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2016 VIRGINIA LAW ENFORCEMENT APPELLATE UPDATE MASTER LIST

Cases Reported from June 1, 2015 to June 1, 2016

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Fourth Amendment - Search & Seizure

U.S. Supreme Court

City of Los Angeles v. Patel: June 22, 2015

Certiorari to the United States Court of Appeals for the Ninth Circuit: Hotels challenge the requirement that they produce their registers on demand to law enforcement on Fourth Amendment grounds.

Facts: A City of Los Angeles ordinance required hotels to allow police to inspect their hotel registers on demand. Failure to do so would result in criminal prosecution. Hotel operators filed suit on Fourth Amendment grounds.

Held: Ordinance struck down. The Court ruled that inspection of a hotel registry is a "search" under the Fourth Amendment and therefore requires some sort of legal process. Notably, the Court did not find that the "legal process" required was a search warrant or a finding of probable cause. Instead, the Court simply found that the statute cannot penalize a hotel owner without affording them an opportunity for "pre-compliance review" before a neutral decision-maker.

The Court declined to find that there must be *actual* review, only requiring that a hotelier be permitted to seek it if he wished. The Court allowed that, for example, an administrative subpoena would suffice, even if it were issued by an officer in the field without probable cause. The Court also noted that law enforcement could seize and hold the registry until the hearing, to prevent tampering. Lastly, the Court noted that hotel operators are free to consent to searches of their registries.

U.S. Court of Appeals

Armstrong v. Pinehurst: January 11, 2016

North Carolina: Plaintiff appeals the granting of summary judgment in a Use of Force case under the Fourth Amendment

Facts: A doctor issued an involuntary commitment order against the plaintiff, who was bipolar and schizophrenic, after he had been poking holes in his skin and fled the emergency room. The doctor noted, in the order, that the plaintiff was a danger to himself, but did not note that he was a danger to others.

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Police responded and found the defendant still near the hospital. He was calm and cooperative, but was also eating grass and gauze and putting cigarettes out on his tongue. He wandered into traffic a few times, as he was standing a few feet from an active roadway. However, when the involuntary commitment order arrived, he sat down and wrapped himself around a signpost. Three officers and two security officers tried to remove the defendant, but he did not budge.

After about 30 seconds, the officers told the plaintiff that, if he did not let go, they would tase him. The plaintiff refused and the officers "drive stunned" the plaintiff 5 times over a 2-minute period. Although the Taser only caused the plaintiff to hold on more tightly, finally two hospital security officers joined and all five people were able to pull the plaintiff off the post.

The officers continued to struggle with the plaintiff, who kicked at them while they handcuffed him. However, he soon stopped moving or breathing at all, and a few minutes later he died. The plaintiff's estate sued under the Fourth Amendment, claiming excessive force. The District Court dismissed the case on qualified immunity grounds, finding that the use of force was objectively reasonable.

Held: Affirmed. The Court held that the officers used unconstitutionally excessive force when seizing the plaintiff. However, the Court then held that, since that holding was not "clearly established" at the time of the use of force, the officers were entitled to qualified immunity.

The Court first focused on whether the use of force was objectively reasonable under *Graham v. Connor*. The Court reviewed the three factors to evaluate a use of non-deadly force under *Graham*: Severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or evading by flight. The Court found that the use of force was unreasonable under *Graham.*

With respect to the first factor, the Court noted that there was no crime at issue at all. Even if the plaintiff were guilty of failure to obey the police, however, the court found that offense to be minor. The Court allowed that a mentally ill suspect could be "dangerous", which would satisfy this factor, but opined that officers should have considered the plaintiff's mental illness as a mitigating, and not an aggravating, factor in deciding whether to use force.

The Court also observed that the commitment order only declared the plaintiff to be a danger to himself, rather than others. The Court wrote that, where a seizure's sole justification is preventing harm to the subject of the seizure, the government has little interest in using force to effect that seizure and in fact the use of force is contrary to the government's interest.

With respect to the second and third factors, the Court agreed that some "limited" use of force was justified. However, the Court noted that the main issue had been the plaintiff's flight from the scene, which was not a problem so long as he was wrapped around the signpost. The Court observed that the plaintiff was stationary, non-violent, and surrounded by people, and simply had refused to comply for a 30-second period.

The Court characterized the use of a Taser as a "serious use of force", designed to "cause excruciating pain." In a footnote, the Court also stated that the Taser is equally "severe and injurious" regardless of the mode to which the Taser is set, drive-stun or "dart" mode. The Court also took note

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that the officers' use of the Taser was contrary to the manufacturer's recommendations and industry standards.

In short, the Court found that it is unreasonable to use a Taser against a resisting, unrestrained arrestee unless the resistance raises a risk of immediate danger or there is some exigency that is sufficiently dangerous to justify the force. In addition, the exigency must be reasonably likely to be cured by using the Taser. The Court spent several pages citing a number of different cases that concerned whether the use of a Taser was or was not justified. In the end, the court likened the Taser to any other use of force, such as a baton or serious physical force.

However, the Court agreed that, prior to this ruling, the officers did not have sufficiently clear guidance to forfeit their qualified immunity in this case. Nevertheless, the Court wrote that

> "Where, during the course of seizing an out-numbered mentally ill individual who is a danger only to himself, police officers choose to deploy a Taser in the face of stationary and non-violent resistance to being handcuffed, those officers use unreasonably excessive force. While qualified immunity shields the officers in this case from liability, law enforcement officers should now be on notice that such Taser use violates the Fourth Amendment."

United States v. Graham, May 31, 2016
United States Court of Appeals for the Fourth Circuit
Rev'd Panel Decision of August 5, 2015

U.S. District Court - Maryland: Defendants appeal their convictions for Hobbs' Act Robberies on Fourth Amendment grounds.

Facts: Investigating a series of robberies, investigators sought cell phone information from Sprint/Nextel, the service provider for two phones recovered from the suspects' vehicle. Investigators then obtained two court orders under 18 U.S.C. 2703 (d) for disclosure of historical cell-site location data (CLSI) for calls and text messages transmitted to and from both phones. The first set of orders sought specific periods between 2 and 5 days long during which the robberies had taken place. A second order sought several months' worth of information.

The government used this information during its investigation and at trial to convict the defendants. The trial court denied a motion to suppress the cell-site location data obtained through the court orders. A panel of the 4th Circuit Court of Appeals ruled that the government's procurement and inspection of the defendants' historical cell-site data was a search, and that the government violated the Fourth Amendment by engaging in this search without first securing a judicial warrant based on probable cause.

Held: Conviction affirmed. In a 12-3 ruling, the Court agreed with every other Circuit Court of Appeals in the United States and held that the Government's acquisition of historical cell-site location

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data (CLSI) from defendants' cell phone provider did not violate the Fourth Amendment. The Court based its decision on the "third-party" doctrine, which holds that an individual enjoys no Fourth Amendment protection in information he voluntarily turns over to a third party, even when the information is revealed to a third party on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

The Court likened this case to the U.S. Supreme Court's *Miller* decision in 1976. In that case, the U.S. Supreme Court had ruled that a bank customer, by disclosing financial data to their bank, assumes the risk that the government will obtain it. In this case, the Court observed that the Government did not surreptitiously view, listen to, record, or in any other way engage in direct surveillance of the defendants to obtain this information. Instead, the Government merely requested existing records from the service providers using a court order obtained pursuant 18 U.S.C. 2703.

The Court rejected the argument that, in this case, the Government conducted a search or did any "tracking" of the defendants in this case. The Court distinguished historical CLSI from real-time location data, such as the kind collected by a "stingray."

The Court rejected the panel's reasoning and held that the defendants did not have a reasonable expectation of privacy in the historical CSLI. In particular, the Court found it was irrelevant that the government put the historical CLSI data to a different use than the providers did. The Court also found that users voluntarily share their data and clearly know that their cellphone provider is aware of and is monitoring their location. The Court reviewed similar cases involving pen registers and internet user information and noted that other courts have rejected the claim that a user must affirmatively agree to share his data.

Lastly, the Court rejected the argument that the sheer amount of data collected gave it special Constitutional protection. The Court wrote: "The Supreme Court may in the future limit, or even eliminate, the third-party doctrine. Congress may act to require a warrant for CSLI. But without a change in controlling law, we cannot conclude that the Government violated the Fourth Amendment in this case.

Virginia Supreme Court

Evans v. Commonwealth: September 17, 2015

Norfolk: Defendant appeals his convictions for Distribution of Cocaine and Possession of a Firearm on Fourth Amendment grounds

Facts: Defendant had drugs for sale and guns in his home. Officers smelled the odor of marijuana emanating from the defendant's apartment window. They knocked on the door and the defendant's mother answered. They smelled the odor coming from inside, but the defendant's mother, who was shaking and nervous, denied any marijuana was inside and slammed the door in the officers' faces. Officers knocked again, but there was no answer for five minutes, although they heard noises of

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movement inside. When the defendant's mother opened the door again, she tried to close the door quickly, but the officers forced their way in and observed marijuana in plain view.

The defendant's mother then consented to a search of the apartment and officers located guns, ammunition, drugs and other contraband.

Held: Affirmed. The Court agreed that the officers were entitled to enter because they had probable cause along with exigent circumstances. The Court cited two Fourth Circuit cases, *Grissett* and *Cephas*. The Court held that the strong odor of marijuana, coupled with the mother's contemporaneous knowledge that the officers at the doorway smelled the marijuana, provided an exigent circumstance once the mother attempted to close the door. The Court found that the mother had a natural incentive to destroy or hide the contraband.

The Court rejected the defendant's argument that the police created the exigency by announcing their presence and their awareness of a heavy odor of marijuana, noting that the US Supreme Court rejected that argument in *Kentucky v. King*.

Mason v. Commonwealth: May 5, 2016
Reversed Panel Decision of August 5, 2014
Affirmed En Banc Decision of February 3, 2015

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. The pass was 3"x 5". 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. However, the Court of Appeals, sitting *en banc*, affirmed the trial court's ruling.

Held: Affirmed, motion properly denied. The Court began by describing the test for "reasonable suspicion", noting that the test is not what the officer thought, but rather whether the facts and circumstances apparent to him at the time of the stop were such as to create in the mind of a reasonable officer in the same position a suspicion that a violation of the law was occurring or was about to occur. The Court then reaffirmed that an officer's mistake of fact or of law is irrelevant if the facts and circumstances at the time of the stop would have been sufficient to create in the mind of a reasonable officer in the same position a suspicion that a violation of the law was occurring or was about to occur.

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In this case, the Court noted that it is nearly impossible for an officer to determine, prior to a stop, whether a dangling object *actually* obstructs the driver's view. However, the Court observed that the statute protects public safety and has an important goal. The Court found that, in this case, a reasonable person could readily conclude from the fact that the tag was sufficiently prominent to attract the officer's attention during the brief moments that it passed through his field of view that it might have violated the statute.

Virginia Court of Appeals
Published

Collins v. Commonwealth: July 21, 2015

Albemarle: Defendant appeals his conviction for Receiving Stolen Property on Fourth Amendment and sufficiency of the evidence grounds.

Facts: Defendant possessed a stolen motorcycle. Police first observed the motorcycle when it eluded police, and next when it eluded police again about a month later at over 140 miles per hour. Recording the license plate number, police traced the vehicle to its previous owner, who had sold it to the defendant and stated that the defendant knew it was stolen. Police then found the defendant's Facebook page, where he had a photo of the motorcycle in front of his house. When police located the defendant a month later, he denied possessing a motorcycle or having ridden a motorcycle for several months.

Within an hour, the officer went to the defendant's home, where he saw the same motorcycle, now partially covered with a tarp in the driveway. The officer walked up, lifted the tarp, and found that it now had different plates, which came back to another vehicle, and a Vin # that revealed it was stolen.

The officer then found the defendant at the front door of the house. The defendant first denied knowing about the motorcycle, then admitted he purchased it from the previous owner, then admitted he had driven it recently and obtained new tires for it. At trial, the defendant argued that the officer's examination of the motorcycle violated the Fourth Amendment.

Held: Affirmed. The Court rejected the defendant's argument that, under *Jones* and *Jardines*, that the officer's entry onto the property and examination of the motorcycle were unlawful. Instead, the Court found that the officer had probable cause and an exigent circumstance that permitted him to examine the motorcycle. The Court noted that the vehicle was readily mobile, and in fact had eluded the police repeatedly in the prior months. In addition, the defendant denied knowing anything about the motorcycle within an hour of the officer finding it at his house. The officer was entitled to believe that the defendant, knowing he was under investigation, would attempt to hide or secrete the vehicle. In that way, the Court likened this case to the *Thims* case, although it declined to find that the *Carroll* doctrine applies universally on private property.

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Regarding sufficiency, the Court noted that the defendant's false statements alone were sufficient to demonstrate his knowledge that the motorcycle was stolen.

Cantrell v. Commonwealth: July 28, 2015

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

Facts: Police arrested the defendant for driving while intoxicated and towed his pickup truck. The police department did not have an established inventory policy that described what an officer must do to inventory a vehicle. The officer secured the vehicle in a garage to protect the property, but delayed the inventory until the next day because his shift was over. When he conducted the inventory the next day, he declined to document the property because there were so many tools and items in the truck bed. However, he searched the cab and found Oxycodone, Methamphetamine, and Cocaine. At the motion to suppress, he explained that, during an inventory search, he one of his goals is to look for contraband.

Held: Reversed. The Court noted that the police department had no written policy or training regarding inventory searches. Thus, the Court found that the police could not rely on the "Community Caretaker" exception to the Fourth Amendment. In this case, the officer did not actually inventory the items at all, but instead admitted that he was looking for contraband. The Court found that this search was not an inventory search at all, but was a pretextual search for contraband.

However, the Court rejected the argument that the officer could not delay the inventory search, finding that his explanation for the delay was reasonable.

Hawkins v. Commonwealth: August 4, 2015

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

Facts: Defendant, a felon, carried a concealed handgun in his waistband. Police observed as his friend engaged in a hand-to-hand drug transaction. After officers stopped one of the people involved in the transaction, that person directed police to the defendant. Five officers walked up to the defendant and his friend on the street. Their conversation was casual, they did not mention the prior stop, and the officers did not block the defendant's path.

When an officer observed a bulge under the defendant's shirt, he asked if the defendant could "do him a favor" by raising his "shirt up a little bit" so he could see. The defendant extended his arms out and raised them up and didn't move for five seconds. An officer then lifted the defendant's shirt and found the defendant's firearm. The defendant later stated that he didn't want to startle the officers

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with the gun, so he let the officers remove the firearm on purpose. In a motion to suppress, the trial court found the encounter was consensual.

Held: Affirmed. The Court found that the defendant's non-verbal response to the officer's request invited the officers to lift his shirt. The Court also noted that the defendant's later statement to the officer confirmed that the encounter was consensual.

Turner v. Commonwealth: October 27, 2015

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

Facts: Detectives learned that the defendant was selling cocaine and obtained a search warrant to install a GPS tracking device on the defendant's vehicle for a 30-day period, beginning March 13, 2013. They installed the GPS on March 19. However, after they learned the defendant was going to have a tire repaired, they removed the GPS on March 20 and then re-installed it on April 3. After the 30-day period ended, the detectives applied for and obtained a 30-day extension of the GPS unit.

Detectives later obtained a search warrant for the defendant's residence and located cocaine for sale. The defendant fled the residence when police arrived, but they captured him while he was carrying a small amount of cocaine.

At trial, the Commonwealth introduced numerous photos of mail from the defendant's residence, bearing his name and address, over the defendant's "best evidence" and "completeness" objections.

Held: Affirmed. The Court rejected the defendant's argument that the officers needed to have obtained a new search warrant to re-install the GPS and held that the removal and re-attachment of the GPS tracking device was a single, continuing search that was authorized by the warrant. The Court found that 19.2-56.2 permits the removal and reattachment of the GPS unit during the 30-day period.

The Court then rejected the defendant's argument that 19.2-56.2's standard of "good cause" for a 30-day extension is an impermissibly lower standard than probable cause. The Court found that the warrant demonstrated probable cause, which was sufficient.

The Court also rejected the argument that the Commonwealth should have introduced the letters themselves, instead of mere photographs, finding that the photographs of the mail were not "writings" under Rules 2:106(a) and 2:1002, because they were not admitted for the truth of their contents, but merely to prove that the defendant had dominion and control over the basement. The Court found that "completeness" did not require the Commonwealth to produce the entire letter, either.

Matthews v. Commonwealth: November 3, 2015

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

Facts: Defendant possessed cocaine in his vehicle. An officer stopped the defendant for having a dangling object on the rearview mirror. The officer spoke to the defendant, who revealed he had a criminal history. The officer had the defendant step from the vehicle and the officer asked the defendant a series of questions about his prior arrests and his tattoos. The officer believed the defendant may have been a narcotics user, so he summoned a K-9 unit. However, while on scene, the officer told the defendant that, if he consented to a search of his vehicle, they would cancel the K-9 unit. The defendant then consented to a search of the vehicle, so the officer cancelled the request for the K-9 unit, searched the vehicle, and found the cocaine.

Held: Affirmed. The Court first found that the consent was not valid, given that the defendant was not free to leave and there was no evidence that he knew he was free to refuse the request to search his vehicle.

The Court then turned to the impact of the U.S. Supreme Court's 2015 *Rodriguez* ruling. The Court noted that, in this case, the officer impermissibly delayed the traffic stop in this case in several ways: inquiring into the defendant's criminal history, asking if the defendant's tattoos were "prison tattoos," and requesting the K-9 unit. Although the delay was *"de minimis",* the Court then observed that *Rodriguez* rejected the "*de minimis"* test and found that a traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket, and also ruled that officers may not conduct unrelated investigations to prolong a traffic stop, absent reasonable suspicion ordinarily required to detain the individual.

The Court then found that the officers seizure of the defendant and subsequent search were unlawful, because the officer lacked reasonable suspicion to extend the traffic stop by asking the unrelated questions and calling for the K-9 unit.

However, the Court then ruled that there was no reason to apply the exclusionary rule in this case. The Court noted that, at the time of the stop in this case, binding precedent established that a *de minimis* delay in the completion of a traffic stop to conduct an investigation unrelated to the purpose of the stop did not violate the Fourth Amendment's prohibition against unlawful seizures. The Court found that *Rodriguez* implicitly overrules that precedent, but at the time, the officers in this case were complying with established law.

McLaughlin v. Commonwealth: November 17, 2015

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

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Facts: Defendant was on probation and signed an agreement that gave his probation officer permission to visit his home. During a transfer investigation, the probation officer visited the defendant's home, but it did not appear that he was living there. The officer asked the resident if he could examine the defendant's bedroom, and the resident agreed. The resident was not on the lease, but appeared to be in control of the premises. There, in plain view, the officer observed the defendant's belongings along with a handgun. The trial court denied a motion to suppress the search.

Held: Affirmed. The Court first found that the defendant had consented to the search. Even though a "home visit" is not equivalent to a complete Fourth Amendment waiver, in this case, the defendant's consent provided the officer authority to view the defendant's bedroom as part of his transfer investigation.

The Court also held that the officer lawfully relied on the resident's consent to the search, even though she was not on the lease.

Osman v. Commonwealth: December 15, 2015

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

Facts: Just after midnight, an officer's attention turned to the defendant's vehicle after hearing a loud "bang" and observing that the defendant was partway into a parallel parking spot with his tire on the sidewalk. The area was a high-traffic area with many bars that were letting out at that time of night. Believing the defendant had either been in a crash or was DUI, the officer ran over and told the defendant to stop. The defendant refused at first, then stopped the car but refused to remove his keys or roll down the window. The defendant yelled at the officer.

The officer then removed the defendant from the vehicle and put him in handcuffs, informing him of his *Miranda* rights. The defendant, who appeared to be intoxicated, continued to refuse to cooperate and refused to take a breathalyzer. The officer arrested him. At a motion to suppress, the defendant argued the officer lacked reasonable suspicion to stop him and lacked probable cause to arrest him.

Held: Affirmed. Regarding the stop, Court held that it was objectively reasonable for the officer to conclude that the defendant may have been driving under the influence. Regarding the arrest, the Court found that the defendant was not "under arrest" simply because the officer pulled him out of the vehicle and put handcuffs on him. However, the Court found that once the investigation was complete, the officer had probable cause to arrest the defendant. Specifically, the Court repeated that the defendant's refusal to take a breathalyzer was relevant to probable cause, as was his driving, attitude, and behavior.

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White v. Commonwealth: May 10, 2016

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

Facts: Police responded to an anonymous tip that the defendant was selling drugs near a motel. The area was a "high-crime" area known for drug distribution and officers observed the defendant engage in what appeared to be a hand-to-hand drug transaction. They approached the defendant and he gave them consent to search his person. While an officer patted the defendant down, he felt a "powdery substance" in the defendant's sock that the officer believed was illegal drugs. The defendant attempted to stop the officer from removing the item, but the officer recovered it and found that it was heroin.

The defendant then asked the officer to go tell his girlfriend about his arrest. The girlfriend was in a motel room and she gave the officers consent to search the room. The officers did not check to see who had rented the room. The officers "assumed" that the girlfriend was "the lessee" because she "seemed to have control" of it. The officers saw a bag on a bed in the room. Before an officer opened the bag, the girlfriend told him that the bag belonged to the defendant. Inside the bag, the officers found drugs and distribution paraphernalia.

Held: Affirmed in part, reversed in part. The Court ruled that the initial detention was reasonable, but the search of the bag was unlawful.

First, regarding the search of the defendant's person, the Court ruled that even if the defendant withdrew that consent in the course of the search, probable cause supported the seizure of the drugs from the appellant's sock. The Court examined the initial encounter and found that the defendant gave voluntary consent to the search. Thereafter, the officer felt an object consistent with illegal drugs and when he did, the defendant immediately began to struggle and attempt to escape. The Court found that the totality of the facts, including the defendant's resistance, gave the officer probable cause to seize the item in the defendant's sock.

However, regarding the search of the bag in the motel room, the Court held that the defendant established a reasonable expectation of privacy in the bag and that the Commonwealth failed to prove that the girlfriend had actual or apparent authority to consent to a search of the bag. The Court pointed out that, even if the defendant did not have an expectation of privacy in the hotel room, the evidence did demonstrate that the bag belonged to the defendant and no evidence demonstrated that the girlfriend had any possessory interest in the bag. The Court refused to find that the defendant had abandoned his interest in the bag by leaving it in the motel room.

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Commonwealth v. Hocutt: June 23, 2015

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

Facts: Defendant, stopped for a traffic violation, parked his car in a marked parking spot in a convenience store parking lot on a Tuesday morning. The officer learned the defendant was suspended, without notice, for failure to have insurance. He then impounded the car because, as the officer explained, it was unsafe to drive without insurance. The officer then found heroin in the car which the defendant admitted was his.

The trial court examined the police impoundment policy and noted that it did not allow for towing in this circumstance. The trial court suppressed the evidence.

Held: Affirmed, evidence properly suppressed. The Court focused its analysis on the Hanover Police impoundment policy and found that the towing in this case was not done pursuant to policy. Therefore, the search was not a lawful impound under the Fourth Amendment.

The Court noted that there was no evidence that the vehicle was blocking access or that the property owner asked the vehicle to be removed, which the department's policy stated would allow for impound. The Court rejected the argument that, because the officer was legally required to seize the license plates, that the vehicle was therefore inoperable and had to be impounded. The defendant, for example, could have had the vehicle towed at his own expense. The Court also noted that there was no risk to the defendant's property, as he was not arrested and it was still daytime, nor was there evidence that the defendant would attempt to drive the vehicle away in violation of law.

Burton v. Commonwealth: September 22, 2015

Prince William: Defendant appeals his convictions for Possession with Intent to Distribute and Importation of Cocaine on Fourth Amendment grounds.

Facts: Defendant stopped at a rest area after transporting cocaine into Virginia. State Troopers noticed the defendant's vehicle smelled of marijuana. They asked the defendant to step out and patted him down, locating two bags of cocaine. The defendant argued that the officers did not have the authority to order him out of the vehicle, arguing that the smell of marijuana, standing alone, was insufficient to demonstrate probable cause to search the vehicle.

Held: Affirmed. The Court reaffirmed that *Cherry* provides authority to search a vehicle when officers smell the odor of marijuana from a vehicle. The Court then reaffirmed that officers always have the authority to order a driver or passenger from a car at any time for any reason, under *Atkins* and *Mimms*.

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Barrett v. Commonwealth: October 6, 2015

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

Facts: Defendant had been receiving twenty to forty pounds of marijuana a month from out of state and selling it for a year. A detective learned about the defendant from a confidential, reliable informant. The detective watched the defendant engage in a hand-to-hand transaction involving a large amount of cash in a parking lot on several occasions, and watched the defendant deliver packages to people in parking lots on several occasions. The detective also watched the defendant collect a bag under extremely suspicious circumstances at the airport, watched him conduct a transaction involving apparent marijuana with a known drug dealer, and also watched him repeatedly meet a woman who was apparently delivering something to him at the airport.

Finally, detectives watched the defendant pick up the woman at the airport, collect her bags, and travel with her to a motel where he had traveled before. Officers stopped him, ran a dog around his car, and found marijuana in his car.

Held: Affirmed. The Court reviewed the evidence and found that it was reasonable for an officer to believe that the defendant may have marijuana in the vehicle.

Fitzgerald v. Commonwealth: November 10, 2014

Danville: Defendant appeals his convictions for Possession of Firearm by Felon and Carrying a Concealed Handgun on Fourth Amendment grounds.

Facts: Defendant, a felon, carried a gun concealed. Officers encountered him and spoke to him, but noted that he had a bulge in his jacket that appeared to be a handgun. They asked him to keep his hands out of his pockets but the defendant immediately put his hands back in his pockets. An officer patted the defendant down and felt a rectangular, rail-type handgun. The officer grabbed it, but the defendant struggled and fought the officer. The officer subdued the defendant and recovered the handgun.

Held: Affirmed. The Court found that the incident was a consensual encounter, until the officers developed reasonable suspicion to believe that he had a concealed weapon. The Court noted that the defendant was in a high-crime area known for drugs and violence and that the defendant took his hands out of his pockets but then put them back immediately. The officers observed that the defendant had a bulge on the right side of his jacket that appeared it could be a weapon.

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The Court rejected the defendant's complaint that the officer "manipulated" the weapon unlawfully, noting that *Terry* does not forbid an officer from manipulating an item, but simply restricts the officer's manipulation to "what is necessary to determine if the suspect is armed."

Freeman v. Commonwealth: November 17, 2015

Clarke: Defendant appeals his conviction for Drug Possession and Carrying a Concealed Weapon on Fourth Amendment and Due Process grounds.

Facts: Defendant carried drugs and a concealed handgun in his car. Detectives observed him driving and saw multiple objects dangling from the rearview mirror. They stopped the defendant and ultimately located the drugs and the gun. At a motion to suppress, a detective testified that he was concerned that the dangling air fresheners might impair or obstruct the defendant's view while driving.

Held: Affirmed. Regarding the Fourth Amendment issue, the Court examined the record, which included photographs of the three dangling air fresheners, and found that the officers had reasonable suspicion to stop the defendant for a violation of 46.2-1054. The Court likened this case to *Mason*, noting that in this case both the size of the objects and the fact that they were suspended from the rearview mirror were objective facts that provided the officer with reasonable suspicion that the defendant's view of at least part of the roadway might be impaired or obstructed.

The Court also rejected the defendant's argument that 46.2-1054 is unconstitutionally vague. The Court further observed that, even if the statute were unconstitutional, it would not require suppression of the evidence, since the exclusionary rule does not require suppression of evidence based on a statute that is later found to be unconstitutional. In this case, the officers relied on a properly-enacted statute.

Malone v. Commonwealth: December 8, 2015

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

Facts: Defendant, a felon, had a concealed firearm while standing with his companions outside a motel in a "high crime" area. Police, on patrol and asked to enforce "no trespassing" signs in the area, approached. As they did, the defendant and his friends saw the police and ran away. Officers pursued the defendant and captured him. They discovered that the defendant had a firearm, ammunition, and was wanted on outstanding warrants.

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Held: Affirmed. The Court first agreed that the officer lawfully chased and detained the defendant based on reasonable suspicion of criminal activity. The Court rejected the argument that the officer needed probable cause to arrest the defendant at that time and refused to find that the officer "arrested" the defendant by capturing him and returning him to the motel. Instead, the Court found that the officer simply restored the defendant to the "status quo", before he fled.

Diggs v. Commonwealth: December 8, 2015

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

Facts: Defendant had marijuana for sale in a vehicle that he was driving. An officer saw the defendant driving and noticed that the inspection sticker was peeling away and that the vehicle had temporary tags. He also noticed the defendant had just left an auto repair shop known to sell counterfeit inspection stickers. The officer stopped the defendant, detected the marijuana, learned the defendant was suspended, and found the marijuana.

At a motion to suppress, the officer testified that he had made roughly 100 such stops for unauthorized inspection stickers and that 9 out of 10 times, he found that the sticker was unlawful. He also recounted the shop's history of selling counterfeit stickers and the area's reputation as a high-crime area.

Held: Affirmed. The Court distinguished a similar stop in *Moore* by noting that, in that case, the defendant was driving a rental car and that therefore there was insufficient evidence that the driver *knowingly* operated a vehicle with an invalid inspection sticker. In this case, the Court found the officer had sufficient reasonable suspicion for the stop.

Commonwealth v. Collins: December 22, 2015

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

Facts: Defendant, a felon, drove past an officer with loud music playing. Under Richmond City Code, it is unlawful to play music from a vehicle if it is plainly audible from at least 50 feet. The officer testified that he was between 42 and 50 feet away at first, and could still hear the music 100 feet away, although faintly. The officer stopped the defendant and recovered a firearm.

The trial court granted a motion to suppress on the grounds that "it's hard to know how" the City code is violated because it is too vague.

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Held: Reversed, motion to suppress improperly granted. The Court first ruled that duly-enacted laws are presumed constitutional and the officer acted in reliance on a validly enacted law. The Court then found that, under *Heien*, an officer could reasonably believe that "plainly" means "without enhancement" and that it was reasonable for the officer to stop the defendant. The Court noted that the officer did not need proof that the defendant was *actually* in violation of the ordinance, only reasonable suspicion.

Commonwealth v. Brown: January 26, 2016

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

Facts: Defendant, a felon, carried a gun concealed on his person. Officers noticed him in a high-crime area while patrolling a housing complex marked "No Trespassing". Police spoke to him. The defendant claimed he was visiting someone, but admitted that he did not live at the apartment complex, and the signs themselves provided no exceptions under which non-residents were permitted on the property. He was alone in the complex after dark, was nervous during his encounter with the police, and failed to provide a specific name or address for the tenant he claimed to be visiting.

The officers patted the defendant down and found his firearm. The trial court suppressed the evidence, finding that the officers did not sufficiently investigate the defendant's claim that he was visiting someone. The trial court also found that the signs did not sufficiently note whether "trespassing" included visiting someone by authorization.

Held: Reversed, motion to suppress improperly granted. The Court found that the officers had probable cause to arrest the defendant for trespassing and consequently had a lawful basis to search him incident to that arrest. The fact that the defendant might have had a defense to the trespassing charge was not relevant to probable cause, since probable cause does not demand that the officer's belief be correct or more likely true than false.

The Court also rejected the argument that the "no trespassing" signs should have indicated whether or not they applied to people who are visiting people who are residents.

Spaulding v. Commonwealth: February 9, 2016

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

Facts: Defendant had cocaine in his pocket when someone shot him in the leg. Police and paramedics responded and transported him to the hospital in an ambulance. Inside the ambulance,

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paramedics removed the defendant's pants and handed them to the officer, who searched them and found cocaine. The defendant was conscious at the time, but the officer explained that he was searching for identification.

At the motion to suppress, the Commonwealth argued that the search was lawful but did not submit any police policy or testimony regarding the need to identify the defendant. [*The parties used a stipulated record to resolve the case*- Ed.]. The trial court denied the motion to suppress.

Held: Reversed. The Court observed that the Commonwealth had failed to put on any evidence regarding the shooting, the investigation into the shooting, or any need to identify the defendant. The Court also noted that the Commonwealth did not introduce the department's written policy, although it referenced the policy in argument. The Court then concluded that there was no lawful reason for the search.

Purvis v. Commonwealth: February 23, 2016

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

Facts: Defendant possessed cocaine when officers observed him make an improper right turn. Officers stopped him and learned that the defendant's license was suspended. Telling the defendant that he wasn't worried about the license, an officer asked the defendant if he would consent to a search of his vehicle. Police found cocaine residue in the vehicle. Another officer then searched the defendant and found cocaine on the defendant's person. Police used this information to obtain a search warrant for the defendant's residence, where they found more cocaine.

Held: Affirmed. The Court first repeated that the officers were entitled to arrest the defendant for Driving Suspended, in light of *Virginia v. Moore*, and therefore were entitled to conduct a search of the defendant incident to arrest. The Court found that it was irrelevant that the search preceded the arrest, that the officer stated that he was not concerned about the suspended license, and that a different officer conducted the search.

The Court also found the defendant's consent gave the officers authority to search his vehicle. The Court rejected the argument that the officer lied to the defendant about whether he would arrest him for driving suspended. Although the Court agreed that the defendant was in custody at the time he gave consent, the Court found the consent valid in the totality of the circumstances.

Commonwealth v. Gaiters: March 22, 2016

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

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Facts: Defendant possessed drugs with the intent to sell. An officer received an anonymous tip that the defendant was engaged in selling drugs and driving a two-toned SUV. The informant described the defendant in detail. The officer located the defendant and began to watch her. The officer saw the defendant interact with 5 people in 30 minutes, each time interacting with the person as if that person were a drug buyer. The officer detained the defendant and had a drug dog walk around the vehicle; the dog alerted on the vehicle.

The trial court granted a motion to suppress, finding that the officer lacked reasonable suspicion for the detention.

Held: Reversed, motion to suppress improperly granted. The Court agreed that an anonymous tip cannot form the basis of reasonable suspicion without sufficient corroboration. However, in this case, the officer corroborated the substance of the tip with his personal observations, which were consistent with the tip.

Gonzales v. Commonwealth: April 5, 2016

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

Facts: Defendant, who had drugs and a gun in his home, assaulted his wife. Police met his wife at the hospital, where she told police about the drugs and the gun and told them they could search the home. Officers responded to the residence and the defendant stepped out when they arrived, closing the door behind him. The officers arrested him, but he asked to get his shoes from inside the home. The defendant led the officers inside the home to get his shoes.

Inside the home, the defendant denied living at the residence and stated that it belonged to his mother. While the defendant put his shoes on, one of the officers conducted a "protective sweep" of the rooms down a nearby hallway. During a cursory examination of the rooms, he observed a digital scale on a table, looked in a closet, and saw a handgun. Both items were in plain view after the officer entered. After field-testing cocaine on the scale, officers obtained and executed a search warrant at the residence.

The trial court denied the defendant's motion to suppress. The defendant entered a conditional guilty plea and appealed

Held: Reversed. For reasons that the opinion never explains, the Court never addressed the fact that the defendant's wife gave the officers consent to search the residence. In addition, the Commonwealth did not argue standing. The Court does not express an opinion or make any observations about the wife's consent or standing. The Court agreed that the defendant gave consent to

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enter the home, but only for the limited purpose of retrieving his shoes, and therefore the entry was limited to areas where the defendant took them for his shoes.

The Court agreed that the officers have the authority to conduct a protective sweep of an area if officers have a reasonable and articulable belief that someone was in the house that posed a danger to the officers. However, in this case, the Court found no evidence in the record that officers suspected that someone was present in the home. The Court emphasized the fact that, when the officers first entered the home, they did not consider conducting a protective sweep, but instead waited until after the defendant had obtained his shoes.

The Court did not consider "Inevitable Discovery", finding that when a defendant enters a conditional guilty plea pursuant to 19.2-254, he is entitled to withdraw his guilty plea as soon as the Court of Appeals reverses the trial court's ruling. Therefore, as the trial court had not ruled on the "Inevitable Discovery" argument, the Court found that, pursuant to the language of 19.2-254, the Court of Appeals could not apply the "Inevitable Discovery" argument.

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Fifth Amendment – Confessions & Self-incrimination

U.S. Supreme Court

No Cases of Interest to Law Enforcement

U.S. Court of Appeals

No Cases of Interest to Law Enforcement

Virginia Supreme Court

No Cases of Interest to Law Enforcement

Virginia Court of Appeals – Published

Smith v. Commonwealth: October 13, 2015

Stafford: Defendant appeals his convictions for Armed Robbery and other offenses on Fifth Amendment grounds.

Facts: Defendant and his confederates robbed and shot two people and fled in his car. Police located the defendant later that night and detained him, handcuffed him, and placed him in the back of a police vehicle. The detective told the defendant that he was being "detained" and that they were putting him in the car because it was raining heavily and everyone was soaking wet. The detective asked the defendant if he would be willing to talk to her, and if so, would he be willing to talk to her at the police station about where he and his vehicle was previously. The defendant then said that he had been driving the vehicle previously that evening.

At trial, the defendant objected that the detective had not read him *Miranda* warnings prior to the conversation.

Held: Affirmed. The Court ruled that the detective did not interrogate the defendant and therefore did not need to read *Miranda* warnings. The Commonwealth had conceded that the defendant was in custody, but the Court found that the detective's statements were merely logistical and not a question designed to elicit an incriminating response.

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Overbey v. Commonwealth: December 15, 2015

Powhatan: Defendant appeals his convictions for First Degree Murder and Use of a Firearm on Fifth and Sixth Amendment grounds.

Facts: Defendant shot and killed two men. A Deputy located the defendant and told him he was not under arrest, but merely being detained. The deputy handcuffed him and put him in a patrol car and the defendant stated he did not want to make any statements, although he kept talking anyway. A Detective arrived and asked to speak to the defendant. The defendant stated that he would not say anything without a lawyer.

At the detention center, when a corporal dropped the defendant off at jail and said "good luck," the defendant responded "good luck. You know what the fuck I did." He then asked the corporal why the police were obtaining a search warrant for a particular residence. The corporal stated it was to look for evidence and a gun, but the defendant stated "you will never find that."

The next day, a Detective transported the defendant and the defendant began to speak about the victim. The Detective suggested the defendant may want to speak to someone. The defendant was formally charged with murder and had a bond hearing before the magistrate. A Lieutenant later returned and read the defendant his *Miranda* warnings and the defendant agreed to speak. The defendant admitted to the murders and provided the location of the firearm.

Held: Affirmed. The Commonwealth had conceded and the Court agreed that the defendant had properly invoked his right to counsel when the Deputy and Detective first detained the defendant. However, the Court then found that the defendant re-initiated conversations with the officers that evinced a willingness and a desire for a generalized discussion about the investigation, under *Edwards.*

The Court then found that his subsequent waiver was knowing, intelligent and voluntary. First, he invoked his rights without having them explained to him. Second, the Court observed that the officers carefully respected his invocation of his right to counsel and did not engage in any coercive behavior. Lastly, the Court found that the defendant understood his rights, especially based on his past interactions with the police.

The Court also rejected the argument that the defendant had a Sixth Amendment right to counsel at the time of the interview. The Court found that he first requested counsel before his arrest, which did not trigger a Sixth Amendment right to counsel. After his arrest, he waived his right to counsel and spoke to the police.

Virginia Court of Appeals
Unpublished

Wilson v. Commonwealth: November 3, 2015

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Campbell: Defendant appeals his conviction for Driving as an Habitual Offender and DUI on Fifth Amendment grounds.

Facts: Defendant, drunk, wrecked his car and rescue workers found him upside down, with his leg wrapped around the steering column. The defendant lied about his name and claimed an unknown woman had been driving. A trooper asked the defendant about the crash, but the defendant said he didn't want to talk anymore. At the hospital, the trooper again asked about the crash. The defendant again denied driving. The trooper arrested the defendant and advised him of his *Miranda* rights and read him implied consent. The defendant again stated he didn't want to talk to the trooper, but as the trooper continued reading the implied consent form, the defendant stated "you're harassing me because I flipped my jeep."

The defendant objected to the admission of his statement on Fifth Amendment grounds, but the trial court denied the motion. At trial, witnesses testified that the vehicle belonged to the defendant and that he had been driving it shortly before the crash.

Held: Affirmed. The Court first agreed that the evidence was sufficient to find the defendant guilty. The Court then turned to the *Miranda* issue and rejected the defendant's argument that he had invoked his right to remain silent. The Court re-affirmed that a suspect cannot invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation. In this case, the Court found that the defendant was not in custody until after the trooper arrested him, and therefore he could not preemptively invoke his right to remain silent. In addition, once he was in custody, his statement about "flipping" his jeep was not in response to interrogation; instead, it was a spontaneous utterance.

Johnson v. Commonwealth: January 12, 2016

Chesapeake: Defendant appeals his convictions for Drug Possession on Fifth Amendment grounds

Facts: Defendant carried drugs in his car. An officer observed that the vehicle had a defective brake light and stopped the defendant's car. The officer smelled marijuana and searched the defendant, finding cocaine. The officer placed the defendant in handcuffs and put him in the back of his patrol car. After finding more drugs, the officer informed the defendant of his *Miranda* rights.

The officer asked the defendant if he wanted to talk to a narcotics detective, but the defendant stated "no, I don't want to talk to anybody." The officer told him that that was his right and ended the conversation, although he informed the defendant that, if he changed his mind, he could let the officer know later.

The defendant then called out to the officer and asked what the drugs were, claiming not to know what they were. The defendant then continued to talk and confessed to selling drugs. At trial, the defendant contended that the officers did not respect his invocation of his right to remain silent.

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Held: Affirmed. The Court noted that the issue is whether the defendant's invocation of his right to remain silent was sufficiently unambiguous under the circumstances to preclude further questioning by law enforcement. In this case, the Court found that the defendant's statement "I don't want to talk to nobody" was simply declining an offer to talk to a narcotics detective.

Commonwealth v. Malick: March 22, 2016

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

Facts: Defendant murdered a young girl in 1990. In 2014, Detectives from a "cold-case" unit visited the defendant at his home in Pennsylvania and interviewed the defendant about the murder. The defendant invoked his right to counsel. The detectives then detained the defendant to execute a search warrant for DNA and fingerprints. Officers placed him in handcuffs and advised him of his *Miranda* rights. As they drove the defendant to a location to collect the evidence, they spoke to the defendant generally about his experience living in Virginia Beach.

During a motion to suppress, evidence at the hearing was in conflict about what happened next. The Commonwealth contended that the defendant made several incriminating statements spontaneously, without prompting. However, the trial court concluded that, the detectives, through questioning, elicited the statements about the victim.

Held: Affirmed, motion to suppress properly granted. The Court agreed that the evidence was sufficient that the statements were elicited in a manner that violated the defendant's Fifth Amendment rights and that exclusion was proper. The Court began by noting that, after a defendant has invoked his right to an attorney, the Commonwealth bears the burden of proving that the statements were admissible by a preponderance of the evidence. The Court also repeated that "interrogation" can include statements that are the functional equivalent of interrogation, even though the questions are not direct questions. Although the Court agreed that the evidence was in conflict, the Court found that the Commonwealth had failed to carry its burden to demonstrate the evidence was admissible.

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Crimes Against Person/Domestic Violence

Virginia Supreme Court

Chilton v. Commonwealth: November 12, 2015
Affirming Court of Appeals Ruling of November 18, 2014
Ricks v. Commonwealth: November 12, 2015
(Combined Ruling)

Chilton:
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 agreed with the Court of Appeals that the evidence failed to demonstrate that the victim was injured by choking. The Court noted that the record did not even demonstrate that that the defendant choked the victim, or that she "saw black" as a result of it.

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

Facts: Defendant assaulted his girlfriend, first telling her he was going to kill someone, and then striking her repeatedly until finally holding her down by the neck. At trial, the victim testified that she could not breathe and that the defendant held her for several seconds until he kicked her away. The defendant then captured her again and choked her, cutting off her breathing completely. She escaped again, only for the defendant to choke her again and tell her he was going to leave her for dead. At trial, the victim explained that she could not call for help because she could not speak and that her voice did not come back until days later, although she did not seek medical attention. A deputy saw a faint mark on her neck.

Held: Affirmed. The Court held that "bodily injury" under § 18.2-51.6 is any bodily injury whatsoever and includes an act of damage or harm or hurt that relates to the body, is an impairment of a function of a bodily member, organ, or mental faculty, or is an act of impairment of a physical condition. The Court rejected the argument that it requires observable wounds, cuts, or breaking of the skin. In this case, the Court found that the evidence was sufficient.

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Virginia Court of Appeals
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Le v. Commonwealth: July 28, 2015

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

Facts: Defendant sexually abused his martial arts student, a child, for many years, repeatedly having sexual intercourse with her. Defendant argued that the evidence did not prove that he used force and therefore he was not guilty of sexual abuse.

Held: Affirmed. The Court first reaffirmed that proof of sexual intercourse is sufficient to prove a conviction for §18.2-370.1. The Court then rejected the argument that §18.2-67.10(6)(a) requires proof of force to prove "Sexual Abuse".

Lambert v. Commonwealth: December 22, 2015

Scott: Defendant appeals her conviction for Assault and Battery on sufficiency of the evidence.

Facts: Defendant, a teacher, witnessed a special needs student in another class apparently leave her backpack and coat at the bus stop. The defendant went into the school, found the student, and demanded that she return. The student refused, so the defendant dragged her by her wrists back to the bus stop.

At trial, the trial court found that the defendant's actions did not fall under the exceptions contained within 18.2-57(G). The trial court found that the defendant's actions were outside the scope of her employment, in part because the School Board never permitted her to grab a child by the wrists.

Held: Reversed. The Court first construed 18.2-57(G), which excludes incidental, minor, or reasonable physical contact designed to maintain order and control while acting in the course and scope of a school employee's official capacity. The Code further requires "due deference shall be given to reasonable judgments" made by the employee.

The Court found that the trial court improperly substituted the School Board's standards of conduct for the standards contained in the statute. The Court held that the School Board may not re-define criminal conduct by policy. The Court concluded that the defendant was clearly acting as an employee in the scope of her duties at the time of the offense. The Court then observed that the trial court failed to give due deference to the defendant by accounting for her mistaken impression that the

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student had abandoned her backpack and coat. Because the trial court did not rule on whether the defendant acted "reasonably", the trial court did not comply with the statute.

Wiggins v. Commonwealth: April 26, 2016

Dinwiddie: Defendant appeals his conviction for Possession with Intent to Distribute Marijuana and Felony Child Neglect on sufficiency of the evidence.

Facts: Police executed a search warrant at the defendant's residence while he and his son were in the home. Inside, police found the defendant and his son asleep in the house (*The opinion does not note the child's age- EJC*). Police found evidence of drug distribution throughout the defendant's house, including marijuana hidden in the kitchen, a loaded handgun by the defendant's bed, a loaded carbine rifle under the couch in the living room, ammunition throughout the house, and a large amount of cash. At trial, an expert testified that the presence of loaded firearms and large amounts of cash was consistent with drug distribution.

Held: Affirmed as to PWID Marijuana, Dismissed as to Felony Child Neglect. The Court first found the evidence, taken as a whole, sufficiently demonstrated the defendant's constructive possession of the marijuana hidden in the kitchen.

Regarding the child neglect charge, the Court indicated, in a footnote, that there must be evidence that a defendant knew that the circumstances facing a child posed a substantial risk to the child's safety and that the defendant willfully ignored an existing danger to the child. The Court then found that a conviction requires either a consistent pattern of neglect or a more imminent threat to a child's safety than existed in this case. In this case, the Court found that the evidence merely showed that the child was in a home with two loaded firearms.

The Court distinguished the *Jones* case by noting that, in this case, the Commonwealth did not introduce evidence of controlled buys conducted in the house, surveillance showing that drug deals took place in the house while the child was present, or that any drugs or paraphernalia were in the same room as the child. In this case, there was no testimony that the gun in the living room was in plain view or that the child had ever been left unsupervised in the same room as either of the weapons when they were loaded and unlocked.

Dietz v. Commonwealth: May 3, 2016

Hampton: Defendant appeals her conviction for Internet Solicitation of a Child on sufficiency of the evidence.

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Facts: Defendant, a school teacher, began texting an 11-year-old boy in her class. The child's father turned the phone over to police, who posed as the child. While police posed as the child, the defendant sent pictures of herself in the bathtub, including a photo of the upper portion of her breasts. She sent that photo after asking the child if he had ever seen a woman's "boobs" before. She also sent a picture of her lips while formed in a kiss, but told him to delete the photos and hide her contact information from his parents.

Held: Affirmed. The Court first rejected the argument that the Commonwealth must prove that a third party, other than the defendant and the child, was involved or the target of the communications. The Court then found that the defendant was clearly acting with lascivious intent and that her breast was a "sexual part" for purposes of §18.2-370. The Court declined to find that the defendant must expose her entire breast, including her nipple, to be guilty of Indecent Liberties.

Virginia Court of Appeals
Unpublished

Conway v. Commonwealth: June 2, 2015

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

Facts: Defendant beat the victim with his fists, causing swelling below the victim's eyes, hemorrhages in both eyes, and caused him to not be able to move one eye. Defendant argued that his attack did not constitute "wounding."

Held: Affirmed. The Court agreed that, in the Malicious Wounding statute, the word "wound" is distinct from the term "bodily injury." The Court then construed the word "wound" in the statute and found that while it requires a breaking or breaching of the skin, such a wound need not be external. Internal wounds, such as in this case, are also sufficient under the statute. The Court rejected the argument that the *Harris* case prevents a trial court from finding an attack with fists as sufficient to prove malicious wounding.

Artis v. Commonwealth: June 2, 2015

Suffolk: Defendant appeals her conviction for Involuntary Manslaughter on sufficiency of the evidence.

Facts: Defendant's two year old daughter accidentally ingested Suboxone belonging to her mother's boyfriend. As soon as she discovered it, the defendant began to attempt to help the child and relatively quickly notified poison control and then went to the hospital. After several hours, the hospital discharged the child, with instructions noting that the ingestion was "nontoxic" and was "not likely to

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cause serious medical problems. Further treatment is not needed at this time." Staff reassured the defendant that the child "would be okay" and that the Suboxone "would wear off."

However, once home, the child began to hallucinate and could not eat. The defendant gave the defendant some medicine and put the defendant to bed. The next morning, the child was dead.

Held: Reversed. The Court held that the defendant was entitled to rely on the hospital's assurances and found insufficient evidence that the defendant knew or should have known the probable result of not taking the child back to the hospital that night. The Court contrasted the negligence in the *Flowers* case, noting that in that case the defendant declined to seek medical treatment for the child for hours on purpose.

Brown v. Commonwealth: July 21, 2015

Fredericksburg: Defendant appeals his convictions for Failure to Appear and Contributing to the Delinquency of a Minor on sufficiency of the evidence.

Facts: Defendant and his girlfriend rented a hotel room. Hotel staff later found the defendant's 2 year-old son in diapers wandering outside the hotel. Police responded and found the hotel room empty, tub full of water, and covered in drug residue and paraphernalia. The parents were nowhere to be found. When police later located the defendant, he claimed that he had left the child with the mother. However, he admitted that he had reason to believe that the mother would not care for the child and that he knew she may not stay with the child.

Defendant then failed to appear in court, claiming that he thought his case had been continued because his girlfriend's case had been continued.

Held: Affirmed. The Court found that the defendant knew that the mother would likely not care for the child and neglected the danger that she would abandon the child. Regarding the failure to appear, the Court also observed that the defendant had no reason other than speculation to believe his court date had changed.

Howard v. Commonwealth: July 21, 2015

Henrico: Defendant appeals his convictions for Attempted Robbery, Use of a Firearm, and Possession of a Firearm by Felon on sufficiency of the evidence.

Facts: Defendant and an accomplice ran up to the victim with a gun, yelling "don't run", but the victim ran. The men chased the victim, demanding that he return with them, but he refused, and they fled the scene in a vehicle. Police chased the vehicle, until the defendant ran and threw an object during

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the chase. Police recovered it and found that it was part of a firearm, one that the victim stated that the men used. Police found the defendant's fingerprints in the vehicle along with masks and clothing consistent with the victim's description.

Held: Affirmed. The Court examined the attempted robbery and found the evidence sufficient, noting that the victim perceived that the defendant was trying to rob him. The Court reaffirmed that a there need not be an explicit demand for property, so long that it can be inferred.

Lee v. Commonwealth: July 28, 2015

Hanover: Defendant appeals his convictions for Violation of a Protective Order on sufficiency of the evidence

Facts: Defendant was subject to a protective order preventing him from having any contact with the victim or from being within 1000 feet of the victim. One day, while conducting a regular exchange of their child pursuant to a visitation order, the victim saw the defendant's car in the parking lot of the shopping center where the exchange was to occur, within 1,000 feet of where she was parked. After receiving her child, the victim began to leave the parking lot, pausing at a stoplight at the exit. The defendant's vehicle was in front of her at the light. While waiting for the light to change, the defendant expressed exaggerated laughter and gestured to her in a threatening manner, making the sign of a pistol with his hand and then pulled an imaginary trigger.

The victim could not recall the exact date of the incident. After the trial court convicted the defendant, the trial court signed the agreed statement of facts for the appeal with initials only, and not a true signature.

Held: Affirmed. The Court first found that the trial judge's initials were sufficient as a signature. The Court then found the evidence sufficient to demonstrate a violation of the protective order. The trial court rejected the argument that the victim's inability to remember the exact date was fatal to the case.

Harrison v. Commonwealth: October 13, 2015

Chesterfield: Defendant appeals his convictions for Sexual Assault on sufficiency of the evidence and Due Process grounds.

Facts: Defendant sexually assaulted a former girlfriend. Prior to the incident, the defendant and victim had exchanged erotic stories, shared erotic pictures, and discussed the victim's interest in bondage and submission. However, when the defendant attempted sexual contact with the victim, she

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refused and told him no. Nonetheless, he removed her clothes, object sexually penetrated her and sodomized her, despite her telling him "no" and hitting him, although not very hard. She told the defendant to leave and he left.

At trial, the defendant claimed that he believed that she wanted to have sex in a rough or dangerous way, based upon her statements and her web-based dating profile, in which she expressed interest in that. The defendant adduced evidence that he suffered from Asperger's, which prevented him from reading subtle social cues.

After the trial, the defendant moved the dismiss the charges on Due Process grounds. Prior to trial, the Commonwealth and the defense had discussed releasing the defendant on bond to obtain treatment. During the post-trial hearing, the defense contended that the prosecutor guaranteed that if the defendant sought and completed treatment, the Commonwealth would nolle pros' the charges. In reliance on that agreement, the defense failed to retrieve certain electronic messages that later became unavailable. The Commonwealth denied that such an agreement existed.

Held: Affirmed. Regarding sufficiency, the Court found that the victim's refusal was not a "subtle social cue", but a clear statement. The Court refused the find that the victim's previous statements or actions invited an assault on her person. The Court also found that the evidence failed to show that any agreement existed between the Commonwealth and the defendant.

Williams v. Commonwealth: November 10, 2014

Rockingham: Defendant appeals his convictions for Attempted Capital Murder of a Law Enforcement Officer and Use of a Firearm on sufficiency of the evidence.

Facts: Defendant, intoxicated and riding a horse, shot at his neighbor. Police responded and demanded that the defendant surrender, but he cursed at them and fled, only to return and shoot in the direction of police. At trial, although witnesses testified that they saw the defendant with a gun and heard the gunshots, no one could testify that they saw the defendant fire the gun.

Held: Affirmed. The Court found the evidence was sufficient to demonstrate that the defendant was firing at the officers and had the intent to kill them, since a natural consequence of shooting a gun repeatedly at people in their direction is to kill them.

Taylor v. Commonwealth: December 8, 2015

Norfolk: Defendant appeals his conviction for Indecent Liberties on sufficiency of the evidence.

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Facts: Defendant sexually assaulted a 13 year old who was in the care of his girlfriend while the child's mother was out of town. During the assault, the defendant was the only adult at home and the victim was going to bed. At trial, the defendant argued that he did not have "custodial responsibility" for the victim.

Held: Affirmed. The Court ruled that the defendant was acting "in the nature of a baby-sitter" at the time of the assault, as in *Kolesnikoff*. The Court also repeated that one can assume custody or care of a child through a course of conduct, as in *Snow*.

Spitler v. Commonwealth: December 15, 2015

Portsmouth: Defendant appeals his conviction for Domestic Assault and Battery on sufficiency of the evidence.

Facts: Defendant punched his wife and she fell to the ground. At trial, the victim testified that she did not know what hit her. She stated that she turned a corner and immediately felt something hit her eye and she fell. She testified that the defendant was there instantly and that there was nothing that could have knocked her over other than the defendant. She suffered a black eye as a result. At trial, the defendant testified that his wife fell down the stairs.

Held: Affirmed. The Court first observed that victims of domestic violence are naturally reluctant to testify and that the trauma that the victim suffered may explain the tenor of her testimony. The Court then found the defendant's explanation inherently incredible and the evidence sufficient to demonstrate the defendant assaulted the victim.

Cheatham v. Commonwealth: February 16, 2016

Amherst: Defendant appeals his conviction for First Degree Murder on refusal to instruct on Self-Defense.

Facts: Defendant killed his wife by beating her to death after she asked him for a divorce. He fled the scene. Police captured him in North Carolina with her phone and the letter in which she asked him to sign her divorce papers. At trial, the defendant contended that the victim had pulled a gun on him and that he knocked the gun out of her hand with a stick and then "lost control" and continued to hit the victim until she was dead. He claimed that he discarded the gun and his own weapon after he fled. The trial court denied a self-defense instruction

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Held: Affirmed. The Court ruled that the force the defendant used, even by his own testimony, was not reasonable in relation to the harm threatened by the victim. Even in the defendant's own story, he continued to beat her to death even after he had disarmed her. The Court also noted that the defendant's story was not credible in light of the evidence.

Quisque v. Commonwealth: February 23, 2016

Fairfax: Defendant appeals his conviction for Rape on sufficiency of the evidence.

Facts: Defendant raped a woman with whom he had been drinking after she fell asleep. When she awoke, she struck him and he fled. When police first found him, he denied having intercourse with the victim, but then claimed that he had done so by mistake, thinking that she was his girlfriend. At trial, the defendant claimed that, although the victim was asleep, she was not sufficiently "physically helpless" to prove Rape.

Held: Affirmed. The Court examined the facts and the noted that states of sleep can be more or less debilitating. In this case, the Court found the evidence sufficient to demonstrate the victim's physical helplessness.

Jackson v. Commonwealth: March 1, 2016

Patrick: Defendant appeals his conviction for Indecent Liberties on sufficiency of the evidence.

Facts: Defendant, 46 years old, visited the victim's home and asked her to go with him to his car. She refused. Her brother intercepted the defendant and asked him why he wanted the victim to go to the vehicle. The defendant stated that he wanted the victim to "sit on his face." The victim heard that statement, as she was a few feet away.

Held: Affirmed. The Court found that the evidence proved that the defendant directed a statement proposing a sexual act toward the victim either directly or while speaking to her brother within her earshot, and that the defendant invited the victim to enter his vehicle for purpose of engaging in sexual activity.

Possich v. Commonwealth: March 29, 2016

Williamsburg/James City County: Defendant appeals his conviction for Indecent Liberties on sufficiency of the evidence.

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Facts: The defendant sexually abused his 5-year-old daughter. The child first disclosed the abuse to a neighbor, who was her babysitter. Police and a social worker interviewed the victim on several occasions. Initially, the victim did not disclose to them, but over time, she began to disclose the offense to them. At trial, the victim testified to the offense via closed-circuit television.

Held: Affirmed. The Court reaffirmed that the child's account alone was sufficient to prove the offenses, despite the defendant's claims about inconsistencies among her various statements. The Court found it entirely reasonable that, over time, the victim disclosed more to strangers. The Court found it logical that the more comfortable she felt with a stranger over time, the more detailed the information she would reveal.

Although the victim made inconsistent statements, the Court found that the trial court could easily determine that the inconsistencies in the victim's various statements arose from her youth, her fragile memory, the time span of the investigation, the traumatic nature of the offenses, the fact that the assailant was her own father, and her feelings of complicity as demonstrated by her reluctance for her mother to learn of the abuse.

The Court wrote: "The fact that the prosecution chose to offer the child's testimony over closed-circuit television showed an independent assessment that testifying was difficult and traumatic for the young victim. These facts reflect confusion of a child of tender years who does not want to hurt her father and yet knows that he did something wrong."

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Crimes Against Property/Fraud

Virginia Supreme Court

Bowman v. Commonwealth: October 29, 2015

Hampton: Defendant appeals his conviction for Construction Fraud on sufficiency of the evidence.

Facts: Defendant took a $2,100 advance for construction and then never did the work. The victim sent the defendant a demand letter, but it was returned unclaimed. At trial, the victim testified that he could not remember what the letter said. The Commonwealth introduced the envelope, still unopened, at trial, but no one ever opened it at trial.

Held: Reversed. The Court examined 18.2-200.1 and found that the 15-day notice letter is a necessary, material element of the offense. The Court noted that, once the contractor receives the letter, the contractor must return the funds, but the letter must demand the return of all or part of the original advance; the letter cannot offer the contractor an alternative (such as completing the work). In this case, the Court observed that the evidence was insufficient to demonstrate the contents of the letter.

Virginia Court of Appeals
Published

Moreno v. Commonwealth: August 11, 2015

Loudoun: Defendant appeals his conviction for Uttering a Forged Public Record on sufficiency of the evidence.

Facts: Defendant assaulted his uncle. When the case came up for trial in General District Court, the defendant adduced a handwritten letter to the Judge and the Commonwealth's Attorney that purported to be from the victim. The signed letter stated that the victim had received $100 from the defendant in full satisfaction of the offense and did not want to proceed. The judge dismissed the case pursuant to Va. Code §19.2-151. The letter was a forgery. At trial for Uttering of a Forged Public Record, the defendant argued that the purported "accord and satisfaction" was not a public record.

Held: Affirmed. The Court ruled that the purported "accord and satisfaction" was a public record for purposes of Va. Code §18.2-168. The Court wrote that the word "public record" is defined by §42.1-77. The Court noted that the letter was clearly written regarding a transaction by or with a governmental actor, in this case, the General District Court. The Court rejected the argument that,

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because the victim did not appear in court or have the writing notarized, the purported accord and satisfaction did not satisfy Va. Code §19.2-151 and therefore the writing was not received "in pursuance of law" under §42.1-77. The Court refused to allow the defendant to approbate and reprobate, in other words, get the benefit of an accord & satisfaction and then claim that he received it unlawfully. The Court also found that the document nevertheless qualified as a public record.

Simmons v. Commonwealth: December 15, 2015

Chesapeake: Defendant appeals his conviction for Possession of Burglary Tools on sufficiency of the evidence.

Facts: Defendant stole property from a store. An officer stopped the defendant and recovered the items, although none of them showed any signs of tampering. After searching the defendant extensively, he located a hidden X-acto knife. The defendant claimed he found it on the ground just before the officer stopped him.

Held: Affirmed. The Court found the defendant's explanation to be inherently incredible and therefore ruled that the evidence demonstrated that the defendant possessed the hobby knife with the intent to use it to commit a theft.

Reid v. Commonwealth: February 2, 2016

Newport News: Defendant appeals his convictions for Obtaining Money by False Pretense on sufficiency of the evidence.

Facts: Defendant defrauded two victims using the same scheme. He told the victim that his car had been towed and he needed to borrow money to get it back; each time, he promised that he had the money in his car and could pay the victim back as soon as he obtained his car. The victim would drive him to an ATM, get money, and then drive him to a residence, where the defendant would disappear.

At trial, the defendant argued that, since the money was a loan, he did not obtain true ownership of the money and was not guilty.

Held: Affirmed. The Court noted that the defendant obtained the money to use for his own benefit. Even if the victims believed that the loan was for a specific purpose, that purpose was the defendant's, not their own. Therefore, because the defendant took both possession and ownership of the victim's funds, he committed larceny by false pretenses. The Court also found the evidence sufficient to convict.

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Wilson v. Commonwealth: February 9, 2016

Floyd: Defendant appeals his conviction for Attempted Arson on sufficiency of the evidence.

Facts: Defendant, angry at a store owner, stuffed paper into the door handle of a local country store and tried to light the paper on fire. At trial, a store employee testified that part of the building had a room used to store grain. The trial court convicted the defendant under Attempted Arson of a storehouse under 18.2-79, rather than 18.2-80.

Held: Affirmed. The Court addressed the meaning of the word "storehouse" and noted that it was different than "structure" under the Burglary statute. Reviewing various definitions and cases from other states, the Court held that a "storehouse" is a "general type of structure for storing goods for a number of purposes" and "includes both retail stores and structures for the storage of provisions and goods." The Court then found that the country store in this case was a "storehouse" under 18.2-79.

Holt v. Commonwealth: April 12, 2016
Aff'd in Part, Rev'd in Part, Panel Ruling of August 4, 2015

Norfolk: Defendant appeals her convictions for Obtaining Money by False Pretense and Embezzlement on sufficiency of the evidence

Facts: Defendant, 29 years old, began dating a 17-year-old boy. The boy agreed to buy the defendant's truck to help her make child support payments, paid the defendant, and obtained title to the vehicle, signed by the defendant. However, the boy did not register the title at DMV. He kept the car at the residence where he and the defendant resided. When the defendant's ex-boyfriend got out of prison, the defendant began to date him as well. One day, when the defendant's ex-boyfriend and the victim got into an argument, the defendant's ex-boyfriend took the truck and drove away. The next day, the defendant obtained a replacement title for the vehicle in her own name, claiming the original had been lost or stolen.

At trial, the defendant's argument focused on her lack of fraudulent intent and the victim's failure to entrust her with the vehicle at the time of the alleged embezzlement. She never argued that the Commonwealth failed to prove that she made a false representation of a past or existing fact.

In an unpublished opinion, a panel of the Court of Appeals affirmed the conviction as to Obtaining Money by False Pretense but reversed as to Embezzlement.

Held: Affirmed conviction for Larceny by False Pretense; Reinstated dismissal of Embezzlement conviction. The Court did not completely vacate the panel's opinion. Instead, for procedural reasons, the Court reinstated the panel's decisions concerning Holt's intent to defraud, set forth in Part II(A)(1) of

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the panel opinion, and the reversal of her embezzlement conviction set forth in Part II(B) of the panel opinion. [*See previous case update from August 4, 2015 – EJC.*]

Thereafter, the Court found that the defendant had waived her argument on the false pretenses conviction and refused to find that the "ends of justice" exception applied. The Court found that the jury could have reasonably inferred that the defendant's relationship was a pretext on her part, one that allowed her to take advantage of the victim's relative youth and inexperience to obtain financial support from him. The same inference also implied that the defendant was likely to relate false statements to encourage the victim to purchase the Suburban.

Beck v. Commonwealth: April 26, 2016

Hampton: Defendant appeals his conviction for Breaking and Entering on sufficiency of the evidence.

Facts: Defendant, a tenant, broke into the portion of the home that belonged to his landlord and stole property. The residences were part of the same home, but separated by locked doors. The defendant did not have permission to enter the landlord's residence, but the landlord did invite over a few times. The defendant and the landlord shared a common utility room and garage between the residences.

One day, the landlord discovered that the defendant had taken property from her residence and pawned it. The landlord testified that she always kept the door to her residence closed, although some evidence indicated that someone sometimes left the door open. At trial, the defendant contended that the residence constituted one single dwelling and also that there was insufficient evidence of a breaking.

Held: Affirmed. The Court agreed that, under *Hitt*, a breaking must be into a dwelling, rather than within the dwelling. However, the Court observed that, despite the *Lacey* case, joint access to common areas in a multi-unit apartment complex or rooming house does not render it impossible for a resident of that complex or rooming house to burglarize other units within the complex or rooming house. In this case, the Court found the evidence demonstrated that the living quarters and the apartment were separate dwellings and that the garage and utility room constituted common areas. The Court also found the evidence sufficient to demonstrate a breaking, based on the testimony that the victim's door was always closed.

Virginia Court of Appeals
Unpublished

Alston v. Commonwealth: June 30, 2015

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

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Facts: Police chased the defendant, who fled into a woman's house. When she discovered him inside, he told her to be quiet, but she began to yell, so the defendant punched her in the jaw, knocked her to the ground, and dragged her upstairs, where he told her that he was going to kill her. However, the police arrived quickly and captured the defendant. At trial, the defendant claimed that he did not enter the home with the intent to assault the victim, but instead entered with the intent to hide, and only thereafter developed the intent to harm the victim.

Held: Affirmed. The Court found that the evidence supported the conclusion that the defendant expected the house to be occupied when he entered, and intended to use force against the woman in order to avoid detection by the police. Although the defendant also had the intent to elude the police, the fact that the defendant told the victim to be quiet did not foreclose the conclusion that he possessed the intent to assault her upon entering the home.

Cummings v. Commonwealth: November 10, 2015

Chesapeake: Defendant appeals his conviction for Larceny by False Pretense on amendment of his indictment and sufficiency of the evidence.

Facts: Defendant took money from a homeowner to build a pool and then did not build it. He obtained a building permit, but did so using the name of another company, one for which he did not work, because his own license had expired. The Commonwealth indicted the defendant for Larceny by False Pretense from the homeowner and Forgery for the false building permit. At the motion to strike, the trial court ruled that the defendant's false building permit did not prove a Forgery. The Commonwealth amended the offense to Larceny by False Pretense and the trial court permitted the amendment, over the defendant's objection.

Held: Affirmed. The Court first found that the amendment did not change the "nature and character of the offense charged." Although the Court agreed that the elements of the offense are different, both charges were based on the same conduct, the defendant's false representation.

Regarding sufficiency, the Court agreed that "permission to build a swimming pool" is not property under 18.2-178. However, the Court noted that the evidence demonstrated that the defendant received an actual piece of paper, which can be the subject of a larceny.

Russell v. Commonwealth: November 24, 2015

Portsmouth: Defendant appeals his convictions for Grand Larceny on sufficiency of the evidence.

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Facts: Defendant inherited a house and its furnishings from his mother jointly with his sisters. All three siblings lived together in the house. However, the sisters discovered the defendant had taken some of the mother's property and pawned it without their knowledge or consent.

Held: Reversed. The Court found that the evidence proved that the defendant was a co-owner of the property. The Court held that, as a co-owner of the personal property, the defendant had the right to possess, use and enjoy the common property, and therefore it was legally impossible for him to steal the property.

Sharp v. Commonwealth: November 24, 2014

Chesterfield: Defendant appeals his conviction for Fraudulent Conversion of Leased Property on sufficiency of the evidence.

Facts: Defendant signed a rent-to-own agreement for furniture, made her first payment, and then never paid again. The store sent the required notice and repeatedly tried to contact the defendant but the defendant never paid and never returned the property. The defendant argued that the 2014 changes to the code demonstrated that 18.2-118 did not apply to her case at the time, and also that she did not have the intent to defraud.

Held: Affirmed. The Court agreed that the lease-purchase agreement was a lease for purposes of the pre-2014 version of 18.2-118. The Court reviewed the 2014 changes to 18.2-118, which exempted lease-purchase agreements from the scope of the code, but refused to find that these changes demonstrated that the General Assembly never intended the code to apply to her conduct.

The Court then found that, by withholding the property in this case, the defendant violated the terms of the lease and that the evidence demonstrated that the defendant possessed the requisite fraudulent intent.

Kersey v. Commonwealth: November 24, 2014

Richmond : Defendant appeals his conviction for Aiding & Abetting Armed Burglary on sufficiency of the evidence.

Facts: Defendant knocked on the door of an unoccupied residence and, hearing no answer, went to the side window and removed it, entering the house, while a neighbor watched. He then opened the door for two other men, one of whom was carrying a gun, and they entered the residence. However, when a police car approached, the men fled. Police captured the defendant at the scene.

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Inside the house, they found the house ransacked, the victim's property left, stacked by the window, and a firearm hidden in the couch.

Held: Affirmed. The Court agreed that the evidence was sufficient to prove that the defendant shared the perpetrator's common intent and that he aided and abetted them.

Outsey v. Commonwealth: December 8, 2015

Norfolk: Defendant appeals his conviction for Failure to Return Rental Property on sufficiency of the evidence.

Facts: Defendant, a former employee at a rent-to-own business, co-signed a television rental with his roommate. After the defendant and his roommate failed to make any payments, the store contacted the defendant, but the defendant had provided a non-working number and moved away. He never responded to numerous letters, including the letter required by 18.2-118(B).

Held: Affirmed. The Court first found that the evidence, including the store's own business records, was sufficient to show that the store sent the letter by certified mail. The Court then found that the defendant's failure to make any payments, coupled with his providing a non-working phone number and his moving away, demonstrated his intent to defraud.

Henderson v. Commonwealth: December 15, 2015

Portsmouth: Defendant appeals his conviction for Attempted Burglary on sufficiency of the evidence.

Facts: Defendant arrived at the victim's apartment, banged on the door, and demanded that he exit so that the defendant could assault him. The victim refused and called 911. The defendant continued to strike the door for 20 minutes and then smashed the living room windows. At that point, the police arrived and the defendant fled, until police captured him nearby carrying a baseball bat.

Held: Affirmed. The Court found the evidence clearly demonstrated that the defendant intended to assault the victim. The Court concluded that the defendant smashed the windows with the intent to lure the victim into a fight, either inside or outside the residence. The evidence further demonstrated that the defendant only fled because the police arrived. The Court also found that, by smashing the windows, he committed a sufficiently overt act to be convicted of attempt.

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Drug & Gun Offenses

Virginia Supreme Court

No Cases of Interest to Law Enforcement

Virginia Court of Appeals Published

No Cases of Interest to Law Enforcement

Virginia Court of Appeals Unpublished

Stallings v. Commonwealth: November 10, 2014

Danville: Defendant appeals his convictions for Drug Possession on sufficiency of the evidence.

Facts: Defendant possessed Oxycodone in a pill bottle in his pocket. The pill bottle was un-labeled and the pills inside were packed in another baggie. When an officer stopped him, the defendant provided a false name and identification repeatedly. At trial, the defendant testified that he thought the pills were ones that he could lawfully possess and that the pills belonged to his uncle.

Held: Affirmed. The Court repeated that the Commonwealth must prove that the defendant knew that the substance he possessed was a controlled substance, but does not need to prove that the defendant knew *what* controlled substance he possessed. In this case, the Court found that the evidence demonstrated that the defendant knew that he possessed drugs that were not lawful to possess.

Hampton v. Commonwealth: November 17, 2014

Danville: Defendant appeals his convictions for Possession of Firearm by Felon, Armed Burglary, and Use of a Firearm on sufficiency of the evidence.

Facts: Defendant entered a residence, brandished a gun and threatened to kill the victim with the gun. The defendant had first concealed the gun in a blanket. The victim testified that the gun was a "large black gun" that looked like a military rifle and that she could feel the metal barrel against her head when the defendant demanded she give him money. The defendant told the victim that he was

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going to shoot her with the gun. The defendant's co-defendant testified that the gun looked like an assault rifle. Both witnesses were familiar with guns.

At trial, the defendant testified that the object was merely a BB gun.

Held: Affirmed. The Court agreed that the circumstantial evidence was sufficient to conclude the object was a real firearm.

Moore v. Commonwealth: November 24, 2014

Suffolk: Defendant appeals his conviction for Drug Possession on sufficiency of the evidence.

Facts: Defendant stole property from a store and left in a car driven by another man in the man's sister's car. Police stopped the car and the defendant surrendered the stolen items. Police then searched the car. Under the defendant's seat, police found a small quantity of cocaine and marijuana.

Held: Reversed. The Court found that the evidence was insufficient to prove that the defendant was aware of the drugs found under the seat of the vehicle and that mere proximity and occupancy of the vehicle did not prove knowledge. The Court distinguished other cases, where additional facts pointed to knowledge of the presence of illegal drugs, such as furtive movements, odors, and false statements.

Williams v. Commonwealth: December 8, 2015

Chesterfield: Defendant appeals his conviction for Carrying a Concealed Handgun, 2nd offense, on sufficiency of the evidence.

Facts: Defendant carried a handgun openly in a holster on his waist while riding a scooter. The handgun was only visible because of how he rode the scooter; a long coat that he was wearing would otherwise have covered the gun. However, the defendant crashed and EMTs loaded him into an ambulance. Thereafter, the long coat that he was wearing covered his firearm. He did not tell the EMTs or an investigating officer that he had a handgun on his person.

The EMTs released him and an officer approached him, asking if he had a handgun concealed under his coat. The defendant revealed the firearm and stated that he tried to keep the gun visible but could not because of the coat.

Held: Affirmed. The Court noted that, after the crash and after all medical treatment was complete, the defendant intentionally decided not to reveal the handgun or uncover it, despite the fact that he clearly knew that the firearm was concealed.

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Livingston v. Commonwealth: March 29, 2016

Chesapeake: Defendant appeals his conviction for Conspiracy to Distribute Drugs on sufficiency of the evidence.

Facts: Defendant drove his co-defendant to a secluded location behind a convenience store to conduct a drug deal. Police watched as a confidential informant purchased drugs from the passenger right in front of the defendant. They then apprehended the men, finding an "owe-sheet" in plain view in the center console and their "buy-money" in the passenger's possession. The defendant's first name appeared on the owe-sheet.

Police asked the defendant whether he knew his passenger was selling drugs and the defendant responded, "You know." The officer then asked, "So, was he?" but the defendant did not answer and simply stared at the officer. At trial, the defendant testified that he had no idea that his passenger was going to sell drugs, denied seeing a drug deal happen, and denied making the statement to the officer.

Held: Affirmed. The Court examined the particular facts and found that the evidence was sufficient to demonstrate a conspiracy. The Court pointed out that the defendant immediately drove to a secluded location, never put his vehicle in park, and then lied about what happened in the car when he testified at trial. He also lied about the owe sheet and about his statements to the officer. The Court rejected the argument that the Commonwealth failed to prove what the defendant would receive in exchange for his participation.

Cahoon v. Commonwealth: March 29, 2016

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

Facts: Defendant and his brother carried prescription pills for sale in their vehicle. An officer stopped them and discovered the pills, along with a list of their street values in the defendant's possession, as well as a drug ledger in the brother's possession. The officer learned that both brothers had recently obtained prescriptions for the drugs, but they were each missing 50 pills. After first stating that he had the pills at home, the defendant then said he had consumed them, but neither brother appeared under the influence. Neither defendant had any money.

Held: Affirmed. Concerning the conviction for Possession with Intent, the Court noted that the defendant had a prescription for morphine that was missing fifty pills in just a period of days. Expert testimony established that such a consumption pattern was inconsistent with personal use, and neither

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brother appeared to be under the influence of any substance. The Court ruled that the trial court was entitled to conclude that the defendant neither had abandoned nor misplaced the morphine, since it was valuable property. The defendant's inconsistent stories provided the trial court with additional evidence of his guilt.

Concerning the Conspiracy conviction, the Court found that circumstantial evidence supported the conviction. The evidence was sufficient to allow the trial court to conclude that both brothers lied to the police about their activities, giving rise to an inference of guilt. The defendant, despite possessing no prescription in his name for one of the drugs, possessed a note describing the street value of the drug. The Court wrote that the defendant "offered no innocent explanation for the note, and we cannot think of one."

The Court also noted that, throughout the period of surveillance by the deputy, both brothers repeatedly made furtive glances into the vehicle's mirrors, suggesting that both knew that they had reason to fear being stopped by the deputy.

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DUI/Traffic/Habitual Offender

Virginia Supreme Court

No Cases of Interest to Law Enforcement

Virginia Court of Appeals
Published

Doggett v. Commonwealth: April 12, 2016

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

Facts: During a race with his friend, the defendant's vehicle accidentally struck his friend's vehicle and caused a crash that severely injured a passenger. The race started when the defendant's friend made a forward motion with his hand while their two vehicles were stopped next to each other at the stoplight. During the race, the cars were traveling well over the speed limit and both vehicles made maneuvers in order to get in front of the other car, even when the road narrowed down to one lane of traffic in their direction and that lane was bounded by a double-yellow line.

Held: Affirmed. The Court first noted that, although §46.2-865 does not define the word "race," the plain meaning of the term is "a contest of speed between two or more motor vehicles." The Court found that the evidence was clearly sufficient to demonstrate that a "race" took place.

The Court then turned to the issue of whether the defendant's failure to allow his friend's vehicle to pass him constituted behavior so gross, wanton or culpable so as to show a disregard for human life. In this case, the Court found that the defendant knew or certainly should have known that the roads were wet, that the speed limit was 35 miles per hour, that there was almost no shoulder on the road, that driving fast by itself in those conditions would be quite dangerous, and that racing another vehicle would create a dangerous situation that likely would lead to injury, especially when the drivers were attempting to pass each other in the lane for oncoming traffic.

Finally, the Court addressed the issue of causation. The Court ruled that the language of §46.2-865.1 is consistent with the principle of "proximate causation." The Court then likened this case to the *O'Connell* case and observed that the friend's failure to maintain control was completely foreseeable. In this case, the Court found that that the friend's negligence in hitting the defendant's car does not mean that the friend's negligence was an intervening cause; the defendant was already engaged in racing, had passed the friend, and then sped up to prevent the friend from passing him when the friend was in the lane of oncoming traffic maneuvering to pass appellant.

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Smith v. Commonwealth: May 10, 2016

Portsmouth: Defendant appeals his conviction for Hit & Run on Sufficiency of the Evidence

Facts: Defendant crashed into a building. Police responded and located the defendant nearby, but he denied being the driver. He provided police with his name and all of his contact information. At trial, the defendant argued that he remained at the scene of the crash, provided all the information required and was not required to admit that he had been the driver.

Held: Affirmed. The Court ruled that §46.2-894 requires that a driver involved in an accident identify himself as the driver.

The Court also noted, in a footnote, that the Virginia Supreme Court has already rejected the argument that the statute unlawfully requires the defendant to incriminate himself. The Court cited *Banks*, a 1976 case, and also cited *California v. Byers*, which upheld California's Hit & Run statute against a similar challenge.

Virginia Court of Appeals
Unpublished

Jones v. Commonwealth: June 30, 2015

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

Facts: Defendant fled from an officer into a wooded area in a vehicle. The officer followed at about 25 miles per hour, but because the ground was rocky and uneven, the officer explained that traveling at that speed imperiled his vehicle. At trial, the trial court viewed photos of the area and even traveled to the area to examine it.

Held: Affirmed. The Court reaffirmed that the danger need not be imminent and noted that the speed was excessive for the terrain and although the distance traveled was not great, it was unusually perilous.

Croft v. Commonwealth: June 30, 2015

Montgomery: Defendant appeals his conviction for Driving Revoked, DUI-related, on sufficiency of the evidence.

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Facts: Defendant, convicted of DUI, never applied for his license after the one-year period of suspension ended. Although he had never held a license at all and had numerous other suspensions, he then drove again after the one year period had expired and the trial court convicted him of Driving Revoked, DUI-related under 18.2-272.

Held: Reversed. The Court found that the one-year suspension imposed by 18.2-271 only lasts one year. The Court ruled that, thereafter, he was not driving "during the time for which he was deprived of the right to do so" due to his DUI conviction.

Lillard v. Commonwealth: July 14, 2015

Spotsylvania: Defendant appeals his conviction for Reckless Driving on sufficiency of the evidence.

Facts: Defendant, driving a tractor-trailer in the left lane of I-95, changed lanes and struck another car, sending it into a third car and spinning off the highway. Defendant did not stop. Defendant later claimed that he was unaware that he had struck anyone, denied driving in the left lane, and claimed that he would not have made the maneuver that witnesses claimed he made, because he admitted it would have been dangerous. At trial, the court acquitted the defendant of felony hit and run, but convicted him of reckless driving.

Held: Affirmed. The Court observed that the defendant violated §46.2-803.1 by driving his truck in the left lane and changed lanes in a dangerous manner that was likely to injure others.

Ramos v. Commonwealth: September 22, 2015

Arlington: Defendant appeals his convictions for DUI 2nd offense and Refusal, 2nd offense, on sufficiency of the evidence.

Facts: A local resident came home between 8:00 pm and 8:30 pm and parked on his private driveway. At 10:15, he discovered that the defendant's car was in his driveway and that the defendant was attempting to change one of 2 flat tires. The defendant was visibly intoxicated. The defendant stated that he had hit something and apologized for the car being there. Police responded and arrested the defendant at 11:23 p.m.. They found that the vehicle's engine was still warm. The defendant refused to take a breath test.

At trial, defendant argued that the evidence failed to demonstrate that he was operating a vehicle on a highway and failed to prove that he was arrested within 3 hours of operating the vehicle.

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Held: Affirmed. The Court found that the circumstantial evidence demonstrated that the defendant operated his vehicle on a highway within three hours of his arrest. The Court found the defendant's statement that he "had hit something" demonstrated that he had been driving. He was alone on the scene, was trying to fix the vehicle, and took responsibility for the vehicle.

The Court also rejected the argument that the defendant may have been driving before 8:22 p.m., based upon the fact that the defendant was only beginning to repair the flat tire and the fact that the hood was still warm to the touch.

Rich v. Commonwealth: November 10, 2014

Virginia Beach: Defendant appeals her convictions for DUI maiming on sufficiency of the evidence.

Facts: Defendant, intoxicated, crashed into a man crossing the street in a medical scooter. A witness testified that she saw the man crossing the street erratically, slowed down and let him by, and then drove on, only to see the defendant crash into him a few seconds later. Just after the crash, the defendant told a witness and an officer that she was "just looking down" when it happened. She explained that she leaned over for her boyfriend to light a cigarette for her and took her eyes off the road.

There were no skid marks before the crash. The defendant told the officer that she had only slept for 2 hours the night before.

Held: Affirmed. The Court found the evidence was sufficient, in light of her inattentiveness, consumption of alcohol, and decision to drive without sleep.

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Evidentiary Issues

United States Supreme Court

Ohio v. Clark: June 18, 2015

Certiorari to the Supreme Court of Ohio: Defendant appeals his convictions for child abuse on Sixth Amendment *Crawford* grounds.

Facts: Defendant beat his girlfriend's 3 year old son. The next day, teachers noticed the child's injuries and interviewed the child. The child made several statements implicating the defendant. The trial court admitted testimony by the teachers relating what the 3 year old said, over the defendant's hearsay objection.

Held: Affirmed. The Court noted that the 3 year old was inherently unavailable because he was incompetent to testify. The Court then found that the teachers' primary purpose was not to assist in the defendant's prosecution, and therefore the child's statements were not "testimonial" hearsay. The Court pointed out that the teachers needed to know whether it was safe to return the child at the end of the day, which inherently meant they needed to find out who hurt the child. However, that emergency did not render their primary purpose as a law-enforcement purpose, even though they are "mandatory reporters" under Ohio law. Instead, the Court likened the situation to the 911 call in *Davis.*

The Court also wrote that statements by very young children will rarely, if ever, implicate the Confrontation Clause.

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Legault v. Commonwealth: June 30, 2015

Virginia Beach: Defendant appeals his conviction for Indecent Liberties on refusal to allow evidence of a prior, allegedly false accusation.

Facts: On trial for indecent liberties, the defendant sought to impeach the victim by proving that another pending allegation, in Norfolk, was false. The defendant sought to introduce evidence of the victim's other pending allegation against the defendant, and then introduce evidence that the other pending allegation was false. The evidence consisted of witnesses and physical evidence to prove that, during the time that the victim stated the defendant assaulted him in Norfolk, the defendant was out of state. The trial court refused to allow the cross examination or admit the extrinsic evidence.

Held: Reversed. While the Court agreed that normally, a witness' credibility may not be impeached by showing specific acts of untruthfulness or bad conduct, the Court allowed that in a sex crime case, the complaining witness may be cross-examined about prior false accusations. If the witness denies making the statement, the defense may submit proof of such charges. Although the Court agreed that first, the trial court must make a threshold determination that a reasonable probability of falsity exists, in this case the Court found that the defendant did so.

Bevels v. Commonwealth: October 13, 2015

Fredericksburg: Defendant appeals his conviction for Distribution of Cocaine, 2nd Offense, and Conspiracy to Distribute, on admission of "other crimes" evidence.

Facts: Defendant agreed to sell cocaine to a police informant, who arrived and conducted the transaction with the defendant's girlfriend. The defendant agreed to sell to the informant again, a second time, two days later at the same residence, but this time the defendant's mother conducted the transaction. The Commonwealth only charged the defendant with the first transaction, but used the second transaction as evidence at trial, arguing that it demonstrated a common scheme or plan to conceal his involvement.

Held: Affirmed. The Court found the defendant's scheme sufficiently idiosyncratic to justify the admission of the other transaction. The Court also distinguished the *Rider* and *Boyd* cases, noting that, in this case, the defendant did not personally deliver the drugs and was charged with conspiracy.

Stackfield v. Hampton: December 28, 2015

Hampton: Defendant appeals his conviction for Trespassing on admission of hearsay.

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Facts: Defendant trespassed at a grocery store. At trial, a police officer testified that he responded to the store and spoke to a manager, who stated that he did not want the defendant at the store. The officer then found the defendant, who refused to leave. The manager did not testify at trial. The defendant objected to the officer's testimony regarding the store manager as hearsay, but the trial court overruled the objection.

Held: Reversed. The Court agreed that the manager's statement that the defendant was barred from the property was hearsay under Rule 2:801(a). Therefore, it was error to admit the statement for its truth through the police officer.

Ballard v. Commonwealth: May 3, 2016

Virginia Beach: Defendant appeals his convictions for Credit Card Fraud on admission of hearsay testimony.

Facts: Defendant stole credit cards from two victims and used them. At trial, one of the victims testified about the unauthorized activity on her card. She testified from notes she made from her own bank records and from information provided by the stores. Neither the victim nor the Commonwealth presented the actual records. The defendant objected that the testimony was hearsay, but the trial court overruled the objection.

Held: Reversed. The Court found that the victim's testimony was hearsay. The Court noted that the Commonwealth did not try to move in the bank records themselves or establish that the bank statements that the victim mentioned were business records. The Court also refused to find that the notes were a "present sense impression" that the victim made when she collected the information. Lastly, the Court found that the victim did not have personal knowledge of the transactions and therefore the notes could not constitute a past recollection recorded.

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Jurisdiction/Venue

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Morehead v. Commonwealth: April 19, 2016

Williamsburg/James City County: Defendant appeals his conviction for Unlawful Dissemination of Nude Images on Venue grounds.

Facts: Defendant posted nude images of his wife, from whom he was separated, on the Internet without her consent. Defendant sent the pictures from his home in Virginia Beach and emailed them to his wife, who was in Williamsburg, telling her that he was going to post the images. He also posted them online and posted links to them on Facebook. She received and viewed the images in Williamsburg.

Held: Affirmed. The Court first noted that §18.2-386.2 has its own specific venue provision, which provides: "Venue for a prosecution under this section may lie in the jurisdiction where the unlawful act occurs or where any videographic or still image created by any means whatsoever is produced, reproduced, found, stored, received, or possessed in violation of this section." The Court found that, under the plain language of the code section, Williamsburg was the proper venue. In this case, the defendant maliciously disseminated the images when he posted them on the Internet and he notified the victim about his actions by sending her copies of the images and links to the website, and the venue was proper because the victim received the images in Williamsburg.

The Court also noted that it is entirely likely that there would be multiple, alternative, venues for prosecution under this code section. However, the Court rejected the argument that the very act of receiving the images must, in and of itself, be in violation of the statute. For purposes of establishing venue based on receiving the images, the Commonwealth must simply show that a person received nude images that were disseminated in violation of the code section.

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Williams v. Commonwealth: February 2, 2016

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Norfolk: Defendant appeals his conviction for Obstruction of Justice on venue grounds.

Facts: Prior to trial in Norfolk for violating a protective order, the defendant confronted his wife in Virginia Beach and threatened her with harm if she appeared in court. His wife was the victim of the violation and had been summoned to appear in Norfolk Circuit Court. The Commonwealth indicted the defendant with having obstructed justice in Norfolk.

Held: Reversed. The Court found that, although the witness was to appear specifically in the Norfolk Circuit Court, that fact was irrelevant to proving whether the offense occurred. Code § 19.2-244 provides that venue is proper "in the county or city in which the offense was committed." As the entire offense in the present case was committed in the City of Virginia Beach, the Court ruled that the trial court lacked venue.

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Procedure/Voir Dire/Jury Instructions

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Sufficiency of the Evidence – Miscellaneous Offenses

Virginia Supreme Court

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Stith v. Commonwealth: July 7, 2015

Sussex: Defendant appeals his conviction for Wearing a Mask in Public on sufficiency of the evidence

Facts: Defendant robbed a convenience store while wearing a mask and carrying a gun. The Commonwealth charged robbery, use of a firearm, and feloniously wearing a mask. At the arraignment, the defendant stated that he was 19. The trial took place over a year later. During the trial, the Commonwealth did not present any evidence regarding the defendant's age. At trial, the defendant contended that the evidence was insufficient to prove he was over 16 years of age at the time of the offense. The trial court observed that he was clearly an adult by appearance and that he was being tried as an adult, and therefore had to be over 16 at the time of the offense.

Held: Affirmed. The Court reaffirmed *Jewell* in stating that a trial court is entitled to use physical observations to determine a defendant's age.

The Court explicitly declined to rule on whether the trial court could rely on the defendant's statements at his arraignment about his own age.

Kobman v. Commonwealth: October 27, 2015

Orange: Defendant appeals his convictions for Possession of Child Pornography on sufficiency of the evidence.

Facts: Defendant possessed child pornography. During the execution of a search warrant, the defendant told police that they would find what they were looking for in his computer. Investigators found child pornography in his computer's "recycle bin" and in the computer's "unallocated space." The investigator found the images in the unallocated space using special software that allowed him to retrieve information that was not accessible to the user, although the recycle bin was easily accessible to the defendant.

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Held: Affirmed in part, reversed in part. The Commonwealth conceded that there was not sufficient evidence to convict the defendant using the images in "unallocated space", and the Court agreed, finding that there was no evidence of the defendant's dominion and control over those images. However, the Court found the evidence sufficient to demonstrate that the defendant exercised dominion and control over the images in the recycle bin.

Pelloni v. Commonwealth: February 2, 2016

Portsmouth: Defendant appeals his conviction for Cruelty to Animals on sufficiency of the evidence.

Facts: Defendant was the sole caregiver for several puppies at his residence. Officers responded to a tip and found the puppies starving, emaciated, and surrounded by feces. They discovered one dog, Hannibal, among the others, who had starved to death over the course of 2-3 weeks, while he was infected with parasites that had been in his system for at least two weeks by the time animal control found him. There were no food or water bowls available to any of the puppies.

The defendant told officers that he was responsible for providing food and water for the dogs, but stated that he intentionally did not take the dogs to see a veterinarian because of cost. In particular, he admitted that he knew Hannibal had been sick for at least a week but didn't take him for treatment because he didn't think he could afford it. An expert for the Commonwealth testified that Hannibal's death would easily have been prevented by food, water, and basic care.

At trial, the defendant argued that he did not act "willfully."

Held: Affirmed. The Court noted that "willfully" includes behavior that is inexcusably careless, regardless of whether the act itself is right or wrong. Thus, acts or omissions done with knowledge and consciousness that injury will result constitute "willful" behavior under the statute. The Court then likened this case to cases under the Child Neglect statute, 18.2-371.1, like *Ellis* and *Barrett*. In this case, although the Court agreed that the defendant may not have had the "purpose" of inflicting Hannibal with "pain or inhumane injury," the Court found the evidence was sufficient to demonstrate the defendant "willfully inflicted inhuman injury or pain" on the dog.

Thorne v. Commonwealth: April 19, 2016

Chesapeake: Defendant appeals her conviction for Obstruction of Justice on sufficiency of the evidence.

Facts: An officer stopped the defendant for driving a vehicle with heavily tinted windows. The defendant opened her window about three to four inches to provide her identifying information, but when the officer asked her to lower the window further so that he could test the tint and also see into

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the vehicle for safety reasons, she refused. At trial, the officer testified that he believed that other people were in the vehicle, but he could not see inside because of the tinting.

The officer ordered the defendant out of the vehicle but she refused. Finally, after nine minutes, another officer arrived and the defendant complied by lowering the window. The defendant argued that her refusal to comply was not opposition or resistance by direct action.

Held: Affirmed. While the Court agreed that actions that merely make the officer's duty more difficult do not constitute obstruction, obstruction can include passive behavior. Where the officer seeks to make the defendant act directly and the defendant refuses or fails to act as required, if the obstructive behavior clearly indicates an intention on the part of the defendant to prevent the officer from performing his duty, the evidence proves the offense. The Court likened this case to the *Molinet* case from 2015, and noted that the defendant's refusal to comply in this case completely prevented the officer from completing his investigation for a significant period of time. The Court also rejected the argument that, because she eventually complied, the defendant was not guilty of the offense.

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Callahan v. Commonwealth: October 6, 2015

Loudoun: Defendant appeals his convictions for Possession of an Explosive Device on sufficiency of the evidence and jury instruction issues.

Facts: Defendant detonated a pipe bomb at an empty golf course with his friends. When questioned, the defendant explained that he used powder from fireworks, put the powder in a pipe, inserted a fuse, and sealed the pipe. He claimed he intended to make a "fountain firework," but analysis of the defendant's phone demonstrated he had repeatedly called the device a "bomb." At trial, the defendant argued that he had made a firework, not a bomb. The trial court refused his instruction on possession of illegal fireworks under the Loudoun County Code.

Held: Affirmed. The Court first distinguished an "explosive" under 18.2-85 from a "firework" under 27-95. The Court noted the defendant intended to make a "bomb" according to his texts. The Court found that the trial court, therefore, correctly refused the instruction on "fireworks" because the object was not a firework. The Court held that possession of illegal fireworks is not a lesser-included offense of possession of explosives; it is just a different offense.

Cary v. Commonwealth: October 20, 2015

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Norfolk: Defendant appeals his conviction for disorderly conduct on sufficiency of the evidence.

Facts: Police found the defendant shouting and walking along the road around 1 am, so loudly that people across the road could hear him and the noise drew their attention. When an officer asked the defendant for his name, he faced the officer but he refused to identify himself to the officer. At trial, the defendant argued that he was guilty of Obstruction of Justice, and not Disorderly Conduct.

Held: Affirmed. The Court found that the defendant's actions did not constitute Obstruction, under *Ruckman*. The Court found that the defendant's actions did have the intent to cause public inconvenience, annoyance, or alarm.

Miles v. Commonwealth: November 3, 2015

Richmond: Defendant appeals her conviction for Obstruction of Justice on sufficiency of the evidence.

Facts: Police arrested the defendant's brother for a firearms offense related to a shooting. They responded to the probation office parking lot to seize the defendant's vehicle as part of the investigation. When they did, they noticed the defendant get out of the vehicle and get into a similar vehicle nearby. A detective walked to that vehicle and asked what the vehicle was and the defendant stated that the defendant had been in that vehicle just before his arrest. The detective told the defendant to get out of the vehicle so that he could seize that vehicle as well. The defendant refused repeatedly and locked the doors. The detective then reached into the window to unlock the door, but the defendant closed the window on his arm. Still, the detective was able to open the door, but the defendant refused to exit, so the detective pulled her from the vehicle and arrested her.

At trial, the defendant testified that the detective refused to tell her why she had to get out of the vehicle and that she thought it was unfair that she had to get out of the vehicle.

Held: Affirmed. The Court found that the defendant's conduct constituted direct action calculated to prevent and obstruct the detective's performance of his duties.

Cossitt-Manica v. Commonwealth: November 17, 2015

Powhatan: Defendant appeals her conviction for Perjury on sufficiency of the evidence.

Facts: Defendant testified for her boyfriend at his burglary trial, providing alibi testimony. Later, prosecutors discovered the alibi was false and indicted the defendant for Perjury in violation of 18.2-434. At the defendant's trial, her boyfriend, the burglar, testified that the defendant and he had been together as she had testified, but that he had deliberately convinced her that the dates they had been

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together were different than the true dates. As corroboration evidence, the Commonwealth introduced the burglar's own convictions for burglary, perjury, and inducing another to commit perjury.

Held: Reversed. The Court held that the record lacked sufficient evidence to provide the strong independent corroboration required to support a conviction for perjury. The Court examined the specific statements in the record that the defendant made at the burglar's trial and found that the only evidence of perjury consisted of the burglar's testimony. In the Court's view, the burglar's own convictions were not sufficiently independent to constitute corroboration. In addition, those convictions did not specifically contradict the defendant's testimony at the original trial.

Molinet v. Commonwealth: December 8, 2015

Richmond: Defendant appeals his conviction for Obstruction of Justice on sufficiency of the evidence.

Facts: Officers responded to a call for a fight and found three women at the scene. While one officer spoke to the women, a Sergeant stood nearby to keep people away and keep the area safe. The defendant, who did not know the women, walked up from the street and started to speak to the women. The Sergeant told the defendant to step away, but the defendant refused, and stepped forward in an aggressive and angry manner, telling the Sergeant to "shut the fuck up!" The Sergeant arrested the defendant for Obstruction.

Held: Affirmed. The Court first found that the defendant prevented the Sergeant from performing his duty of keeping the scene safe and keeping the perimeter clear for the other officer. The defendant did more than simply flee or hide or make contradictory statements, but instead caused the Sergeant to focus on the defendant and the threat he posed. The Court then agreed that the defendant intended to obstruct the officers as well.

Ramsey v. Commonwealth: December 29, 2015

Norfolk: Defendant appeals her convictions for Computer Invasion of Privacy on sufficiency of the evidence.

Facts: Defendant, a state trooper, used VCIN to run inquires on 15 individuals, such as her own girlfriend, for personal reasons. At trial, the Commonwealth adduced evidence that the defendant knew that VCIN was for criminal justice purposes only. At trial, the defendant argued that she had authority to get access to the system and therefore was not guilty.

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Held: Affirmed. The Court construed 18.2-152.5(A) in light of 18.2-152.2, which defines the term "without authority." The Court noted that in this case, the defendant knew or should have known that she was acting in a manner that exceeded her right, agreement, or permission to use VCIN. The Court agreed that the evidence demonstrated that the defendant had no authority to examine the information on VCIN for non-criminal justice purposes.

Perry v. Commonwealth: December 29, 2015

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

Facts: Officers arrested the defendant and took him to jail. At the jail, the officer walked the defendant to the entrance, but the defendant took a few steps away and pulled away from the officer and broke from his grasp, although the officer immediately was able to restrain him again.

Held: Affirmed. The Court agreed that the evidence demonstrated that the defendant sought to escape and violated 18.2-479.1 by attempting to do so.

Dunne v. Commonwealth: February 23, 2016

Rockbridge: Defendant appeals her conviction for False Report to Law Enforcement on sufficiency of the evidence.

Facts: Defendant, a cadet at VMI, falsely reported that a police officer sexually assaulted her. The Virginia State Police investigated. The defendant gave a statement to the Special Agent stating that, after she reported that someone stole her wallet, the investigating officer sexually assaulted her by asking her to disrobe and then penetrating her vagina and anus with his fingers. However, that report was false.

At trial, the defendant argued that she had not actually reported a crime and therefore she was not guilty

Held: Affirmed. The Court rejected the argument that the Commonwealth failed to prove that the officer's alleged actions were a crime. The Court agreed that, if the defendant had consented to the officer digitally penetrating her and he had not sought sexual gratification from the act, he might not have been found guilty of a crime. However, the mere fact that the officer may have committed a crime was sufficient. In addition, the fact that the officer's action would have been a violation of Federal Law, in this case, Unlawful Deprivation of Civil Rights in violation of 18 U.S.C. 242, was also sufficient to demonstrate the offense.

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The Court also found that the defendant's initial statement to a civilian was a "report" under the statute. In addition, the Court found her statement to the State Police investigator was also a report.

Brockington v. Commonwealth: April 19, 2016

Henrico: Defendant appeals his conviction for Failure to Register as a Sex Offender on sufficiency of the evidence.

Facts: Defendant, a sex offender, failed to submit his registration form on time. The State Police sent the defendant's re-registration form by registered and certified mail to his verified address prior to the re-registration date of September 1, 2014. The defendant was at his address at all times relevant to the case and he did nothing to obstruct the delivery of the form. The defendant knew that his form had not arrived and inquired with both his federal probation officer and his state compliance officer about what he should do to remain compliant with the Registry.

Prior to a warrant and investigation by the VSP for the defendant's reregistration paperwork, on September 16, 2014, the defendant went to the VSP headquarters and filled out a secondary registration form, because he knew that he had not received his form and that he must re-register with the VSP.

Held: Affirmed. The Court first reaffirmed that this offense is a general intent crime, rather than a specific intent crime. Therefore, an accused 'knowingly fails to register or reregister' in violation of the statute if he has knowledge of the fact that he has a duty to register or re-register, but does not do so. The Court rejected the argument that the VSP's failure to send the letter in compliance with §9.1-904 vitiated the defendant's obligation to register.

The Court found that, although the defendant acted to remedy the situation by proactively executing an alternative form at VSP Headquarters, it is "clear that the General Assembly intended this particular statute to be draconian in application and it simply permits no room for any error on the part of those obligated to register as a sex offender." Therefore, the defendant was in violation as of September 1, 2014.

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