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2015 VIRGINIA LAW ENFORCEMENT APPELLATE UPDATE MASTER LIST

Cases Reported from June 1, 2014 to June 1, 2015

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Fourth Amendment - Search & Seizure

U.S. Supreme Court

Riley v. California and *United States v. Wurie*: June 25, 2014

Riley: Certiorari to the Court of Appeal of California: Defendant appeals his convictions for firing at an occupied vehicle, assault, and attempted murder on Fourth Amendment grounds
Wurie: Certiorari to the United States Court of Appeals for the First Circuit: Defendant appeals his convictions for Possession with Intent to Distribute and Possession of a Firearm on Fourth Amendment grounds.

Facts: Police stopped Riley for expired tags and discovered he had a suspended license. Police conducted an inventory search of the car and located 2 loaded guns concealed under the car's hood, in violation of California law. Officers arrested Riley and searched him incident to arrest, where they found a smart phone in his pants pocket. The officer accessed the information on the phone, noting that Riley had several entries in his contacts preceded by the letters "CK", known to the officer to be short hand for "Crip Killer," a term used to identify members of the Bloods street gang.

Two hours later, a detective with gang expertise went through the phone and observed photos and videos of gang related activity, as well a photo of Riley himself standing in front of a car that had been involved in an earlier shooting. Riley was charged with offenses related to the earlier shooting, convicted, and sentenced according to guidelines that provided for an enhancement for gang activity. He received 15 years to life and appealed.

In the companion case, police arrested Wurie for making a drug sale. Incident to arrest, officers seized Wurie's cellphone, which was an older "flip" phone, rather than a more modern smart phone. However, they also noticed that the phone was receiving numerous calls from a location called "my house" according to the display. Officers opened the phone and used the information inside to locate the defendant's home. Obtaining a search warrant, they searched the apartment and located a large amount of illegal drugs and a firearm. The trial court denied Wurie's motion to suppress and convicted him of possession with intent to distribute and possession of the firearm.

Held: Convictions reversed. The Court held that police must obtain a warrant before searching a cell phone seized incident to an arrest. The Court focused its holding on a "trilogy" of 4th amendment opinions: *Chimel*, *Robinson*, and *Gant*. *Chimel* held that, incident to arrest, police may conduct warrantless searches of the arrestee's person and the area within his immediate control, based on the government's interest in officer safety and preventing evidence destruction.

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The Court later applied this analysis *Robinson*, where the Court found that an officer is entitled to conduct a search incident to arrest during any arrest, regardless of whether those interests are actually at stake in the specific case. The Court, however, noted that in *Gant* it had placed a limitation on warrantless searches of vehicles incident to arrest, restricting them to either areas that are currently within an unsecured arrestee's control or where evidence of the offense of arrest might reasonably be found.

In this case, the Court observed that the data on the phone posed no threat to officer safety, and opined that the prospect of remote wiping of the phone could be mitigated by the use of inexpensive aluminum bags that could eliminate the ability for the phone to receive a signal. The Court rejected the argument that the data in the phone was so vulnerable as to make waiting for or obtaining a search warrant impractical. Instead, the Court wrote that modern cell phones contain all "the privacies of life" and merit special protection. The Court noted, however, that other exceptions to the warrant requirement may still apply to searches of phones. First, the Court pointed out that exigent circumstances may permit a warrantless search of a phone. In addition, officers are still permitted to physically examine the body of a phone to, for example, determine if there was razor blade between the phone and its case. The Court repeated its finding in *Robinson* that unknown physical objects may always pose risks, no matter how slight, during the "tense atmosphere" of custodial arrest and that therefore searching such objects is lawful. However, the Court distinguished a search of the data inside the phone, discussing in depth the vast varieties and volume of data that a cell phone contains.

Carroll v. Carman: November 10, 2014

On petition for writ of certiorari to the Third Circuit Court of Appeals: Police Officers appeal denial of their claim of qualified immunity on Fourth Amendment grounds.

Facts: Officers responded to a report that an armed car thief may be in the plaintiff's home. They pulled up to the house and, not finding parking in front, parked on the side of the house where other cars were parked. They approached the side of the house and found a sliding glass door that was open on a porch and appeared to be the commonly-used entrance. They knocked on the door and the plaintiff exited the home, drunk and belligerent. When the officers asked for his name, he refused to answer and instead turned away and reached for his waistband. The officers put him on the ground. The wife then exited the home, the officers searched for the suspect in the house with her consent, and, after they did not find him, left.

The plaintiffs sued on Fourth Amendment grounds, arguing that the officers unlawfully visited them at their side door instead of their front door. At trial, the trial court denied a motion for summary judgment on qualified immunity and a jury returned a verdict for the plaintiff. The Third Circuit affirmed the denial of the motion for summary judgment, finding that officers are only entitled to approach and knock on the front door of a home and, in this case, knocked on the side door in violation of the Fourth Amendment.

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Held: Reversed. In a *per curiam* opinion, the Court began by noting that a police officer is entitled to qualified immunity unless he violates a "clearly established" rule under the Constitution. The Court rejected the Third Circuit's insistence that officers may only ever knock on the actual front door of a residence. While the Court declined to rule on whether a police officer may conduct a "knock and talk" at any entrance that is open to visitors or whether the officer is restricted to only the front door, the Court reviewed numerous cases where other courts ruled that side or rear entrances may, depending on the facts, be appropriate locations to knock at a residence. The Court held that, in this case, the officers did not violate a "clearly established" rule by knocking at the side door.

Heien v. North Carolina: December 15, 2014

On petition for writ of certiorari to the Supreme Court.

Facts: North Carolina law requires that only one functioning brake light must be operational; however, the law was not clearly written and the courts had not clearly interpreted it this way. Officer mistakenly believed that the law required that both brake light be operational. Officer stopped defendant for having only one operational brake light and discovered a large quantity of drugs. Defendant appealed the stop on 4th Amendment grounds.

Held: Evidence admissible. Reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition, if the mistake is objectively reasonable. An objectively reasonable mistake is a mistake that a reasonably well-trained officer would make, but not a mistake based on an officer's "subjective understanding" of the law or based on "a sloppy study of the laws he is duty-bound to enforce."

Grady v. North Carolina: March 30, 2015

On writ of certiorari to the Supreme Court of North Carolina: Defendant appeals on Fourth Amendment grounds the state's requirement that he wear a GPS tracker for the rest of his life.

Facts: Defendant, a recidivist sex-offender, was required by North Carolina to submit to GPS monitoring for the rest of his life. Defendant objected on Fourth Amendment grounds, but the North Carolina Supreme Court held that it was not a Fourth Amendment intrusion to monitor his movements by GPS.

Held: Reversed. The Court ruled that GPS monitoring is a Fourth Amendment intrusion, holding that the State conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements. The Court explicitly did not address whether the monitoring was reasonable under the Fourth Amendment and instead remanded the case to North Carolina to consider the issue. The Court noted that many Fourth Amendment intrusions are nevertheless reasonable, such as suspicionless searches of parolees and warrantless testing of student athletes.

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U.S. Court of Appeals

No cases to report.

Virginia Supreme Court

Murry v. Commonwealth: September 16, 2014
Reversed Court of Appeals Opinion of June 25, 2013

Hanover: Defendant appeals his sentence for Sexual Assault on the requirement of a lifetime Fourth Amendment waiver.

Facts: Defendant sexually assaulted a child beginning at age 5. When confronted, he claimed consent as a defense. The trial court sentenced the defendant to 156 years but suspended 140 years of that sentence. At sentencing, the Circuit Court required that the defendant be subject to warrantless searches by probation or law enforcement for life. The defendant objected that this requirement was unreasonable.

Held: Reversed. The Court repeated that probation conditions must bear a reasonable relationship to the offenses committed by the defendant, tend to reduce the defendant's exposure to crime, and assist in the defendant's rehabilitation. The Court also agreed that, in general, courts may impose Fourth Amendment waivers as a condition of probation under appropriate circumstances. The Court then reviewed the waiver in this case, nothing that it had no limitation on scope and was essentially a lifetime waiver with no expiration date. In this case, the Court found that the record lacked a basis to impose a lifetime Fourth Amendment waiver. The Court distinguished this case, however, from an instance where a defendant voluntarily enters into a plea agreement in which a Fourth Amendment waiver is part of the agreement and is therefore valid.

Virginia Court of Appeals
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Mason v. Commonwealth: February 3, 2015
Reversed Panel Decision of August 5, 2014

Sussex: Defendant appeals his convictions for Drug Possession and Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: Defendant carried drugs in his car while driving with a parking pass attached behind his mirror. An officer observed the defendant driving with the pass and stopped him for having a "dangling object". During the course of the stop the officer discovered various illegal narcotics.

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The pass was 3"x 5" [The Court included a photo of the pass in its opinion– *Ed*]. The trial court viewed the pass and even went to view the vehicle itself and then denied the motion to suppress, but a panel of the Court of Appeals reversed, finding that the trial court should have suppressed the evidence.

Held: Affirmed, motion properly denied. The Court noted that, in the officer's testimony, he stated he could see the pass as the vehicle drove by and that the pass "could obstruct a driver's view." The Court then, in detail, reviewed the "reasonable suspicion" standard and noted that it was an objective test. The Court repeated that it does not even require "actual suspicion," but merely reasonable suspicion under the objective facts. Thus, the Court found that it was irrelevant whether the officer himself believed that the facts were suspicious in this case. The trial court found that the pass could obstruct the view of the driver. The Court noted that under §46.2-1054, the object must not hang in such a manner as to obstruct the driver's clear view of the highway through the windshield. The Court looked at the pass and found that it would potentially obstruct the view of a pedestrian, road sign, or other risk or obstruction. Although the Court cautioned that it would not approve of a stop for just any object, in this case the facts were sufficient to stop the vehicle. The Court went further to state explicitly that a 3"x 5"pass that hangs from the rearview mirror is, essentially, reasonable suspicion to stop a vehicle.

Sanders v. Commonwealth: May 26, 2015

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

Facts: Defendant had drugs in his hotel room. Officers brought a narcotics-detection dog through the hotel and the dog alerted on the defendant's room. Officers obtained a search warrant and located the defendant's drugs. At trial, the defendant argued that the dog's hallway sniff was unlawful.

Held: Affirmed. The Court reviewed *Florida v. Jardines* and found that the rule in that case applies to a person's home and the immediate curtilage thereto. Even though a motel room has similar protections to a home, however, the Court found that the hallway outside a hotel room does not have the protections that one would receive in the curtilage to one's home. The Court examined the concept of a "curtilage" in depth and found that, just because the hallway was immediately adjacent to the room, that did not make it the "curtilage" to the hotel room. Instead, the Court found that there was no reasonable expectation of privacy in the hallway. The Court also rejected the argument that the use of the dog changed the nature of the search in this case.

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Unpublished

Commonwealth v. Rosser: June 17, 2014

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

Facts: An officer received a BOLO for a gold Nissan Maxima driven by a bald male that was "connected with drug activity" and that would be in a particular area during a particular time. The officer then saw the defendant driving the car as described. He followed the car as it stopped at a known residence, and then saw it driving in the opposite direction a few minutes later. While he followed it again, the defendant turned away abruptly, which the officer found to be evasive. The officer stopped the defendant, although he did not observe any traffic violations. The officer learned that the defendant was suspended and located marijuana in the vehicle.

Held: Affirmed, motion to suppress properly granted. The Court began by noting that the tip in this case was anonymous. The Court likened this case to the *Harris* case, where the Virginia Supreme Court reversed a case on similar facts and found a stop lacked reasonable suspicion. In both cases, the Court noted, the officer found lawful behavior to be suspicious in light of an anonymous tip, but in both cases, the lawful behavior did not sufficiently corroborate the anonymous tip. Although the Court acknowledged that it had previously held that lawful behavior can still provide reasonable suspicion when it is "evasive," the Court found that, in this case, the behavior was not sufficiently evasive. The Court specifically addressed the U.S. Supreme Court's recent decision in *Navarette v. California* and distinguished this case from *Navarette*. The Court took pains to distinguish the facts in this case from the facts in *Navarette,* noting that in that case, the tip specifically described criminal behavior through a recorded 911 call that could be verified, traced, or justifiably relied upon and that the call took place minutes before the officer located the suspect. In this case, there was no evidence of how or when the police received the BOLO information and the officer did not corroborate any of the details of the anonymous tip.

Parker v. Commonwealth: August 26, 2014

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

Facts: Officers observed the defendant riding a bicycle on public housing property. They asked to speak to him and he agreed. He provide his identification and the officer issued him a barment notice, banning him from the property. He then returned the defendant's ID and gave him the barment notice. The officer then asked him if he could look at the serial number on the bicycle to determine if it had been stolen. The defendant agreed and the officer examined the bicycle, determining it to be stolen. The officer arrested the defendant and found drugs that the defendant intended to distribute.

Held: Affirmed. The Court found that, once the defendant received his identification and the ban notice, he was free to leave and that the conversation about the bicycle was a consensual

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encounter. The Court repeated that merely giving someone a barment notice does not constitute a seizure, but added that whether it was a seizure or not was irrelevant. The Court found that nothing in the officers' words or actions suggested the defendant was not free to leave. The Court also repeated that the officers were not required to inform the defendant that he was free to leave in order to conduct a consensual encounter.

Woodberry v. Commonwealth: September 16, 2014

Norfolk: Defendant appeals her convictions for Possession of a Firearm by Felon and Brandishing on Fourth Amendment grounds

Facts: Defendant threatened convenience store employees with a gun in a parking lot. Police received a dispatch that described the defendant's vehicle type and provided her license plate number. A police officer interviewed the witnesses and confirmed the incident by watching a videotape and then repeated the description over the radio. Another officer, who had seen the vehicle leaving the store, located the vehicle again and stopped the vehicle. He detained the defendant and searched the vehicle, locating the firearm in the trunk.

Held: Affirmed. The Court applied both the *Carroll* doctrine and the *Arizona v. Gant* case to find that the search was lawful. First, under *Gant*, the Court found that there was a "fair probability" that the firearm would be in the vehicle and therefore the search was lawful. Next, under *Carroll*, the Court found that the officer had probable cause to believe that the vehicle contained evidence of the criminal offense and that he therefore did not need a search warrant.

Harris v. Commonwealth: October 14, 2014

Loudoun: Defendant appeals his convictions for Sexual Assault and Manufacturing Child Pornography on Fourth Amendment grounds, denial of a continuance, and sufficiency of the evidence

Facts: Defendant, a registered sex offender, sexually assaulted a child in his home and filmed one of the assaults. A state police officer obtained a search warrant for the defendant's residence that sought clothing, computer systems and digital storage media. It also sought records, documents, and other things that might show indicia of the defendant residing at the residence. While searching the residence, the officer located a video camera with a video cassette and played the video, which had recorded the assault. Defendant moved to suppress the video as outside the scope of the warrant. The trial court denied the motion.

At trial, the Commonwealth amended a number of the date ranges and offenses alleged in the indictments. The defendant asked for a continuance, but conceded that the amendments did not surprise him and did not change the evidence that he expected to encounter at trial. He simply argued that there could be more witnesses to defend him and therefore wanted more time.

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In her testimony, the victim testified to several instances where the defendant sexually assaulted her, although she could not give specific dates. She could only specify that it happened 3 or 4 times when she was 11 years old, and then every year thereafter until she was 15.

Held: Affirmed. The Court first ruled that the video cassette is a form of magnetic media and therefore fell under the terms of the search warrant. In addition, the Court also held that it was evidence that the defendant was residing at the residence and therefore fell under the scope of the warrant as well. The Court observed that the presence of a videotape depicting the defendant was an indiciation that the defendant lived at the residence.

Regarding his motion to continue, the Court ruled that the defendant failed to demonstrate any prejudice and could not point to any particular evidence or witness that he could not obtain because the trial court denied his continuance motion.

Lastly, regarding sufficiency, the Court rejected the argument that the victim was not believable because she could not remember the exact dates when the defendant assaulted her. The Court also reaffirmed that the victim's testimony alone is sufficient to prove a sexual offense.

Commonwealth v. Dawson: October 21, 2014

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

Facts: Defendant had marijuana in his residence. Officers could smell the odor outside the residence and knocked on the door. The defendant answered the door and the officers detained him and his friends, conducted a "protective sweep" of the interior of the residence to make sure no one was inside, and obtained a search warrant. The search warrant noted that the officer observed baggies of marijuana inside the residence during the protective sweep, but also detailed the odor that the officers observed outside the residence. The trial court suppressed the evidence obtained during the execution of the search warrant.

Held: Reversed, motion to suppress incorrectly granted. The Court first assumed that the protective sweep was not legal and that the officers illegally witnessed the marijuana in the residence before obtaining the search warrant. However, the Court repeated that a search warrant is not invalid simply because it includes tainted evidence. Instead, the Court found that the trial court should have simply redacted the tainted evidence and then determined whether the search warrant was supported by probable cause.

In this case, the Court found that the odor of burning marijuana was sufficient probable cause, citing *Cherry* and *Bunch*. The defendant had argued that, under *Murray,* the entire search was unlawful because of the initial, unlawful entry. The Court distinguished the *Murray* case by

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noting that, in this case, the purpose of the illegal protective sweep was for officer safety and not to look for evidence. The record was clear that the officers had already intended to obtain a search warrant and their illegal entry into the premises did not affect that plan.

Commonwealth v. Vick: November 25, 2014

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

Facts: Defendant possessed drugs in his backpack. Officers found him asleep on the metro train and awoke him by loudly announcing their presence. The officers ordered that the train be held at the station. After several minutes, they were able to awaken the defendant and walked him off the train. Officers asked him for his name and he provided his ID. While holding the defendant's ID, the officers asked him for permission to search his backpack and he agreed. They found PCP and marijuana. The trial court granted a motion to suppress and the Commonwealth appealed.

Held: Affirmed, motion to suppress properly granted. The Court agreed that the evidence demonstrated that a reasonable person would not have felt free to leave when asked for consent to search the backpack under these circumstances, given that he was ordered and escorted off a train that the officers held up and that they were holding his ID at the time.

Minter v. Commonwealth: December 2, 2014

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

Facts: Defendant, a felon, was carrying a concealed gun when officers saw him walking in a public parking lot. While they drove their unmarked vehicle slowly past, the defendant appeared very interested in their vehicle and began to walk away faster, crossing a muddy pool of water to get away. Officers stopped their vehicle and asked to speak to him and he agreed. The defendant appeared very nervous and was shaking and stammering over his words. The defendant reached into his pockets twice and after the officers had told him to keep his hands out of his pockets. Officers conducted a pat-down and asked the defendant if he had any weapons on his person. He stated that he did and they located a handgun on his person. The trial court denied a motion to suppress.

Held: Reversed. The Court first held that the officers seized the defendant as soon as they conducted the pat-down in this case. However, the Court ruled that the seizure lacked reasonable suspicion. Although the defendant walked away from the officers at first, the Court noted that the officers were driving an unmarked vehicle. The Court also agreed that the defendant was nervous, but provided his correct name to the officers and answered their questions. Although the Court acknowledged that the defendant did not keep his hands out of

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his pockets despite direction to do so, there was no other reason to believe he was carrying a weapon. The Court noted that there was no evidence that this area was a high-crime or drug area and pointed out that the encounter took place in the early evening rather than nighttime. The Court also noted that there was no other evidence that the defendant was engaged in any criminal activity. Although the Court cited a number of very similar cases where it had allowed pat-downs, it distinguished those cases on the facts.

Wheeler v. Commonwealth: December 2, 2014

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

Facts: Officers responded to a shooting where the victim had arrived at the hospital and reported he had been shot on the street. Examining that street, officers located a large patch leading to a residence where, despite recent rain, the sidewalk smelled like bleach. Officers then found blood leading to that residence. Officers spoke to a resident, who stated that her housemate had awoken her and stated he had been shot. However, she never called the police. A neighbor approached and also stated that she had heard a shooting earlier that night. Officers, hearing other people inside, entered the residence and conducted a protective sweep to make sure that no one else was inside the residence. While conducting the sweep, they observed illegal drugs and obtained a search warrant based upon those observations. They located drugs that belonged to the defendant.

Held: Affirmed. The Court found that there were exigent circumstances to enter the home. First, the Court ruled that there was a "fair probability" that the victim's blood was inside the residence. The Court then ruled that the blood was evidence of a crime. The Court held that the facts demonstrated than an objective officer could believe that the biological evidence would be destroyed in the time necessary to obtain a search warrant, especially since some evidence apparently had already been destroyed. The Court also rejected the defendant's argument that the officers had not given a sufficient reason for their actions in their testimony, noting that their subjective intent was irrelevant. The Court repeated that it would not consider allegations of the officers' "real motives" for their actions if they otherwise satisfy the objective reasonableness standard adopted by the Fourth Amendment.

Gilliam v. Commonwealth: January 27, 2015

Hampton: Defendant appeals his conviction for Attempted Breaking and Entering on Fourth Amendment grounds.

Facts: Defendant tried to break into a residence. However, police received a call warning them of the offense and responded, finding the defendant, whose clothing matched the caller's description. The defendant, upon seeing the police, started to look around and quickly walked away, looking for a place to run. Police stopped the defendant and handcuffed him. During

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their subsequent investigation, they learned he had committed the offense. Defendant moved to suppress the stop.

Held: Affirmed. The Court found that the officers had reasonable suspicion to believe that the defendant had committed the offense. The Court noted that the suspect's unauthorized presence on the premises of a suspected burglary provides reasonable suspicion. In addition, his flight, as in *Wardlow*, provided additional reasonable suspicion of the offense.

Wilson v. Commonwealth: February 24, 2014

Richmond: Defendant appeals her conviction for PWID Marijuana on Fourth Amendment grounds.

Facts: An officer stopped the car, in which the defendant, a passenger, carried drugs and a gun because the driver failed to use a turn signal while making a left turn. While there were no cars in the intersection, there were cars in the general area at the time. The officer testified that defendant's failure to signal might have affected his own vehicle's movements, since he would have slowed down earlier had he been aware of the turn, but he could not testify that the failure to signal did, in fact, affect his vehicle's movements. The defendant argued that, because the failure to use a turn signal did not affect other vehicles, the driver did not violate 46.2-848.

Held: Affirmed. The Court ruled that a motorist's failure to use a turn signal is sufficient reasonable suspicion of a violation of 46.2-848, provided that other vehicles are in the vicinity and "may" be affected by the un-signaled turn. In this case, the Court observed that the officer's testimony met that burden.

Butler v. Commonwealth: April 21, 2015

Powhatan: Defendant appeals his conviction for Possession of Ammunition by Felon, Possession of Drugs, and Driving Revoked on Fourth Amendment grounds.

Facts: Defendant drove his vehicle on a suspended license. Deputies saw him and identified him, but before they could stop him, he exited his car and entered another car as a passenger. That car then drove away. Deputies stopped that other car, lying to the driver about the reason for the stop. Meanwhile, they asked the defendant if he was still using drugs or had gotten off drugs. The defendant denied using drugs and volunteered that the deputies could search him and his bag. The deputies searched the vehicle console, where they found morphine. They searched the bag and found shotgun shells. The defendant objected to the stop of the vehicle and contended that the search was unlawful.

Held: Affirmed. The Court first ruled that it was lawful for the deputies to stop the vehicle because they had probable cause to arrest the defendant, who was a passenger. The Court rejected the argument that the arrest was invalid because a different deputy conducted the stop

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than the deputy who saw the defendant driving. The Court also rejected the argument that the stop took place too long after the initial deputy saw him driving. The Court then ruled that the defendant consented to the search of his person and could not object to the search of his friend's car, because he lacked standing.

Billups v. Commonwealth: May 5, 2015

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

Facts: Police, using binoculars, observed two men engage in a hand-to-hand transaction, after which the defendant arrived and appeared to take possession of whatever was handed over in the transaction. The defendant left in a vehicle driven by another person. Police stopped the vehicle, obtained consent to search, and located Cocaine in the car. At the motion to suppress, the officers testified that after watching dozens or hundreds of drug transactions, this transaction appeared to be a drug transaction.

Held: Affirmed. The Court found that the two apparent transactions, in quick succession and in a high-drug area, provided sufficient reasonable suspicion for the officers to detain the defendant. The Court focused on the officers' training and experience as the basis for their conclusion that they were observing a drug transaction. The fact that the behavior was potentially innocent was of no import.

Commonwealth v. Correll: May 26, 2015

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

Facts: The defendant drove to a house, where his passenger got out, went into the house, and then returned to the vehicle with an item. An officer observed that and followed the defendant. While the officer followed in an unmarked vehicle, the defendant appeared to be reaching under the seat to conceal something while weaving around the road. The officer stopped the defendant's vehicle. The defendant thereafter was cooperative and did not make any suspicious movements, although he appeared nervous. The officer did not pat down the defendant. Instead, the officer checked the center console and found illegal drugs.

Held: Affirmed, motion properly granted. The Court noted that the defendant's furtive movements took place before the officer had activated his emergency equipment and that his car was unmarked. The Court also noted the lack of evidence that the defendant was engaged in unlawful activity; there was no evidence that the house was a known drug house or that the area was a high-crime area. Lastly, the Court noted that, if the officer had been concerned for his safety, he would have patted the defendant down, but did not in this case.

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Fifth Amendment – Confessions & Self-incrimination

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No cases to report.

Virginia Court of Appeals
Unpublished

Gatling v. Commonwealth: March 4, 2014

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

Facts: Defendant had been selling heroin from his sister's house. Police, who had observed him selling, sought to identify him. Three officers walked up to him one day, outside the home, and asked him for identification. He invited the officers inside without them asking and produced his ID. One of the officers told him that they believed he was selling heroin and he agreed that he was. Obtaining consent to search the home from his sister, they searched the home and found heroin. After learning of his Miranda rights, the defendant again confessed, this time in detail.

Held: Affirmed. The Court noted that the officers never told the defendant that he was not free to leave, nor did they even ask to enter the home. However, the Court also noted that even if the defendant's original statement had been suppressed, the subsequent statement would still have been admissible, as it was preceded by valid Miranda warnings.

Crimes Against Person/Domestic Violence

Virginia Supreme Court

Herring v. Commonwealth: June 5, 2013
Appeal from Panel Decision of April 16, 2013

Augusta: Defendant appeals his convictions for Attempted Murder, Use of a Firearm, and Abduction on sufficiency of the evidence.

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Facts: Defendant, drunk, assaulted his wife in front of her children and his father. He then obtained a shotgun and announced that he was going to kill his wife. The defendant kept the children and their grandfather inside the home while he declared that he was going to kill them and the police. His wife hid behind a vehicle and the defendant followed, pointing the shotgun and aiming it around the area outside until the grandfather shoved the muzzle to the ground, causing it to discharge. The defendant appealed his convictions on sufficiency of the evidence. The Court of Appeals affirmed the convictions in part, but reversed the convictions for abduction.

Held: Affirmed all original convictions, reversed the Court of Appeals regarding the abduction offense. The Court found sufficient evidence that the defendant used intimidation to force the children and grandfather to stay in the home. The Court also found sufficient evidence that the defendant intended to keep them in the home. The Court noted that he armed himself and told the children and their grandfather that he was going to kill them, fired a gun, and paced around the home while making threats.

The Court also rejected the defendant's argument that, to be guilty of attempted murder, the Commonwealth must prove that he committed "the last proximate act" to a murder. Instead, the Court repeated that the evidence must only show an over act that is more than mere preparation.

Stephens v. Rose: September 12, 2014

Fairfax: Defendant appeals granting of a protective order.

Facts: Defendant stalked his former girlfriend, who obtained a protective order against him. Although the defendant and victim had ended their relationship years before, the defendant began to obsessively contact the victim and even showed up at her parents' house. Even though she threatened to call the police, he still called her in the middle of the night and showed up at her house at 7 am with flowers.

Held: Affirmed. The Court reviewed Va. Code §19.2-152.10, which allows a court to issue a protective order when the victim is or has been, within a reasonable period of time, subjected to an act of violence, force, or threat. The Court further noted that stalking can be such an act and found that, in this case, the defendant's actions constituted stalking. The Court found that, as in this case, evidence that the defendant received notice that his contacts were unwelcome may be sufficient to support a trial court's finding that the defendant should have known his continued contacts would cause fear. In addition, the Court found that the victim's fear was reasonable, noting that a victim need not specify what particular harm she fears to satisfy the third element of stalking.

Farhoumand v. Commonwealth: October 31, 2014
Rev'd Court App (unpublished)

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Fairfax: Defendant appeals his convictions for Indecent Liberties on sufficiency of the evidence.

Facts: Defendant sexually molested his younger cousin over the course of years. At trial, the victim testified that the defendant placed the victim's hand on the defendant's genitals on a number of occasions, and also that the defendant exposed his genitals on other occasions. The victim was not able to provide an exact date but testified about the general time periods when these assaults happened. The trial court convicted the defendant of violations of §18.2-370 for exposing his sexual or genital parts to a child who was under 15 years of age.

Held: Reversed in part, affirmed in part. The Court first held that the word "expose," as it is used in §18.2-370, requires a visual display where the genitalia are seen, or where there is a possibility that they could be seen. The Court ruled that the term "expose" in §18.2-370 does not include mere tactile contact and is limited to situations where sexual or genital parts are exposed to sight. The Court pointed out that the sexual battery code section specifically mentions touching, whereas this code section does not. The Court dismissed the indictments where the evidence constituted touching only. The Court then reviewed the instances where the defendant had visually exposed himself to the victim. The Court found that although the victim had not provided a specific date when the offenses took place, the victim provided a general timeframe which was sufficient to convict the defendant in several instances. The Court affirmed those convictions.

Virginia Court of Appeals
Published

Adeniran v. Commonwealth: August 19, 2014

Loudoun: Defendant appeals his conviction for Attempted Robbery on refusal to instruct on Assault as a lesser-included offense.

Facts: Defendant and another man robbed a prostitute whom they had hired. At trial, the defendant contended that while the other man robbed her, he was only holding the knife and did not know there was a robbery happening. The defendant requested that the trial court instruct the jury on Assault as a lesser-included offense but the trial court denied the instruction.

Held: Affirmed. The Court reviewed the elements of Robbery and the elements of Assault and noted that words alone are never sufficient to constitute an assault. Thus, as a matter of law, the Court concluded that Assault cannot be a lesser-included offense of Robbery, as a robbery could take place with words alone. The Court reviewed the Virginia Supreme Court *Guss* ruling but found that it was not controlling.

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Virginia Court of Appeals
Unpublished

Wyant v. Commonwealth: March 31, 2015

Augusta: Defendant appeals his conviction for Violation of a Protective Order on sufficiency of the evidence.

Facts: Defendant, who was subject to a protective order, drove to the victim's house, stood on her property line, and took pictures of the victim and her home. The victim was looking at the defendant at the time from about 50 feet away. The defendant claimed that he did not make "contact" with the victim and that he did not know if the victim was present.

Held: Affirmed. The trial court found that the defendant had "contact" with the victim and rejected his argument that he did not know that the victim was present, under the facts.

Norman v. Commonwealth: April 14, 2015

Chesapeake: Defendant appeals his conviction for Abduction on sufficiency of the evidence (because of recanting victim.)

Facts: Defendant smashed his way in to the victim's house, tearing the door off its hinges, and then assaulted the victim in her bedroom. In view of the victim's sister, he marched the victim out of the house. At trial, the sister testified to the defendant's behavior and actions, but the victim recanted. The victim testified that nothing happened and denied that anything violent happened. She testified that she was not intimidated by the defendant. The defendant argued that the evidence failed to show that he used force or intimidation to detain the victim.

Held: Affirmed. The Court ruled that the trial court was entitled to believe the sister and reject the testimony of the victim. The Court wrote: "Trial courts are confronted on a daily basis with victims of domestic abuse who are reluctant to bring to justice those who frighten and abuse them, whether from motives of affection, financial dependence, ongoing fear, or some other reason. Trial judges need not blind themselves to these realities when they make factual determinations."

Walton v. Commonwealth: April 14, 2015

Middlesex: Defendant appeals his conviction for Violation of a Protective Order, 3rd Offense, on sufficiency of the evidence and jury instruction issues.

Facts: Defendant, who was subject to a protective order and had 2 previous convictions for violation of protective orders, approached the victim aggressively with his dog while carrying something in his hand. As the victim sat in his truck, nervous and scared, the defendant filmed

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the victim while the defendant's dog circled the victim's truck, growling and barking. The defendant contended that the evidence was not sufficient to show that his violation was based on an act or threat of violence. The defendant also complained that the jury instructions were erroneous.

Held: Affirmed. The Court noted that the victim was in fear during the violation and that the evidence demonstrates the defendant's actions were threatening. The Court found that the defendant was responsible for his dog's actions as well. The Court also approved of the jury instructions that the trial court gave in this case.

Howard v. Commonwealth: May 5, 2015

Newport News: Defendant appeals his conviction for Malicious Wounding on sufficiency of the evidence.

Facts: Defendant beat the mother of his children repeatedly, putting her in the hospital for two days. He punched her repeatedly, slammed her body on the ground repeatedly, and chased her as she tried to escape. The attack left her bleeding from her head, required multiple stitches, and left a scar. At trial, the defendant claimed he fought the victim in self-defense. He also argued that the evidence did not show the intent to permanently injure the victim.

Held: Affirmed. Although the Court agreed that the evidence must show that the defendant intended to permanently injure the victim, in other words, to maim, disable, disfigure or kill her, the Court found that the evidence demonstrated that intent.

Crimes Against Property/Fraud

Virginia Supreme Court

No cases to report.

Virginia Court of Appeals
Published

Velez-Suarez v. Commonwealth: January 27, 2015

Loudoun: Defendant appeals his convictions for Conspiracy to Commit Larceny and Destruction of Property on sufficiency of the evidence.

Facts: Defendant and his confederate stole clothing from a department store. The defendants entered the store together holding bags from a store that was not in the mall. Both selected items together, entered the fitting rooms with clothes, spoke to one another, and then left

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separately. A store security officer saw the defendant walk out of the store with a coat that they later recovered abandoned, with the security tag torn off. Although the security officer did not know for sure that the coat had been fixed with a security tag, she testified that it usually would have one. Store security found clothing with sensors cut off and sensors in the fitting room. Police stopped the defendant and recovered wire cutters from him. Police also stopped his confederate, who also had stolen property.

Held: Affirmed. The Court found that the evidence was sufficient to demonstrate that the defendant conspired with his confederate to steal property. The Court rejected the argument that the Commonwealth must prove that the defendants committed an overt act, noting that this argument conflates the law of conspiracy with the law of attempt. The Court found that the evidence was sufficient to demonstrate a conspiracy between the defendants to steal property. The Court also agreed that the evidence was sufficient to convict the defendant of destruction of property, even though the evidence appeared to show that his confederate actually caused the damage. The Court reaffirmed that everyone connected with carrying out a common design to commit a criminal act is concluded and bound by the act of any member of the combination, perpetrated in the prosecution of the common design.

Virginia Court of Appeals
Unpublished

Neblett v. Commonwealth: September 2, 2014

Henrico: Defendant appeals his conviction for Grand Larceny on sufficiency of the evidence regarding value.

Facts: Defendant stole a phone belonging to a woman. At trial, the victim testified that she had purchased the phone one month prior for $600. She admitted that she did not know the value of an equivalent used phone but testified that her phone was in working order and protected by a case. The defendant argued that, without any evidence of depreciation, the trial court could only speculate on the value of the phone.

Held: Affirmed. The Court reaffirmed that, under *Robinson,* the test for value in Grand Larceny is market value, and particularly retail value. Fair market value is the price property will bring when offered for sale by a seller who desires but is not obliged to sell and bought by a buyer under no necessity of purchasing. The Court further reaffirmed that the original purchase price of an item is admissible as evidence of its current value and that an owner is competent to testify regarding the value of her property. The Court distinguished this case from the *Dunn* case, where it held that the Commonwealth failed to demonstrate the depreciation for a 10 year-old typewriter. In this case, the phone was only a month old and was in working condition. The Court agreed that the evidence demonstrated that there was minimal depreciation or possibly no depreciation in the value of the one-month-old cell phone.

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Wyatt v. Commonwealth: January 13, 2015

Pittsylvania: Defendant appeals his convictions for Burglary, Larceny, and Possession of a Firearm by Felon on sufficiency of the evidence

Facts: Defendant, a felon, burglarized a home, stealing jewelry, firearms, and other items. Police located the defendant two days later and attempted to detain him but he led them on a high-speed pursuit. When they captured him, police found that the defendant had been concealing jewelry stolen from the victims. Police never recovered the firearms. The defendant made conflicting statements about the jewelry, including claiming that he obtained the jewelry at a flea market.

Held: Affirmed. After rejecting other arguments he had raised in his appeal on procedural grounds, the Court found the evidence sufficient in this case. The Court repeated that recent possession of stolen property permits a presumption or inference that the defendant stole the items. The Court also noted that the defendant fled from the police and made obviously false statements about where he obtained the jewelry, evincing a consciousness of guilt. Lastly, the Court found that the defendant's possession of the jewelry was sufficient evidence that he had also stolen the firearms. The Court rejected the argument that the Commonwealth had to prove that the defendant did not have an accomplice.

Massey v. Commonwealth: March 24, 2015

Dinwiddie: Defendant appeals his conviction for Larceny by False Pretense on sufficiency of the evidence.

Facts: Defendant defrauded a property owner, entering a contract to buy timber rights but then never paying for them. The defendant provided the victims with a contract signed by someone else in the name of a company that he did not, in fact, work for, but told the victims that he was the person in charge and that they would be dealing with him. As soon as he received the contract, he re-sold their timber rights to someone else for less money than he had promised to pay the victims. At trial, the Commonwealth presented three previous victims whom the defendant had similarly defrauded.

Held: Affirmed. The trial court reviewed the defendant's false statements and the irregularities with the contract and found that his intent had clearly been to defraud the victims. The Court also rejected the defendant's argument that he could not be held responsible, as he was acting in the name of a corporation.

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Virginia Supreme Court

Powell v. Commonwealth: January 8, 2015

Lynchburg: Defendant appeals his conviction for Distribution of Imitation Controlled Substance on sufficiency of the evidence

Facts: Defendant distributed a Schedule VI controlled substance to an undercover officer under the guise that it was Cocaine. The officer had approached the defendant in an open-air drug market and asked if "he was straight." The defendant said that he had what the officer needed and the officer asked for "a four," which, at trial, the officer testified was slang for $40 worth of cocaine. The defendant provided the officer with a knotted baggie containing a white, rock-like substance that looked like a rock of crack cocaine. However, it turned out to be a single pill of quetiapine, cut in half. That substance is a Schedule VI controlled antipsychotic. At trial, the defendant argued he could only be convicted of misdemeanor distribution.

Held: Affirmed. The Court first examined 18.2-248 and found that the Commonwealth must prove that the substance distributed must either be a "counterfeit controlled substance" or be an imitation substance that itself is not a "controlled substance subject to abuse." In this case, the Court noted that the evidence was not that the substance was counterfeit, but that it was sold to imitate another substance. However, the Court reviewed the drug schedules in Section 54.1 and noted that substances that have the potential for abuse appear on Schedules I-V, but not on Schedule VI. The Court then found that the substance sold in this case was likely to be mistaken for crack cocaine. The Court examined the facts and found that it was clear that the defendant implied that the substance he sold was cocaine.

Virginia Court of Appeals
Published

Commonwealth v. Greer: July 22, 2014

Newport News: The Commonwealth appeals the refusal to impose the mandatory minimum in a conviction for possession of Firearm by Felon.

Facts: A jury convicted the defendant of possessing a firearm after being convicted of a violent felony. However, although the jury instruction clearly directed the jury that it could only impose five years, the jury returned a verdict of two years. The trial court imposed the jury's sentence over the Commonwealth's objection, reasoning that he could not declare a mistrial because the jury's verdict was unanimous.

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Held: Reversed. The Court ruled that the trial court's imposition of a two year sentence in this case was void ab initio. The Court found that the trial court should have impaneled a new sentencing jury under 19.2-295.1. In its opinion, the Court expressly rejected the argument that a jury has the right to nullification.

Chianelli v. Commonwealth: April 21, 2015

Virginia Beach: Defendant appeals his conviction for Possession with Intent to Sell Drug Paraphernalia on First Amendment and Vagueness grounds.

Facts: Defendant, who operated a "smoke shop," sold drug paraphernalia such as bowls, bongs, drug test kits, hidden concealment devices, and the like, along with items labeled with marijuana images. Although the store had signs clearly indicating that the paraphernalia was only for tobacco use, undercover officers purchased paraphernalia there while clearly discussing its use for consuming and growing marijuana illegally.

Held: Affirmed. The Court first refused to find that Virginia's Drug Paraphernalia statue threatens First Amendment interests. Consequently, the Court did not conduct a "facial" analysis of the statute's constitutionality. Instead, the Court merely examined it "as applied" to the defendant. The Court rejected the defendant's complaint that, by banning the sale of drug paraphernalia, it unlawfully forbids people from purchasing items to ingest marijuana, even though marijuana is legal to ingest with a prescription. The Court noted that the defendant clearly was selling drug paraphernalia to people who had no prescription for marijuana.

Virginia Court of Appeals
Unpublished

Turner v. Commonwealth: June 24, 2014

Newport News: Defendant appeals his conviction for Carrying a Concealed Weapon on sufficiency of the evidence.

Facts: Defendant was a passenger in a vehicle. After police arrested his cousin for public intoxication, they noticed that there was handgun ammunition in the back seat of the car. When the defendant stepped out of the vehicle, officers noticed a .45 caliber handgun on the front seat next to where the defendant had been seated, only partially obscured by trash. The officers then located a 9 mm handgun where the defendant's feet had been, lying openly just where the seat sticks out. Officers also located a holster for the .45 caliber handgun with a spare magazine for the gun. The passenger door held additional cartridges for the gun. At trial, the defendant's cousin testified that the guns belonged to him, but identified the holster as belonging to the 9 mm rather than the .45 caliber handgun. The defendant claimed not to be aware of the guns or ammunition.

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Held: Affirmed. The Court found that the evidence was sufficient to demonstrate constructive possession of the firearm. The Court noted that the firearms were clearly visible and that the defendant was literally surrounded by guns and ammunition. The Court also discounted the cousin's testimony, noting that he was intoxicated at the time and provided incorrect information about the firearms.

Trusty v. Commonwealth: July 1, 2014

Portsmouth: Defendant appeals his conviction for Possession with Intent and Possession of a Firearm on sufficiency of the evidence.

Facts: Defendant had ¼ kilograms of cocaine and a handgun in his bedroom. Police discovered the gun and drugs while executing a search warrant. In the same room, the police also located numerous documents and possessions belonging to the defendant, including his ID. Dozens of documents listed the residence as the defendant's address, where he resided along with his daughters. The defendant was not present for the execution of the warrant and, although he was on probation at the time and required to register as a sex offender, fled and absconded for over six years.

At trial, a witness testified he had seen the defendant enter and leave the apartment on numerous occasions prior to the execution of the warrant.

Held: Affirmed. The Court found that the evidence was sufficient to demonstrate that the residence belonged to the defendant and noted that the evidence was sufficient to demonstrate his constructive possession of the drugs and gun. The Court pointed out that the evidence demonstrated that the defendant was the only male occupant of the residence and that the bedroom clearly belonged to him.

Cicilese v. Commonwealth: February 10, 2015

Spotsylvania: Defendant appeals her conviction for Conspiracy to Distribute Marijuana on sufficiency of the evidence.

Facts: Defendant was to receive a large package of marijuana at her residence. However, officers intercepted the package and then delivered it pursuant to an anticipatory search warrant during a controlled delivery. After the defendant's father accepted the package, police executed the warrant and found evidence of distribution throughout the home. Officers found plastic baggies, a digital scale, owe sheets, evidence of previous distributions, evidence related to this package, and other evidence demonstrating that the defendant was involved in selling marijuana. The Commonwealth indicted the defendant for conspiracy and noted the date of the offense as the date of the search warrant. At trial, the Commonwealth's drug expert testified that the marijuana was worth $30,000 and the defendant was likely selling it to others who, in turn, sold it in smaller amounts.

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Held: Reversed. [*Note: The Court did not address the conviction for Possession with Intent to Distribute – Ed.*] The Court began by noting that a conspiracy is an agreement between two or more persons by some concerted action to commit an offense. In this case, the Court found that the Commonwealth failed to prove that the defendant conspired with someone else to distribute marijuana, at least not on the date of the indictment. The Court examined the evidence regarding the three potential conspirators: the shipper, her father, and the people to whom she had sold previously. The Court found the evidence insufficient in each case. The Court disagreed that mere knowledge on the part of the shipper of the defendant's intent to distribute constituted sufficient evidence of an agreement. In addition, the Court rejected the argument that evidence of previous agreements was sufficient evidence that an agreement existed on the date of the offense.

Bowser v. Commonwealth: March 4, 2014

Norfolk: Defendant appeals his conviction for Possession with Intent to Distribute Cocaine, 2nd offense, on sufficiency of the evidence, claiming entrapment.

Facts: Defendant sold drugs to an undercover police officer, first approaching her and asking her what she wanted when he saw her on the street. The officer indicated that she wanted a "dub" and denied being a police officer. The defendant sold the officer crack and gave her his phone number. When the officer later called him back and asked for more crack, the defendant at first refused, but then agreed and sold her more crack. Later, the defendant again sold her crack. The defendant had a prior conviction for distribution.

Held: Affirmed. The Court first reviewed the affirmative defense of Entrapment in detail, quoting *McCoy's* definition: "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery persuasion, or fraud of the officer." In this case, the defendant initiated the first contact with the undercover officer. In addition, the Court noted that he had a previous conviction for Distribution and was carrying drugs for sale on his person during the first sale. The Court rejected the defendant's argument that his hesitancy to sell to the officer demonstrated entrapment, noting that caution is not evidence of entrapment.

Kemp v. Commonwealth: May 12, 2015

Suffolk: Defendant appeals his conviction for Possession with Intent to Distribute Marijuana and Conspiracy to Distribute on sufficiency of the evidence.

Facts: Defendant, who resided with another person, had marijuana in his home. In his bedroom, police found a shotgun, scales, a grinder, and empty pots where marijuana had been grown. Defendant admitted that those items belonged to him, that he knew marijuana was being sold from the residence, that he removed the plants before the police arrived, and

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admitted to previously selling marijuana years before. Police also found marijuana in the defendant's roommate's room, locked in a safe, divided for sale. Defendant's co-defendant testified that the defendant was present when the co-defendant accepted deliveries of the marijuana for sale.

Held: Affirmed. The Court found sufficient evidence that there was a common scheme to sell marijuana from the home. In addition, the evidence was sufficient to show that the defendant knew that the drugs were present in the home and that they were being sold out of the home. Therefore, the Court found that he exercised dominion and control over the drugs.

Brown v. Commonwealth: May 12, 2015

Norfolk: Defendant appeals his conviction for Possession of Cocaine on sufficiency of the evidence.

Facts: An officer noticed the smell of marijuana emanating from the defendant's car and approached. When another officer noticed marijuana on the floorboard of the car, they asked the defendant and his companion to exit the vehicle. The defendant, who had been driving, consented to a search. Officers located a bag with cocaine in the center console's cup holder. At trial, the defendant claimed to have only been driving for 30 minutes and stated that the car was not his. He also testified that he had looked in the cup holder and it did not contain cocaine.

Held: Affirmed. The Court distinguished the *Coward* case by noting that, in this case, the defendant testified that he had looked in the cup holder. That statement demonstrated that he had exercised dominion and control over the cocaine.

DUI/Traffic/Habitual Offender

Virginia Supreme Court

Sarafin v. Commonwealth: October 31, 2014
Affirmed Court of Appeals Decision of October 15, 2013

Charlottesville: Defendant appeals his conviction for DUI on sufficiency of the evidence and failure to grant certain jury instructions.

Facts: Defendant drove intoxicated and fell asleep in his car while it was parked on his private driveway with the key in the auxiliary position and only the radio turned on. Officer McBrearty of the CPD woke up the defendant, who turned off the power and stepped out. After she learned that the defendant was intoxicated, the officer arrested the defendant for DUI. The defendant claimed that he had been out, drank alcohol, returned home, drank more alcohol, and then went to his car where he turned on the radio and fell asleep. At trial, the defendant asked Judge

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Peatross to rule that under Enriquez, the fact that he had his key in the auxiliary position was not sufficient to convict him because in this case, he was in his private driveway and not a public highway. He argued that he did not take "an action in sequence" to operate his motor vehicle or intend to activate the motive power of the vehicle. The defendant also asked the trial court to accept four instructions regarding the definition of "operation" that the trial court refused.

Held: Affirmed. The Court analogized this case to the *Nelson* case and found that the defendant was the operator of the vehicle. The Court next found that there is no requirement that a vehicle must be operated on a highway to sustain a DUI conviction. That requirement is unique to mopeds and to instances where the Commonwealth relies on implied consent. The Court also approved of the trial court's jury instruction on "operation." The Court specifically repeated that the statute does not require that the Commonwealth prove that the defendant intended to drive the vehicle.

Virginia Court of Appeals
Published

Harris v. Commonwealth: June 24, 2014

Chesapeake: Defendant appeals his conviction for Felony Habitual Offender on refusal to take his case under advisement.

Facts: Defendant, a habitual offender, drove his car after having a previous conviction for that offense. At trial, he did not challenge any evidence but instead asked the trial court to take the case under advisement. He asked for time to attempt to get his license back. The trial court refused, noting that the defendant had failed to get his license in the 11 years since his first conviction.

Held: Affirmed. The Court noted that the trial court denied the defendant's motion on its merits, rather than finding that it lacked the authority to take the matter under advisement. Therefore, the Court found that, unlike *Starrs*, the issue in this case was whether it was appropriate to take the case under advisement.

Blevins v. Commonwealth: August 26, 2014

Stafford: Defendant appeals his conviction for Reckless Driving on sufficiency of the evidence and refusal to instruct the jury on Improper Driving

Facts: Defendant, while trying to pass traffic on the right on the interstate, struck another vehicle and killed the passenger in that car. The night was rainy and the defendant and the victim had been driving near one another for almost an hour. The defendant was driving between 75 and 80 miles per hour. The defendant claimed that he lost control of the vehicle temporarily before striking the victim.

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Held: Affirmed. The Court first agreed that the evidence demonstrated Reckless Driving. The defendant was driving too fast at night in the rain and was driving aggressively in a manner that caused him to lose control of the vehicle. Regarding the lesser-included offense of improper driving, the Court ruled that the culpability determination for improper driving was exclusively the prerogative of the trial court, and in this case the court made no such finding. Consequently, the Court ruled that an "Improper Driving" instruction was neither legally appropriate nor did it present a factual determination within the purview of the jury.

Jones v. Commonwealth: February 18, 2015

Arlington: Defendant appeals his conviction for Eluding on sufficiency of the evidence.

Facts: Defendant, stopped for a DUI, started to drive away while the officers were partially inside the vehicle attempting to stop him from driving away. The officers had stopped the defendant using lights and sirens. They ordered him to take the keys out of the car, but then he put them back in the car and started to drive away. The officers reached inside the car to stop him but were not successful and both fell to the ground. The defendant then drove away in a reckless manner, at one point flying into the air after hitting an obstruction.

Held: Affirmed. The Court rejected the argument that, because his behavior took place after he had already stopped, that he was not guilty of eluding.

Barden v. Commonwealth: May 12, 2015

Loudon: Defendant appeals his conviction for Driving Suspended on sufficiency of the evidence.

Facts: Defendant drove his car while his license was suspended. When the officer stopped him and asked him for his license, the defendant stated that he did not have one. At trial, the Commonwealth introduced the DMV transcript. It reflected two DUI convictions in 2008, followed by the required license suspensions for 12 months. Thereafter, it reflected multiple suspensions for failure to pay fines and costs. However, at trial, the defendant introduced evidence that he had paid all his fines and costs, although he admitted that he had not paid the reinstatement fee and had not obtained a new license.

Held: Reversed. The Court ruled that the defendant's failure to reapply for a new license or formally become a reinstated licensee did not extend the periods of his suspension or revocation. The Court found that the statute allows for reinstatement only after the period or order of suspension has terminated. Therefore, if the defendant was eligible for reinstatement, he was not suspended or revoked at the time. The Court noted that under § 46.2-302, an individual who has failed to pay a reinstatement fee, shall be tried under § 46.2-300 (No Operator's License).

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Virginia Court of Appeals
Unpublished

No cases to report.

Evidentiary Issues

Virginia Supreme Court

Gardner v. Commonwealth: *June 5, 2014*

Arlington: Defendant appeals his convictions for Sexual Assault on refusal to admit character evidence.

Facts: On several occasions, the defendant sexually assaulted children during his daughter's sleepovers. At trial, the defendant offered several character witnesses and sought to elicit testimony about his reputation in the community for being a good caretaker of children and for not being sexually assaultive or abusive toward them. The trial court sustained the Commonwealth's objection to the testimony and the Court of Appeals denied an appeal.

Held: Reversed. The Court repeated that a defendant is not limited solely to reputation evidence regarding truthfulness, but may offer evidence to prove good character for any trait relevant in the case. The Court rejected the Commonwealth's argument that character evidence is limited to a defendant's character for truth and veracity or for peacefulness.

The Court also rejected the Commonwealth's argument that character evidence was restricted to his reputation before being criminally charged. The Court explained that it would be impossible for a defense character witness not testify to the defendant's reputation at the time of trial but instead to solely reconstruct what that reputation was prior to the offense. On the other hand, the Court noted that the Commonwealth is required to restrict bad character testimony to the defendant's reputation before he was accused of a crime.

Lastly, the Court also rejected the argument that, in order for the character testimony to be admissible, the defendant has to demonstrate that the witnesses had discussed the relevant characteristics prior to the defendant being charged.

Virginia Court of Appeals
Published

Davis v. Commonwealth: October 21, 2014
Affirmed Panel Decision of February 25, 2014

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Surry: Defendant appeals his convictions for First Degree Murder and Attempted First Degree Murder on Collateral Estoppel grounds.

Facts: Defendant fired roughly a dozen bullets into an occupied car outside a nightclub, killing one of the passengers. At preliminary hearing, the defendant's charges included Murder, Attempted Murder, and Reckless Handling of a Firearm, a misdemeanor. The Commonwealth elected to put on probable cause regarding the felonies and try the misdemeanor during the preliminary hearing. The General District Court found no probable cause and dismissed the felonies and also found the defendant not guilty of the misdemeanor. The General District Court explicitly found on the record that there was insufficient evidence that the defendant was the person who fired the gun. The Commonwealth obtained direct indictments for the felonies and convicted the defendant at trial, over the defendant's plea of Collateral Estoppel.

Held: Conviction Reversed. The full court adopted the panel's original opinion without further opinion.

Dalton v. Commonwealth: March 31, 2015

Radford: Defendant appeals his conviction for Distribution of Cocaine on best evidence grounds.

Facts: Defendant sold cocaine to a cooperating informant. At trial, the cooperating informant testified that he had previously texted the defendant and asked for a gram of cocaine and the defendant said that he had it. The defendant objected, arguing that the physical text was the best evidence, but the trial court overruled the objection after the informant testified that he no longer had the phone.

Held: Affirmed. The Court began by noting that the best evidence rule is much narrower than it originally had been. The Court cited Rule 2:1002 as the definition and scope of the current best evidence rule. The Court then held that a text message is a "writing" for purposes of 2:1002. However, the Court then ruled that the original's absence was sufficiently accounted for at trial.

Virginia Court of Appeals
Unpublished

Watkins v. Commonwealth: July 22, 2014

Chesapeake: Defendant appeals his conviction for Grand Larceny on hearsay and best evidence grounds

Facts: Defendant stole jeans from Kohl's. At trial, the loss prevention officer testified to the price tag that was on each of the jeans from memory, but did not bring any proof of the

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price. The defendant objected on hearsay grounds. The Commonwealth did not provide an explanation of why the price tags were not available and did not provide any other basis for the officer's testimony, but the trial court overruled the objection and admitted his testimony.

Held: Reversed. The Court ruled that the officer's testimony regarding the price tags affixed to the stolen jeans was hearsay. The Court reaffirmed that under *Robinson*, price tags are admissible evidence provided that the evidence meets the "best evidence" rule. In this case, the Commonwealth did not produce the writing nor did the Commonwealth sufficiently account for the absence of the writing. The Court also pointed out that the Commonwealth could have demonstrated that the officer had a basis of knowledge to know the price of the jeans, reaffirming that a non-expert, even one who is not the owner, can testify to the value of property as long as he or she has sufficient knowledge or basis of opinion.

Miller v. Commonwealth: October 28, 2014

Virginia Beach: Defendant appeals his conviction for Aggravated Malicious Wounding on refusal to admit the victim's blood alcohol content

Facts: Defendant, angry at the victim, struck the victim's motorcycle with his car and fled the scene. The evidence at trial was circumstantial; the victim did not remember the incident and an eyewitness only saw what happened just before and just after the crash. At trial, the victim testified he had no memory of the crash or whether he had consumed alcohol before it happened. The defendant sought to admit the victim's blood alcohol level as evidence but the trial court refused.

Held: Reversed. Although the Court agreed that the evidence at trial was sufficient to convict the defendant, the Court ruled that the victim's blood alcohol level was relevant to whether the victim's intoxication could have demonstrated there was an independent, intervening act that caused the crash. The Court found that the error was not harmless, as the evidence presented at trial was entirely circumstantial.

Curtis v. Commonwealth: March 31, 2015

Wise: Defendant appeals his conviction for Distribution of Cocaine on admission of evidence.

Facts: Defendant sold cocaine to a police informant. At trial, the informant testified that she had used drugs with and purchased cocaine from the defendant in the past. A drug expert also testified to the types of cocaine and the ways that people ingest cocaine. The defendant objected to both items of testimony.

Held: Affirmed. The Court held that the informant's testimony provided background information of her relationship with the defendant and established the legitimacy of her testimony regarding the controlled buy in this case. It demonstrated how she could identify the defendant and that

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the defendant knew what cocaine was. The Court also held that the expert's testimony was merely superficial explanation and was not unduly prejudicial.

Jurisdiction/Venue

Virginia Supreme Court

Williams v. Commonwealth: April 16, 2015
Rev'd Court of Appeals Ruling of June 10, 2014

Norfolk: Defendant appeals his convictions for Drug Distribution and Drug Possession on venue grounds.

Facts: The defendant sold cocaine to an undercover officer. At trial, the Commonwealth presented no evidence that the location of the offense was in the City of Norfolk, although it identified the location by a street address. At the motion to strike, the Commonwealth asked the trial court to take judicial notice that the street address was in the City of Norfolk. However, the trial court simply stated that it was overruling the motion to strike and convicted the defendant without making a statement on the record about whether the address was in Norfolk.

Held: Reversed. The Court ruled that the record did not demonstrate that the trial court took judicial notice of the location of the offense. The Court also rejected the Court of Appeal's attempt to take judicial notice of the location, finding that the matter was not common knowledge for the Court of Appeals and that the Court of Appeals had no basis in fact for that ruling.

Virginia Court of Appeals
Published

Kirby v. Commonwealth: September 2, 2014

Chesterfield: Defendant appeals his conviction for Murder and Use of a Firearm on Venue grounds

Facts: Defendant shot and killed a man. Police found his body in Richmond, 160 feet from the Chesterfield County border. He was tried and convicted of murder and use of a firearm in Chesterfield, although there was no evidence regarding where the homicide took place. At trial, the defendant argued that the proper venue for the offense was the City of Richmond.

Held: Affirmed. The Court first agreed that §19.2-247 permits venue for homicide where the body of the victim was found. However, the Court noted that under §19.2-250(B), the territory up to a mile around Chesterfield is considered to be within Chesterfield's jurisdiction. Therefore, for purposes of homicide venue, the body was located in Chesterfield.

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Virginia Court of Appeals
Unpublished

Collins v. Commonwealth: June 6, 2014

Pittsylvania: Defendant appeals his conviction for Grand Larceny on venue grounds.

Facts: Defendant stole tools from a contractor. The contractor noticed the items missing but could not say for sure when the items went missing or where he was when the defendant took them. He only learned the defendant stole them after he learned that the defendant had pawned the items in Danville. The defendant's friend testified that the defendant had access to the contractor's trailer in August, but the pawn ticket was from July. The contractor testified that he traveled all over the area, although he was frequently in Pittsylvania County and concluded that the tools were stolen there on that basis.

Held: Reversed. While the Court agreed that venue need not be proved beyond a reasonable doubt, the Court repeated that the Commonwealth must prove a 'strong presumption' that the offense was committed in the trial court's venue. The Court likened this case to the 1980 *Pollard* case, finding that in both cases, the evidence as to venue is vague and uncertain.

Procedure/Voir Dire/Jury Instructions

Virginia Supreme Court

Via v. Commonwealth: June 27, 2014

Hampton: Defendant appeals his conviction for Robbery and related offenses on failure to grant a jury instruction.

Facts: Defendant and two other men committed a home invasion robbery. Police recovered DNA from one robber at the scene and he, when arrested, identified his co-conspirators and a getaway driver. The other robber and the getaway driver testified at the defendant's trial against him. The Commonwealth never charged the getaway driver, who testified that he was forced to help the robbers. At trial, the defendant requested that the trial court grant him the "great care and caution" jury instruction, advising the jury regarding their consideration of the testimony of the getaway driver, but the trial court refused because it found that he was not an accomplice.

Held: Reversed. The Court repeated that a trial court should give the "great care and caution" jury instruction when an accomplice testifies and his testimony is not corroborated. The Court agreed that the test for whether a witness is an accomplice is whether he could be indicted for the same offense, but pointed out that another accomplice's testimony does not sufficiently

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corroborate the testimony of the accomplice at issue. In this case, the Court found that the getaway driver was clearly an accomplice and observed that no evidence corroborated his testimony other than the testimony of the other accomplice. Therefore, the trial court should have granted the requested instruction.

Walker v. Commonwealth: April 16, 2015
Rev'd Court of Appeals Decision of March 25, 2014

Mecklenburg: Defendant appeals his convictions for four counts of Distribution of Cocaine, 3rd offense, on denial of his motion to sever.

Facts: Defendant sold drugs to an informant on four occasions within a 13-day period after having two previous convictions for Distribution. Defendant moved to sever the case into four separate trials but the trial court denied the motion.

Held: Reversed. The Court first approved of the Court of Appeals' reasoning in the *Spence* case, where that court ruled that separate sales of a controlled substance by the same individual on different occasions do not constitute a common scheme or plan. The Court then analyzed these facts and found that they did not demonstrate a common scheme or plan. The Court found that there was no evidence of a *modus operandi*, nor was there evidence that the acts together achieved a goal not attainable by separate crimes. The Court noted that all drug sales involve the hope that a customer will return, but that fact does not make such distributions part of a common scheme or plan.

The Court also construed the "common scheme or plan" language contained in Rule 2:404(b). However, the Court did not address the Court of Appeals' argument that the repeated sales demonstrated that the defendant knew what cocaine was.

Virginia Court of Appeals
Published

Howard v. Commonwealth: August 5, 2014

Newport News: Defendant appeals his convictions for Burglary and Grand Larceny on deficiencies in his indictment.

Facts: Defendant broke into a building and stole property. The Grand Jury met and issued indictments for the offenses and the foreperson signed the indictments. Returning to the courtroom, the Grand Jury handed the clerk the indictments, along with others, and the clerk examined them and then passed them to the judge, who entered an order reciting that the grand jury had been sworn, charged, retired, and returned the indictments. The order listed the case number, name of defendant, charge, and the finding. The indictments were not transcribed into the order, however, and were not read aloud in court. Instead, they were placed in the

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defendant's electronic case file. The defendant objected that his indictments were not read aloud in court, had not been included in the clerk's order book, and that the indictment in his file did not have the foreperson's signature.

Held: Affirmed. The Court held that neither the Code nor *Reed* require an indictment to be read verbatim when the Grand Jury returns. It is sufficient that the Grand Jury "return" the indictment in open court. In this case, the trial court's order adequately reflected that. The Court also held that the court's electronic file need not contain an exact copy of the indictment, bearing the foreperson's signature. The record of indictment became part of the record, which complied with §17.1-240. Lastly, the Court found that the code no longer requires a physical order book and that the clerk, by scanning and including the indictment and order in its records, complied with the code.

Butler v. Commonwealth: October 28, 2014

Powhatan: Defendant appeals his sentencing for Possession of a Firearm by Convicted Felon on imposition of the mandatory minimum sentence.

Facts: Defendant, a felon, possessed a firearm. The Commonwealth failed to allege in the indictment that the defendant's felony conviction took place within the previous 10 years. However, the Commonwealth proved at a bench trial that the prior convictions took place within the previous 10 years. The trial court imposed the mandatory 2 year sentence over the defendant's objection.

Held: Affirmed. The Court found this case identical to the *Adkins* case and ruled that the date of the prior felony conviction is not an element of the underlying offense and therefore need not be mentioned in the indictment. However, the Court limited its ruling to bench trials, finding that the Supreme Court's rulings in *Apprendi* and *Alleyne* do not apply in bench trials. The Court observed that the fact that the offense took place in the previous 10 years did not increase the statutory maximum and therefore *Hill* and *McKinley* do not apply in this case. [*Please note that this opinion explicitly does NOT apply in a Jury trial – Ed*]

King v. Commonwealth: April 7, 2015
Aff'd Panel Decision of October 28, 2014

Fairfax: Defendant appeals her convictions for Malicious Wounding and Use of a Firearm on failure to instruct the jury on the defense of accident

Facts: Defendant shot her husband while he was sleeping. At trial, the defendant claimed that it was an accident and that it happened when she and her husband struggled over the gun. The trial court denied a defense instruction on the defense of accident.

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Held: Reversed. The Court ruled that, because "more than a scintilla" of defense evidence supported the theory that the shooting was an accident, the defendant was entitled to the instruction. The Court rejected the argument that, since the "Malice" instruction required the jury to find that the defendant acted intentionally, it was sufficient in this case. The full court, unlike the panel, also found that the defendant was entitled to give the instruction that she proffered at trial. That instruction stated that, when the defendant raises the defense of accident, the Commonwealth must prove beyond a reasonable doubt that the malicious wounding was not accidental. The instruction makes clear that "accident" is not an affirmative defense that the defendant must prove.

Virginia Court of Appeals
Unpublished

Commonwealth v. Newsome: August 26, 2014

Chesapeake: The Commonwealth appeals a sentence running mandatory minimum Possession of a Firearm sentences concurrently.

Facts: The trial court found the defendant guilty of Possession with Intent to Distribute Marijuana, Possession of a Firearm while in Possession With Intent to Sell Marijuana, and Possession of a Firearm by Felon. The trial court ran one year of the sentences for the firearm offenses concurrently.

Held: Reversed. The Court reviewed the plain language of §18.2-308.2 and §18.2-308.4. The Court found that while §18.2-308.4 only prohibits a trial court from running the sentence for the firearm offense concurrently with the underlying drug offense, §18.2-308.2 prohibited the trial court from running the sentence for that offense concurrently with any other offense.

Burch v. Commonwealth: October 14, 2014

Loudoun: Defendant appeals his conviction for Assault on a Law Enforcement Officer on refusal to instruct the jury on self-defense

Facts: Defendant, an inmate, punched a deputy in the eye at the jail. The defendant had refused to return to his cell and the deputies in the jail had been attempting to restrain him. At trial, the defendant asked the trial court to instruct the jury that a use of excessive force gave him the right to use reasonable force to defend himself. The trial court refused.

Held: Affirmed. The Court found that the deputies were exercising lawful authority. The Court ruled that the defendant, as an inmate rather than an arrestee, had no legal right to resist the deputies and could not claim self-defense in this case.

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Herrington v. Commonwealth: November 12, 2014

Stafford: Defendant appeals his conviction for Possession of Oxycodone with Intent to Sell on indictment and speedy trial grounds.

Facts: Defendant possessed Oxycodone with the intent to sell. At preliminary hearing on August 28, the General District Court certified the charge of Possession of Oxycodone under §18.2-250. However, the Commonwealth sought and obtained an indictment for Possession with Intent to Distribute Oxycodone under §18.2-248 at Grand Jury on October 1. Trial was set for January 8, but at trial his attorney moved for a continuance due to a conflict of interest. The defendant asked to represent himself on January 8 and go forward on that day, but the trial court refused and continued the case to January 24. Thereafter, the defendant obtained new counsel and trial proceeded in March. The defendant was in custody during the entirety of the proceedings.

Held: Affirmed. The Court first rejected the defendant's argument that the Commonwealth was bound to indict only the offense as certified by the General District Court. The Court ruled that a ruling in a preliminary hearing does not preclude the Commonwealth from seeking a new charge, as a new indictment supplants the finding of probable cause made by the district court. Regarding speedy trial, the Court then considered the effect of the indictment and found that once the Commonwealth presented an indictment for a new, different offense, that indictment supplanted the previous proceeding and re-started the speedy trial clock as of October 1. Therefore, speedy trial did not run until 5 months after October 1, rather than August 28.

Sufficiency of the Evidence – Miscellaneous Offenses

Virginia Supreme Court

Wagoner v. Commonwealth: April 16, 2015
Aff'd Court of Appeals Ruling of April 8, 2014

Martinsville: Defendant appeals his conviction for Abuse and Neglect of an Incapacitated Adult on sufficiency of the evidence.

Facts: Defendant is a doctor who owned a company that ran group homes for intellectually disabled men. The victim, who resided in one of those homes, had dementia and Parkinson's disease and was extremely disabled and unable to communicate. While caring for him, the staff of the hospital accidentally let him get 2nd and 3rd degree burns during a bath. After attempting to care for the burn by themselves for several hours, the staff decided to take him to the ER. However, per policy, they first contacted their supervisors and eventually spoke to the defendant.

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The defendant responded and overrode the staff's decision, refusing to authorize them to take the victim to the ER. He expressed concern that Social Services would investigate the home for their errors in care of the victim. The defendant ordered the staff not to report the incident to the licensing board. Instead, he instructed the staff to care for the victim using over-the-counter remedies. As the victim's condition deteriorated due to his festering wounds, the defendant never returned to examine the victim and only received oral updates on his condition. Eventually the victim died of sepsis and pneumonia. At trial, the medical examiner testified that even if he had been treated, the victim's possibility of survival was 13-25%.

Held: Affirmed. The Court agreed that, under the statute, the Commonwealth must prove that the abuse or neglect was a proximate cause of the death. The Court then interpreted that to mean a "but for" cause. The Court then rejected the defendant's argument that proximate cause means negligence that has destroyed any substantial possibility of the patient's survival. Instead, the Court found that the trial court correctly instructed the jury regarding proximate cause without including the "substantial possibility of survival" language. The Court then found that the evidence was sufficient to demonstrate that the defendant's neglect was a proximate cause of the victim's death. The Court examined the evidence and found it was sufficient to prove that the defendant's neglect of the victim resulted in the victim's death, noting that the defendant's neglect was a "but-for" cause of the victim's death.

Grimes v. Commonwealth: October 31, 2014

Newport News: Defendant appeals his conviction for Burglary on sufficiency of the evidence.

Facts: Defendant broke into the crawl space underneath a house. The crawl space gave no direct access to the house, but contained plumbing, wiring, and so on. The defendant stole copper pipes from the crawl space.

Held: Affirmed. The Court ruled that the crawl space was structurally part of the dwelling house and therefore the defendant was guilty of burglary. The Court observed that the space was contained within the four walls of the house and is under the same roof. It contained integral utilities and therefore was functionally interconnected with and immediately contiguous to other portions of the house.

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Winslow v. Commonwealth: December 23, 2014

Arlington: Defendant appeals his conviction for Grand Larceny on sufficiency of the evidence.

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Facts: Defendant stole money and 2 laptops from a parked vehicle. Police investigated and found the defendant's fingerprints on a box that had contained the victim's money inside the car. The laptops had been in a separate bag near the box. The victim did not know the defendant and there was no apparent reason for the defendant's fingerprints to be inside his car.

Held: Affirmed. The Court first repeated that fingerprints are an "unforgeable signature" that carry significant evidentiary value. The Court then rejected the argument that the Commonwealth must exclude any other possible source of the fingerprints in this case. The Court then concluded it was reasonable to find that, if the defendant had stolen the money from the box, the defendant must also have stolen the laptop computers.

Goodwin v. Commonwealth: February 3, 2015

Augusta: Defendant appeals his convictions for Uttering a Public Record on sufficiency of the evidence.

Facts: Defendant, stopped for traffic offenses, provided a false name and signed summonses with the false name. At trial, the defendant contended that the evidence did not prove that he sought to obtain "an object mentioned in the writing" and therefore that he did not "utter" the forged writings.

Held: Affirmed. The Court likened this case to the *Bennett* case, where it held that signing a false name on a computer screen to obtain a driver's license was both a forgery and an uttering. By signing the summonses, the defendant asserted that his name and signatures were "good and valid" and therefore was guilty of the offense.

Joseph v. Commonwealth: February 10, 2015

Chesapeake: Defendant appeals his conviction for Resisting Arrest on sufficiency of the evidence.

Facts: An officer stopped the defendant, who was driving a car, and found that he had several outstanding warrants. When the officer attempted to take the defendant into custody, the defendant refused to comply, struggling against the officer, repelling the officer's attempts to handcuff him and pulling away from the officer. However, despite his efforts, the defendant remained in close proximity to the officer and never left the scene. [*Note: The Attorney General conceded that the trial court misapplied the Resisting Arrest statute but the Court issued an opinion anyway – Ed.*]

Held: Reversed. The Court found that the evidence did not demonstrate that the defendant fled from the officer as required by §18.2-479.1. The Court found that non-compliance and resisting do not constitute "fleeing"; instead, there must be evidence of running away or physical movement beyond the scope of the officer's immediate span of control. The Court observed

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that §18.2-479.1 is entitled "resisting arrest" but pointed out that the title of a chapter or code section is not controlling and is not relevant to the meaning of the words in the code section.

Abdo v. Commonwealth: March 24, 2015

Fauquier: Defendant appeals his conviction for criminal contempt on sufficiency of the evidence and admission of evidence.

Facts: Defendant, a police officer, appeared 9 minutes late for his court date in traffic court. Because he was late, the Commonwealth had entered a nolle prosequi on his cases. The judge, noting that he had repeatedly been late or failed to appear before and that the Commonwealth had to nolle pros' his cases before, found him in contempt. In its certification, the trial court noted three prior instances where the defendant had been late.

Held: Affirmed. The Court first found that it was proper for the trial court to consider the previous instances where the defendant had been late to court. The Court next rejected the defendant's argument that the evidence must show a specific intent to act in contempt of court; instead, the Court found that willfulness or recklessness satisfies the intent element necessary for a finding of criminal contempt.

Miller v. Commonwealth: March 31, 2014

Fairfax: Defendant appeals her conviction for Contributing to the Delinquency of a Minor on sufficiency of the evidence and jury instruction issues.

Facts: Visiting the grocery store, the defendant left her 2 year old child in her unlocked car, double-parked, with the engine running and the windows open. Inside, at one point she asked an employee to watch her car "for five minutes," and did not tell the employee that her child was inside, but he watched it for over 30 minutes before he had to leave. The defendant then returned, took her keys from the car, and went back inside for another 30 minutes. Finally, the store called the police.

Held: Affirmed. The Court found that the defendant's conduct rendered the child abused or neglected under 16.1-228(5), because the child suffered an unreasonable absence of her parent. The Court found that leaving a stranger in charge of her child was not reasonable or sufficient. The Court rejected the argument that, so long as the child suffered no actual harm, the defendant was not guilty. Instead, the Court found that the defendant acted willfully in a criminally negligent manner and discussed the standard for criminal negligence under this statute. The Court also rejected the defendant's proffered jury instruction, which would have allowed her to argue that the store employee had become the person responsible for the care of the child in her stead. In doing so, the Court distinguished the elements of Contributing from the elements of Abuse & Neglect.

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Parham v. Commonwealth: April 7, 2015

Hampton: Defendant appeals his conviction for False Statement on a Firearms Consent Form on sufficiency of the evidence.

Facts: Defendant attempted to purchase a firearm. When filling out the form, he denied that he was under indictment for a felony. In fact, he had been indicted for a felony about 2 months before and had just appeared in court for that offense twelve days before. The defendant admitted to a State Trooper that he knew he case was "pending." He first claimed that the store clerk had filled out the form for him. However, at trial, the defendant claimed that he read that portion of the form, but filled it out without knowing what it meant. He claimed that the relied on the store clerk's explanation. He argued that the evidence was not sufficient to show that he understood what an "indictment" was or that his case had reached that stage.

Held: Affirmed. The Court agreed that the defendant must have "actual knowledge" that his statement was false. However, the Court found that the defendant's inconsistent statements demonstrated his guilt. The Court also found that, given that the defendant was aware that his case had been certified to the Circuit court and that he had appeared there to obtain an attorney, the evidence was sufficient to demonstrate that he knew that he was under indictment. The Court distinguished the *Smith* case, where it had reached a different result. The Court noted that in *Smith*, there was no evidence that the defendant knew that the case had reached Circuit Court.

Hodges v. Commonwealth: May 5, 2015

Floyd: Defendant appeals his convictions for Concealed Handgun and Driving Suspended on sufficiency of the evidence.

Facts: Defendant parked along a highway and went to sleep with the engine running. The defendant's license was suspended and he had a handgun in the center console. The console was closed, the barrel of the gun was facing down, and a large plastic cup covered the gun inside. However, the officer could not remember whether the console was latched or fastened close or not. According to his DMV transcript, the defendant had law enforcement notification of his suspension.

Held: Affirmed in part and reversed in part. The Court first found that the notification listed on the DMV transcript, standing alone, proved his guilt for driving suspended.. Turning to the concealed handgun, the Court agreed with the Commonwealth that, to fall within the exception under 18.2-308, the container within the vehicle must not only be closed, but also must be latched or otherwise fastened. However, the Court rejected the argument that such storage is an affirmative defense. The Court found that the Commonwealth bears the burden to establish that the handgun was not secured in a container within the vehicle. In this case, because the officer could not remember, the Court found the evidence insufficient.

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Keys v. Commonwealth: July 8, 2014

Chesapeake: Defendant appeals his conviction for abduction on sufficiency of the evidence.

Facts: Defendant, drunk, beat his girlfriend, who had been badly injured in a previous accident and could not walk without a walker. The defendant struck her and took away her walker and her cell phone. However, the police responded to the disturbance. The defendant ordered the victim not to answer the door and blocked her exit. He then told the police that he would shoot them if they entered. Nevertheless, the victim was able to communicate with the police through a window and gave them a key through the window. However, when the victim tried to crawl out of the residence, the defendant blocked her and barricaded the door closed with her crutches. Finally the victim escaped and police arrested the defendant.

Held: Affirmed. The court found that the evidence sufficiently demonstrated that the defendant detained the victim and intended to deprive her of her personal liberty.

Nunnally v. Commonwealth: July 8, 2014

Newport News: The defendant appeals his conviction for Conspiracy to Obstruct Justice on sufficiency of the evidence.

Facts: Defendant burglarized a home. The victim identified the defendant to the police. Prior to trial, the defendant called a man from jail and instructed him to "apply the pressure for me" on "her," in a conversation that appeared to refer to the victim. Two days later, the defendant and the man spoke again. The man related that the victim wanted $500 not to testify, to which the defendant balked. The man implied that he was going to have to "pop" her but assured the defendant not to worry and that the case would not go to trial. These conversations, however, were in very vague vernacular.

Held: Affirmed. The Court agreed that the Commonwealth must prove an agreement to prove a conspiracy, but also pointed out that it could do so using circumstantial evidence. The Court observed that the evidence demonstrated that the victim would not drop the charges, that the defendant wanted the man to put pressure on the victim, and continued to ask the man to help him even after the man explained that he might have to "pop" the victim. Although the defendant did not ask the man to shoot the victim, he also did not object to the request, and instead continued to encourage the man to help him.

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Wallace v. Commonwealth: July 29, 2014

Portsmouth: Defendant appeals her conviction for Possession with Intent to Distribute Marijuana on sufficiency of the evidence.

Facts: Responding to a tip, police found the defendant in a car with her 3 month-old-child in her lap and a bag containing 29 smaller bags of marijuana in the center console. The total weight of the marijuana was 19 ½ grams. The defendant admitted to smoking marijuana but denied knowing anything about the drugs. At trial, a detective testified as an expert, opining that the possession of that quantity, divided up in 29 bags, was inconsistent with personal use.

Held: Affirmed. The Court rejected the argument that without scales, cash, or firearms the evidence was not sufficient. Instead, the Court agreed that the expert's testimony regarding the packaging was sufficient to demonstrate the intent to distribute. The Court also noted that the defendant's false statements further demonstrated her guilt.

Kemp v. Commonwealth: August 26, 2014

York: Defendant appeals her conviction for Felony Child Neglect on sufficiency of the evidence.

Facts: Defendant kept her 17 ½ year old daughter living in squalor. When the daughter's probation officer visited the home, it was hot, foul smelling, and full of dog hair and feces. [*The remaining description is disgusting and I will spare you the details.* –Ed.]. The child stayed at the home alone 4 nights a week because she was on house arrest but had a restraining order against the defendant's husband, who lived elsewhere. The child, however, had plenty of food because she ate at her job, Wendy's.

Held: Reversed. The Court conceded that the home was filthy, but refused to find that the home's condition demonstrated a reckless disregard for human life. The Court noted that the record failed to demonstrate that the condition of the home resulted in any actual harm to the child. The Court also emphasized that the child's age was an important factor, noting that if the child had been an infant or a young child the result might have been different. Here, the Court found that the child was "both physically and mentally mature enough to recognize and avoid any dangers present in the house."

Cousins v. Commonwealth: September 30, 2014

Chesterfield: Defendant appeals his conviction for Hit and Run and Unauthorized Use on sufficiency of the evidence.

Facts: Defendant took a car without permission and drove on a suspended license, while drunk, until he crashed. An officer responded and located the defendant near the crash. The defendant admitted that he did not have permission to drive the car and claimed he ran because

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he was scared. At trial, one of the defendant's friends testified that he, not the defendant, had been driving. However, he made inconsistent statements at trial and admitted that he had never come forward until the trial. The defendant had never mentioned him before. The victim of the vehicle theft did not testify at trial.

Held: Affirmed. The Court first found that the trial court was entitled to disbelieve the defendant's friend and find that the defendant was the driver. The Court noted that the trial court found it incredible that the defendant would never have mentioned that he hadn't been driving the car before trial. The Court then found that the Commonwealth was not required to call the victim of the vehicle theft to prove that the defendant took the vehicle without permission. The defendant's admission that he did not have permission to use the car and that the victim did not know that he had her car was sufficient evidence to prove unauthorized use of a vehicle.

Auman v. Commonwealth: October 21, 2014

Gloucester: Defendant appeals her conviction for DUI Manslaughter on sufficiency of the evidence

Facts: Defendant struck and killed a pedestrian while she was driving drunk. A witness saw the defendant swerve to the right, off the road, and then strike the pedestrian. The defendant admitted to consuming alcohol to an officer and failed field sobriety tests. She blew a .08. At trial, a forensic toxicologist extrapolated her BAC to the time of the crash and found that was .10. A crash investigator testified, based on the vehicle's event data recorder and the physical evidence, that the defendant did not hit the brakes before striking the victim.

Held: Affirmed. The Court found that the evidence demonstrated the defendant was intoxicated at the time of the crash. The Court also found that the fact that that the defendant swerved off the road and did not brake prior to striking the victim demonstrated that her intoxication caused the crash. The Court rejected the defendant's argument that the victim had been in the road and therefore that the victim caused the crash. The Court found that even if the victim had been in the roadway, the defendant would still have been guilty.

Fountain v. Commonwealth: November 4, 2014

Virginia Beach: Defendant appeals her conviction for Misuse of 911 on sufficiency of the evidence.

Facts: Defendant, stopped for a traffic offense, locked her doors and refused to open her windows and instead called 911. When 911 dispatched a supervisor and confirmed that the officers were real police officers, the defendant refused to hang up and continued to tell 911 that

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she was "scared" and did not want to open her window or interact with the police. The operator hung up on her twice. She repeatedly called back and continued to refuse to interact with the police, claiming that she was "scared" and wanted the entire encounter recorded. Her 911 calls lasted 37 minutes.

Held: Reversed. The Court ruled that §18.2-429(B) criminalizes the "intent to annoy, harass, hinder or delay emergency personnel" at the time the 911 call is placed, i.e., when the caller "causes a telephone to ring." The Court then observed that, in this case, the trial court found that the defendant did not possess the requisite intent when she made the call but instead that she developed the intent to intimidate the officers as she remained on the telephone. Therefore, she did not have the requisite intent under the statute.

Howard v. Commonwealth: November 18, 2014

Sussex: Defendant appeals his conviction for Attempt Capital Murder of a Law Enforcement Officer on sufficiency of the evidence.

Facts: Defendant assaulted his girlfriend, who summoned the police. Police obtained an arrest warrant for the defendant and attempted to remove him from the residence. However, the defendant refused to leave and instead attempted to re-enter his bedroom to claim belongings. Officers attempted to restrain him, fearing he was reaching a weapon, and a struggle ensued. During the struggle, the defendant began to choke one of the officers, who started to lose consciousness. The other officer demanded that the defendant stop, but the defendant tightened his grip, even after the other officer shot him once in the back.

Held: Affirmed. The Court found that, despite his intoxication, the defendant had the specific intent to kill the officer. The Court rejected the defendant's argument that he only wanted to escape.

Chilton v. Commonwealth: November 18, 2014

Lynchburg: Defendant appeals his conviction for Strangulation on sufficiency of the evidence

Facts: Defendant assaulted the mother of his child. During the trial, the victim testified that the defendant placed his hands on her throat. She testified that she "saw black" when she closed her eyes, but did not lose consciousness. She then clarified that the defendant did not put his hands on her throat in a choking motion, just that his hands were on the general area of her neck. The victim did not otherwise appear to suffer any injury.

Held: Reversed. The Court reviewed several cases and found that in this case, the record was devoid of any evidence of any actual injury. Without even a complaint of injury, the Court concluded that the trial court could not have convicted the defendant of the offense.

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Wright v. Commonwealth: November 18, 2014

Rockingham: Defendant appeals his convictions for Malicious Wounding by Caustic Substance, Assault on Law Enforcement, Larcenies, Obstruction and Contributing on sufficiency of the evidence.

Facts: Defendant and his brother stole property from a store. When the store security officer tried to stop them, they fled. However, the store security officer was able to grab a case of beer back, which the defendant's brother then stole back again from the officer. The defendant had left his juvenile stepson in his vehicle during the theft, but during the confrontation, the juvenile stepson jumped out of the car and attempted to fight the store security guard to protect his father and uncle. The defendants fled to their Aunt's house and police surrounded the residence. Officers demanded that the defendants surrender and leave the residence, and when they refused, the officers entered the residence and located the defendants hiding in the basement. There, when the officers approached, the defendants released a caustic, ammonia-like gas.

Held: Affirmed. The Court first found that the defendant was responsible for his brother's larceny as a principal in the second degree. The Court then found the evidence sufficient to demonstrate the defendant was responsible for the release of the gas as a manner of attack against the officers. The Court rejected the defendant's argument that the officer did not actually witness the defendant release the gas into the basement. Lastly the Court affirmed the conviction for contributing to the delinquency of a minor. The Court held that, by putting the juvenile in this situation, the defendant knew that he could cause or encourage the juvenile to fight a store security officer and therefore that the defendant contributed to the delinquency of a minor.

Pork v. Commonwealth: March 31, 2015

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

Facts: Defendant carried heroin in his pocket. An officer approached the defendant in his vehicle and informed him that he was investigating a call for a suspicious vehicle. The officer then noticed a firearm in the backseat of the vehicle, within the defendant's reach. The officer asked the defendant if there were any weapons in the car, but the defendant's eyes shifted to the right, he did not answer, and when the officer ordered him out of the car, the defendant concealed his right hand near his hip, between the driver's seat and center console. The officer ordered the defendant to reveal his hands, but the defendant continued to reach out of sight. The officer ordered the defendant out of the car at gunpoint. The officer patted-down the defendant and located heroin in his pocket.

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Held: Affirmed. The Court ruled that the officer had reasonable, articulable suspicion that criminal activity was afoot and that the defendant was armed. While the Court agreed that the encounter turned from consensual to a seizure, the Court found that the defendant was not seized until he complied with the officer's command to step out of the vehicle. At that point, the officer had developed reasonable suspicion that the defendant was carrying a concealed weapon and therefore was engaged in criminal activity and was armed.

Reed v. Commonwealth: April 7, 2015

Lynchburg: Defendant appeals his conviction for Grand Larceny on sufficiency of the evidence.

Facts: Defendant cut trees from the victim's property without her permission. On direct, the victim stated that she had no opinion on the value of the trees. However, the Commonwealth called an arborist and thereafter re-called the victim. This time, she stated that her opinion was that the trees were worth about $10,000, based on their age and the type of wood. The defendant objected to her being recalled and to her providing a different statement the second time.

Held: Affirmed. The Court first agreed that the trial court could permit the victim to testify again to correct, explain, or supplement her prior testimony. The Court then found that her testimony was admissible regarding the value of the tress, and that her prior statement affected the weight, but not the admissibility, of her opinion. The Court also repeated that expert testimony is not necessary to prove the value of a property.

Bailey v. Commonwealth: April 7, 2015

Suffolk: Defendant appeals his conviction for Grand Larceny on sufficiency of the evidence

Facts: Defendant stole a heat pump from his employer. The defendant was a maintenance employee of the victim, who gave him the heat pump to install at one of the victim's properties. The defendant told the victim that his friend had to take the unit to install a part, and then claimed that the police had it because his friend got arrested, and then disappeared.

Held: Affirmed. The Court first repeated that a property owner can hand property over to another person without giving that person any property interest in the item. For example, the Court noted that when a customer tries on clothing in a store, that customer has no ownership interest in the clothing. If the customer steals the clothing, the offense is a larceny and is a trespassory taking. The Court also noted that, by handing the property over to someone else, the defendant ended any position of trust he had with the victim. Lastly, the Court noted that even if he had embezzled the property, that evidence would also prove a larceny.

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Reaux-King v. Commonwealth: April 28, 2015

Chesterfield: Defendant appeals his conviction for Attempted Robbery on sufficiency of the evidence.

Facts: Defendant, who knew the victim, asked her to meet him outside the convenience store where she worked. When she met him, he told her that he was planning to rob her and the store. The defendant told her that he had a machete, which he put behind an ice machine outside, and had been thinking about this for a while. While he wanted her to give him all her money, he offered to split the money with her. She refused and re-entered the store. Thereafter, the defendant continued to pace back and forth outside the store, watching the victim, and then entered the store repeatedly, and also gestured to where the machete was hidden. The victim finally was able to call 911 and police arrived, recovered the weapon, and captured the defendant.

Held: Affirmed. The Court first repeated that, to prove an attempt, the Commonwealth must only prove a "slight act" in furtherance of robbery. The Court noted that the defendant brought a machete and concealed it, at one point even reaching for it. The Court also observed that the defendant clearly intended to rob the store and only police intervention prevented that.

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