbidding a passenger from livestreaming their own traffic stop violated the First Amendment. Here, no precedent in this Circuit nor consensus of authority from the other Circuits established that Officer Helms's actions were unconstitutional."

Full Case At:
https://www.ca4.uscourts.gov/opinions/211827.P.pdf

Hamstead v. Walker: October 5, 2022
Unpublished
W.Va.: Defendant appeals the dismissal of her Use of Force lawsuit against Law Enforcement.

Facts: The plaintiff drove her vehicle to confront road workers about a project that she opposed. Arriving at the work site, she collided with an asphalt truck. Police responded. The construction workers alleged that the plaintiff caused the crash, but the plaintiff alleged that the construction workers conspired with the police to blame the accident on her and fabricate evidence to support that assignment of fault.

Throughout the incident, the plaintiff was irate and yelling and screaming profanity. The officer told her several times she could not intervene in the other officers' interviews of the construction workers present on the scene and told her to "shut up." The plaintiff continued in her efforts to intervene. When the officer again tried to stop her from doing so and told her she needed to "shut her mouth," the plaintiff responded, "Arrest me, go ahead, just arrest me." The officer arrested her, believing he had probable cause to do so for disorderly conduct and obstruction.

The plaintiff resisted the officer's efforts to arrest her, "swatting" away the officer's hands and "kicking and hollering and screaming" while trying to pull away from him. To aid his efforts, the officer put her up against a truck for leverage, and when that failed, he put her on the ground, which was ultimately successful.

After her arrest, a West Virginia magistrate judge found the plaintiff guilty of disorderly conduct and obstruction but acquitted her of a destruction of property charge. She appealed her convictions to a circuit court. Before trial, however, the plaintiff accepted the State's offer to plead nolo contendere to the disorderly conduct charge in exchange for dismissing the obstruction charge.

The plaintiff then sued the officer, as well as other individuals, for unlawful use of force. She also sued the officer for failing to preserve the bodycam and dashcam footage from the incident, contending that the officer violated her due process rights under the Fourteenth Amendment. After discovery, the officer moved for summary judgment. The trial court granted the motion and dismissed the lawsuit.

Held: Affirmed.

Regarding the plaintiff's claim that the officer's failure to preserve the bodycam and dashcam footage constituted a violation of her due process rights under the Fourteenth Amendment, the Court explained that, for the spoliation of evidence to constitute a due process violation, the plaintiff was required to first allege that the bodycam and dashcam footage was "material," in that it possessed

"exculpatory value that was apparent before it was destroyed, and was of such a nature that she was unable to obtain comparable evidence by other reasonably available means."

In this case, the Court found that the plaintiff failed to allege materiality because she could have obtained comparable evidence by other readily available means. The Court noted that she could have called the construction workers, the officer, and the other police officers present at the scene to testify at trial and cross-examine them about the events that the officer's bodycam and dashcam may have recorded.

Regarding the plaintiff's excessive force claim, the Court agreed that the officer's use of efficient means to bring about the arrest—even though she incurred minor injuries as a result—was objectively reasonable. The Court ruled that the officer was entitled to qualified immunity from this claim and, in turn, summary judgment.

Full Case At:
https://www.ca4.uscourts.gov/opinions/201650.U.pdf

Virginia Supreme Court

Colas v. Tyree: January 26, 2023

Virginia Beach: Police officer appeals a jury verdict in a Lawsuit for a Fatal Shooting

Facts: Police responded to a call in which the plaintiff was experiencing a mental breakdown, was angry and agitated, and had pushed his sister until she fell to the ground. The plaintiff was armed with a "military-style" knife, expressed that he wanted to kill himself, and stated: "I'm going to slit my throat and you guys are going to watch me bleed out or I'm going to charge at an officer and force you to shoot me." He also said he did not want to hurt the officers but indicated he would if they made him or if it was what he had to do. However, he did not advance on the police so long as they stayed out of his yard.

As the plaintiff's mental state deteriorated, officers developed a plan to convince the plaintiff to surrender his weapon and then subdue him. The plaintiff agreed to surrender his knife. However, as an officer tried to tackle the plaintiff to restrain him, the plaintiff retrieved his knife. Within less than two seconds, as the officer who tackled the plaintiff was starting to roll away, the plaintiff made a sudden gesture, raising the knife in the air, and one of the officers shot the plaintiff with a single shot, killing the plaintiff.

At trial for this lawsuit, during the plaintiff's case in chief, the plaintiff called the officers to the stand. The plaintiffs adduced evidence from the officer who killed the plaintiff that he fired the shot in a moment of imminent danger to the life of another officer. At the conclusion of trial, the jury dismissed the plaintiff's gross negligence claim. However, the jury found that the officers unlawfully battered the plaintiff and awarded $1 million in damages.

Held: Reversed. In a 4-3 ruling, the Court ruled that the officer's decision to fire his weapon, on these facts, constituted defense of another as a matter of law.

The Court repeated that the "bare fear" of serious bodily injury, or even death, however well-grounded, will not justify the taking of human life. Instead, there must also be some overt act indicative of imminent danger at the time. In the self-defense context, the Court noted that "imminent danger' is defined as "an immediate, real threat to one's safety." In this case, the Court found that "a mentally disturbed person who seizes a knife and lifts it in the air in very close proximity to the officer who just tackled this person, presents an obvious imminent danger."

The Court wrote that: "the evidence establishes that an officer was on the ground, lying next to a profoundly disturbed and potentially dangerous individual, who then lifted a military-style knife in the air in such a way that the knife might be employed to stab the officer. Applying the adverse party witness rule, the evidence establishes that Detective Colas faced an immediate and possibly mortal danger to a fellow officer, and he was justified in taking a single shot in defense of his fellow officer." "In the immediacy of that moment, Colas was not required to wait and see whether Tyree might plunge the knife into Tuft-Williams' heart or neck, or whether something else might happen."

Regarding the events that led up to the shooting, the Court explained that self-defense turns on the right to respond to an overt act that creates an "imminent danger." For that reason, the Court concluded that what was said and done before this imminent danger may be relevant background, but it was not dispositive on the question of self- defense.

Justices Russell, Goodwyn, and Mann filed a dissent.

Full Case At:
https://www.vacourts.gov/opinions/opnscvwp/1211226.pdf

Virginia Court of Appeals
Unpublished

Best v. Farr: April 18, 2023
Lary v. Farr: April 18, 2023

Arlington: Plaintiffs appeal the dismissal of their Use of Force lawsuit against Police.

Facts: Plaintiffs, the driver and passenger in a car, were stopped by police after police saw a hand-to-hand transaction between the driver and another person that police believed was a drug transaction. The passenger had a warrant for her arrest at the time. Police attempted to detain the plaintiffs using a tactical unit involving multiple unmarked vehicles, manned by at least five armed, plainclothes officers. Three of the unmarked vehicles were instructed to "box in" the van while it was parked on the public street.

Officers converged on the plaintiffs and the lead unmarked vehicle began flashing blue lights. Four of the officers, armed but not in uniform, approached the van. One of the officers began tugging on the driver's window. According to the plaintiffs, no badges were displayed, nor did they tell either

plaintiff that they were under arrest. However, while the officer was pulling on the driver's side window, he yelled to the driver, "show me your hands!"

The driver plaintiff tried to escape, pulling forward and striking the lead police vehicle, and then backing up and striking another unmarked police vehicle, and pushing it backwards, allowing the van to escape. One of the officers was directly in front of the van as it accelerated out and had to jump out of the way to avoid being struck. This officer, along with several of the other officers present, fired multiple gunshots at the van, striking the driver plaintiff five times and the passenger plaintiff once. The driver plaintiff was able to drive a short distance but was unable to continue driving due to his severe gunshot wounds. After the van came to a stop, the passenger plaintiff ran from the van and hid nearby until a police dog located her and bit her when the dog found her.

Both plaintiffs sued the officers for Battery under Virginia Law, but the trial court sustained numerous demurrer motions until dismissing the lawsuit.

Held: Affirmed. The Court held that the plaintiffs failed to allege facts sufficient to state a cause of action under Virginia tort law.

The Court first agreed with the trial court that the stop was supported by reasonable articulable suspicion and was therefore lawful. The Court repeated that the absence of charges or the fact that further investigation reveals a suspect's innocence does not mean that reasonable suspicion did not exist at the time of the stop.

The Court then agreed with the trial court's conclusion that the plaintiffs knew that the officers were law enforcement when they crashed into the cars and fled. The Court noted that:

(1) the police truck flashed blue emergency lights, which are commonly associated with law enforcement,

(2) the first plainclothes officer directed the driver to "show [him] his hands," a directive also commonly associated with law enforcement,

(3) the plaintiffs were both aware that the passenger had an outstanding warrant, which would put them on notice that the police would likely be pursuing her, and

(4) neither plaintiff ever claimed that they did not know that the officers were law enforcement.

The Court concluded that the plaintiffs were not privileged to defend themselves from an assault or threatened assault because the only reasonable inference was that the plaintiffs were in fact aware that they were dealing with law enforcement officers. The Court repeated that there is no right to resist an investigative detention.

The Court then ruled that the officers' use of deadly force in response to the plaintiffs' efforts to flee was justified. The Court noted that the video showed that one of the officers was in immediate danger of being struck by the van, and explained that, just because an officer was able to deftly avoid injury does not mean that he was not in immediate danger. Regarding the dog, the Court found that no facts alleged that would allow for a reasonable inference that the officers did not use reasonable force in doing using a police dog to capture the passenger plaintiff.

Lastly, the Court found that, even if the officers unlawfully failed to identify themselves, the plaintiffs' own conduct was an intervening and superseding cause of the injuries that they suffered. The Court wrote: "Upon being lawfully stopped by the officers, and with the knowledge that he was dealing with law enforcement officers, Best made a conscious choice to attempt to evade detention. There is no

right to resist an investigative detention... The video depicts Best utilizing his van to plow his way through the other police vehicles, and in doing so, he endangered one of the on- foot officers. The officers were entitled to use deadly force to respond in kind to Best's conduct, and it was reasonably foreseeable that they would in fact do so."

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0952224.pdf
and
https://www.vacourts.gov/opinions/opncavwp/0949224.pdf

Sex Offender Registration

Virginia Court of Appeals
Published

Tuthill v. Commonwealth: October 4, 2022
75 Va. App. 550, 878 S.E.2d 41 (2022)
Prince William: Defendant appeals the denial of his petition to be removed from the Virginia Sex Offender Registry.

Facts: In 2001, the defendant pled guilty to two counts of crimes against nature, in violation of § 18.2-361. The two offenses occurred on the same day. The convictions required him to register on the Virginia Sex Offender Registry under § 9.1-902(A), which he did.

In September 2021, the defendant petitioned the circuit court to remove his name and information from the registry, based on §§ 19.2-908 and -910. He argued that argues that § 9.1-910(A)(ii) would only render him ineligible if his two offenses requiring registration occurred at two distinctly different times. However, the trial court denied the petition, because the defendant had convictions for two offenses that required registration made him ineligible for removal from the registry under § 9.1-910.

Held: Affirmed. The Court found that the plain meaning of the statutory language requires anyone convicted of multiple Tier I offenses to remain on the registry, regardless of the temporal proximity of the crimes. The Court ruled that it does not matter when the repeat offenses occurred, only that they occurred. Because the defendant was convicted of two Tier I offenses, he was ineligible to petition for removal of his name from the registry.

The Court repeated that the statutes do not give trial courts discretion to determine eligibility to petition for removal from the registry. For Tier I offenders, only someone convicted of a "single" offense "may petition the court no earlier than [fifteen] years from . . . the date of initial registration." § 9.1-910(A). Although the defendant asked the Court to insert a time-passage requirement between

convictions, the Court noted that no such language appears in the subsection disallowing removal when a person has been convicted of “two or more offenses for which registration is required.”

Full Case At:
https://www.vacourts.gov/opinions/opncavwp/0064224.pdf