Selected Appellate Decisions for Law Enforcement Officers

June 1, 2015– June 1, 2016

- **U. S. Supreme Court**
- **Virginia Supreme Court**
- **Virginia Court of Appeals**

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Please refer to

2016 Appellate Update Master List

for a complete listing of new cases
of interest to law enforcement officers.

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Topics for Presentation

- Fourth Amendment
- Fifth Amendment
- Crimes Against Persons & Domestic Violence
- Crimes Against Property
- Drug & Gun Offenses
- DUI, Traffic, and Habitual Offender Offenses
- Evidentiary Issues
- Jurisdiction & Venue
- Miscellaneous Offenses

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New Cases on Search & Seizure

FOURTH AMENDMENT

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GPS Installation: *Timing*

- If you have a GPS search warrant under 19.2-56.2, you do not need to have a new search warrant to remove and re-install the GPS during the 30-day period.
- The removal and re-attachment of the GPS tracking device is a single, continuing search that was authorized by the warrant during the 30-day period.
  - *Turner v. Commonwealth*, Va. Ct. App. (October 27, 2015)

Historical Cellsite Data

- *U.S. v. Graham*, 4th Circuit (May 31, 2016)
  - Sitting *en banc*, the Court reverses a 4th Circuit Panel ruling from August 2015
- Held: the Government's acquisition of historical cell-site location data (CLSI) from defendants' cell phone provider using a lawful court order did not violate the Fourth Amendment.

Graham's significance

- Court: The defendants did not have a reasonable expectation of privacy in their phone records, since users voluntarily share their data and clearly know that their cellphone provider is aware of and is monitoring their location.
- Note: Federal & Virginia Law still require that you use legal process to obtain these records.

Consent: Hotel Rooms

- *White v. Commonwealth*, Va. Ct. App. (May 10, 2016)
- Police responded to an anonymous tip that defendant was selling drugs.
- Police approached the defendant and he gave them consent to search his person.
- An officer patted the defendant down and 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.

Officers Visit Hotel

- 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: Heroin in Sock Admissible

- Even if the defendant withdrew that consent in the course of the search, probable cause supported the seizure of the drugs from the defendant's sock.
- The Court found that the totality of the facts, including the defendant's resistance, gave the officer probable cause to seize the drugs.

Held: Cocaine in Hotel Inadmissible

- The defendant established a reasonable expectation of privacy in the bag.
- The Commonwealth failed to prove that the girlfriend had actual or apparent authority to consent to a search of the bag.
- Even if the defendant did not have an expectation of privacy in the hotel room, the evidence demonstrated the bag belonged to the defendant.
- No evidence demonstrated that the girlfriend had any possessory interest in the bag.
- Defendant did not abandon his interest in the bag by leaving it in the motel room.

Consent: *Non-Verbal*

- *Hawkins v. Commonwealth*, Va. Ct. App. (August 5, 2015)
- Five officers walked up to the defendant on the street.
- Their conversation was casual 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, a felon, had a firearm.

Court: Affirmed

- The Court found that the defendant's non-verbal response to the officer's request invited the officers to lift his shirt.
- After his arrest, the defendant stated that he didn't want to startle the officers with the gun, so he let the officers remove the firearm on purpose.
- The defendant's later statement to the officer confirmed that the encounter was consensual.

Consent: Probation Searches

- *McLaughlin v. Commonwealth*, Va. Ct. App. (November 17, 2015)
- On probation, defendant signed an agreement that gave his probation officer permission to visit his home.
- During a transfer investigation, the P.O. visited defendant's home, but appeared that defendant did not live there.
- The P.O. asked the resident if he could examine the defendant's bedroom. The resident agreed. The resident was not on the lease, but appeared to be in control of the premises.
- In plain view, the P.O. observed the defendant's belongings along with a handgun.

Court: Affirmed

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

Fourth Amendment

REASONABLE SUSPICION

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Reasonable Suspicion: Anonymous Tips

- *Commonwealth v. Gaiters*, Va. Ct. App. (March 22, 2016)
- 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.

Held: Stop was Lawful

- The trial court had granted a motion to suppress, finding that the officer lacked reasonable suspicion for the detention
- The Commonwealth appealed
- *Held:* Stop was lawful
- 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.

Reasonable Suspicion: Informant's Tip

- *Barrett v. Commonwealth*, Va. Ct. App. (October 6, 2015)
- Confidential, reliable informant tells police that the defendant has been receiving marijuana for distribution.
- Police watch 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.

Police Stop Suspect

- Police watch defendant collect a bag under extremely suspicious circumstances at the airport and watch him conduct a transaction involving apparent marijuana with a known drug dealer.
- Police observe him repeatedly meet a woman who was apparently delivering something to him at the airport.
- Police watch 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: Evidence Admissible

- 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.
- Proper to rely on the tip once the officers corroborated the tip.

Reasonable Suspicion: Dangling Objects

- *Mason v. Commonwealth*, Va. Supreme Court (May 5, 2016)
- Officer stopped the defendant for driving with a "dangling object", a 3"x 5" parking pass.
- Officer finds drugs in the car.
- Defendant appeals and Court of Appeals reversed the conviction.
- Commonwealth appeals to the Virginia Supreme Court.

Court: Stop Was Lawful

- Court: 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 statute protects public safety and has an important goal.
- Here, 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 sufficiently demonstrated that it might have violated the statute.

Reasonable Suspicion: Dangling Objects

- *Freeman v. Commonwealth*, Va. Ct. App. (November 17, 2015)
- Officers observed defendant driving with multiple objects dangling from the rearview mirror.
- They stopped the defendant and located drugs and a 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: Stop was Lawful

- 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.
- 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.

Reasonable Suspicion: Flight

- *Malone v. Commonwealth*, Va. Ct. App. (December 8, 2015)
- Police, on patrol and asked to enforce "no trespassing" signs at a motel in a "high crime area", approached the defendant.
- 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.

Held: Stop was Lawful

- Police 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.
- By capturing him, Officers simply restored the defendant to the "status quo", before he fled.

Reasonable Suspicion: Inspection Sticker

- *Diggs v. Commonwealth*, Va. Ct. App. (December 8, 2015)
- An officer saw the defendant driving and noticed that his 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 marijuana, learned the defendant was suspended, and found marijuana.

Held: Stop was Lawful

- 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.
- Court found the evidence was sufficient reasonable suspicion for a traffic stop.

Reasonable Suspicion: Loud Music

- *Commonwealth v. Collins*, Va. Ct. App. (December 22, 2015)
- 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.

Appeal

- 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.
- The Commonwealth appealed
- Court: Stop was lawful.
  - The officer did not need proof that the defendant was *actually* in violation of the ordinance, only reasonable suspicion.

Arrest v. Detention

- *Osman v. Commonwealth*, Va. Ct. App. (December 15, 2015)
- Officer hears loud “bang” and sees the defendant 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.

Officer Investigates

- 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.
- Defendant argued the officer lacked reasonable suspicion to stop him and lacked probable cause to arrest him.

Court: Affirmed

- It was objectively reasonable for the officer to conclude that the defendant may have been driving under the influence.
- The defendant was not "under arrest" simply because the officer pulled him out of the vehicle and put handcuffs on him.
- Once the investigation was complete, the officer had probable cause to arrest the defendant.
- The defendant's refusal to take a breathalyzer was relevant to probable cause, as was his driving, attitude, and behavior.

Reasonable Suspicion: Pat-Down

- *Fitzgerald v. Commonwealth*, Va. Ct. App. (November 10, 2014)
- Officers walked up to and spoke to the defendant, 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.
- Defendant struggled and fought the officer. The officer subdued the defendant and recovered the handgun.
- Defendant was a felon.

Held: Evidence Admissible

- 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.

Pat-Down Was Lawful

- The Court rejected the defendant's complaint that the officer "manipulated" the weapon unlawfully.
- *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."

"Extending a Stop": Applying *Rodriguez v. United States*

- *Matthews v. Commonwealth*, Va. Ct. App. (November 3, 2015)
- Officer stopped defendant for Dangling Object, and gave him a warning ticket.
- During the stop, the officer engaged in a brief conversation with the defendant about his criminal history and tattoos, which were unrelated to the stop.
- During that conversation, the defendant consented to a search of the vehicle
- Officers discovered drugs.

Held: Evidence Obtained Unlawfully

- The Officer "did not have a reasonable articulable suspicion that Matthews possessed illegal drugs to justify the extension of the stop by inquiring into his criminal record, discussing his tattoos, and requesting a K-9 unit."
- Because the "detention exceeded the time reasonably necessary to address the dangling object traffic violation, the seizure violated the Fourth Amendment and consequently invalidated Matthews's consent to the search"

But...

- The officer's "delay in completing the traffic stop violated the Fourth Amendment and consequently invalidated Matthews's consent to search the vehicle."
  - BUT: Since the stop pre-dated *Rodriguez v. United States*, U.S. Supreme Court *(April, 2015)* the Court refused to exclude the evidence.
  - The Court decided it would only apply *Rodriguez* to cases that took place after April, 2015.

Fourth Amendment & Probable Cause

WARRANTLESS SEARCHES

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Search Incident to Arrest

- *Brown v. Commonwealth*, Va. Ct. App. (January 26, 2016)
- Officers noticed defendant in a high-crime area while patrolling a housing complex marked "No Trespassing."
- Defendant claimed he was visiting someone, but admitted that he did not live at the complex.
- The signs provided no exceptions under which non-residents were permitted on the property.
- Defendant 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 a firearm; defendant was a felon.

Trial Court: Stop was Unlawful

- 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.
- Commonwealth appealed

Held: Stop was Lawful

- 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 "No Trespassing" signs did not need to say whether or not they applied to people who are visiting people who are residents.

Automobile Exception: Plain Smell

- *Burton v. Commonwealth*, Va. Ct. App. (September 22, 2015)
- At a rest stop, 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: Search was Lawful

- Officers have the authority to search a vehicle when they smell the odor of marijuana from a vehicle.
- Officers always have the authority to order a driver or passenger from a car at any time for any reason during a lawful detention of the driver or vehicle.

Search Incident to Arrest

- *Purvis v. Commonwealth*, Va. Ct. App. (February 23, 2016)
- Officers stop defendant for traffic offense and learn he is 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: Evidence Admissible

- 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.
- 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.

Held: Consent Valid

- 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.

Exigent Circumstances: *Marijuana*

- *Evans v. Commonwealth*, Va. Supreme Court, September 17, 2015
- 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 Force Entry

- Officers knocked again, but there was no answer for five minutes, although they heard noises of 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.

Court: Entry Lawful

- The officers were entitled to enter because they had probable cause along with exigent circumstances
- 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.

Exigent Circumstances: *Stolen Property*

- *Collins v. Commonwealth*, Ct. of App. (July 21, 2015)
- Police observe someone fleeing on a stolen motorcycle twice in two months
- Police learn the defendant had recently purchased that motorcycle and find a photo of it at his house on his Facebook page
- Police confront the defendant about the motorcycle, but he denies owning it or riding any motorcycles for months.

Police Investigate

- Within an hour of the interview, 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.

Court: Search Was Lawful

- Court: The officer had probable cause and an exigent circumstance that permitted him to examine the motorcycle.
- The vehicle was readily mobile, and had eluded the police repeatedly in the prior months.
- 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.
  - Note: The Court declined to find that the *Carroll* doctrine applies universally on private property.

Protective Sweep

- *Gonzalez v. Commonwealth*, Va. Ct. App. (April 5, 2016)
- Defendant assaulted his wife.
- Police met his wife at the hospital, where she told police that the defendant had drugs and a gun at 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.

Officers Conduct Protective Sweep

- 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, the officer 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.

Held: Sweep was Unlawful

- Defendant gave consent to enter the home, but only for the limited purpose of retrieving his shoes, and therefore the entry was limited to areas where 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 is in the house that poses a danger to the officers.
- However, there was no evidence 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.

Inventory Search: *Policy*

- *Commonwealth v. Hocutt*, Va. Ct. App. (June 23, 2015)
- Defendant, stopped for a traffic violation, parked his car in a marked parking spot in a convenience store parking lot on a Tuesday morning.
- Defendant was suspended, without notice, for failure to have insurance.
- Department policy did not call for towing, but the officer impounded the car because "it was unsafe to drive without insurance."
- The officer then found heroin in the car which the defendant admitted was his.

Held: Evidence Suppressed

- Department policy did not permit towing in this case.
- 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 have allowed 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 could have had the vehicle towed at his own expense.
  - There was no risk to the defendant's property, 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.

Inventory Search: *Policy*

- *Cantrell v. Commonwealth*, Va. Ct. App. (July 28, 2015)
- Police arrested 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.
- When the officer 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, the officer searched the cab and found Oxycodone, Methamphetamine, and Cocaine.

Court: Conviction Reversed

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

Community Caretaker: Victim ID

- *Spaulding v. Commonwealth*, Va. Ct. App. (February 9, 2016)
- Someone shot defendant.
- Police and paramedics responded and transported him to the hospital in an ambulance.
- Inside the ambulance, paramedics removed the defendant's pants and handed them to the officer, who searched them for identification and found cocaine.
- The defendant was conscious at the time.

Held: Evidence Inadmissible

- 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.
- There was no lawful reason for the search.

Hotel Records: Require Legal Process OR Consent to Obtain

- U.S. Supreme Court: *City of Los Angeles v. Patel* (June 22, 2015)
- Inspection of a hotel registry is a "search" under the Fourth Amendment and therefore requires some sort of legal process.
  - Struck down L.A. ordinance that penalized a hotel owner for not providing records, without affording them an opportunity for "pre-compliance review" before a neutral decision-maker.
  - Court did not find "probable cause" was necessary.

Patel Impact

- In Virginia, we do not have a statute that *requires* hotel operators to produce records to law enforcement.
- The records belong to the hotel, not to the guests, so it is the hotel that may either consent to sharing the records or demand that law enforcement get legal process.

Use of Taser Under 4th Amendment

- *Armstrong v. Pinehurst*: 4th Circuit (January 11, 2016)
- A doctor issued an involuntary commitment order against Armstrong, 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 Armstrong was a danger to himself, but did not find that he was a danger to others.

Police Find Armstrong

- Police found Armstrong near the hospital, walking away.
- He was calm and cooperative, but was also eating grass and gauze and putting cigarettes out on his tongue.
- he was standing a few feet from an active roadway and wandered into traffic a few times.
- 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.

Use of the Taser

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

But Then...

- The officers continued to struggle with Armstrong, who kicked at them while they handcuffed him.
- However, he soon stopped moving or breathing at all, and a few minutes later he died.
- Armstrong'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.

Court: Use of Force Unlawful

- The Court noted that there was no crime at issue at all.
- 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.

No Evidence of Threat

- The Court also observed that the commitment order only declared Armstrong to be a danger to himself, not to 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.

Some Force Was Authorized

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

But NOT Liable in this Case

- The Court agreed that, prior to this ruling, the officers did not have sufficiently clear guidance to forfeit their qualified immunity in this case
- Since that holding was not "clearly established" at the time of the use of force, the officers were entitled to qualified immunity

Caution:

- "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."

Interviews & Interrogations

FIFTH AMENDMENT

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"Interrogation" Defined

- *Smith v. Commonwealth*, Va. Ct. App. (October 13, 2015)
- Police, investigating a robbery, locate defendant, detain him, handcuff him, and place 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.
- In response, the defendant stated he had been driving the vehicle that evening, at the time of the robbery.

Held: Statement Admissible

- The Court ruled that the detective did not "interrogate" the defendant and therefore did not need to read *Miranda* warnings.
- The detective's statements were merely logistical and not a question designed to elicit an incriminating response.

Miranda: Invocation of Right to Remain Silent

- *Wilson v. Commonwealth*, Va. Ct. App. (November 3, 2015)
- Defendant, drunk, wrecked his car.
- Police asked the defendant about the crash, but he said he didn't want to talk.
- At the hospital, police 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."

Held: Statements Admissible

- The Court rejected defendant's argument that he had invoked his right to remain silent.
- A suspect cannot invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation.
- Defendant was not in custody until after the trooper arrested him, and therefore he could not preemptively invoke his right to remain silent.
- His statement about "flipping" his jeep was not in response to interrogation; instead, it was a spontaneous utterance.

Miranda: Invocation of Right to Remain Silent

- *Johnson v. Commonwealth*, Va. Ct. App. (January 12, 2016)
- Police stopped defendant and found drugs in his car.
- The officer arrested the defendant and read *Miranda*.
- 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 ended the conversation, but informed the defendant that, if he changed his mind, he could talk later.
- The defendant 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.

Held: Statements Admissible

- A defendant's invocation of his right to remain silent must be sufficiently unambiguous under the circumstances to preclude further questioning by law enforcement.
- 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.

Invocation & Subsequent Questioning

- *Commonwealth v. Malick*, Va. Ct. App. (March 22, 2016)
- 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.

Conversation Continues

- As they drove the defendant to a location to collect the evidence, they spoke to the defendant generally about his experiences when he was living in Virginia Beach, the place of the murder.
- In the conversation, the defendant made several incriminating statements about the victim.

Held: Statements Inadmissible

- 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.
- "Interrogation" can include statements that are the functional equivalent of interrogation, even though the questions are not direct questions.
- The Court found that the Commonwealth had failed to carry its burden to demonstrate the evidence was admissible.

Waiver of Right

- *Overbey v. Commonwealth*, Va. Ct. App. (December 15, 2015)
- 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.
- The defendant stated he did not want to make any statements, but 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.

Defendant's Statements at Jail

- At the detention center, when an officer 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 officer 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."

Defendant's Statements - Next Day

- 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: Statements Admissible

- The defendant re-initiated conversations with the officers after invoking his right to counsel.
- Officers carefully respected his invocation of his right to counsel and did not engage in any coercive behavior.
- The defendant clearly understood his rights.

Crimes Against Persons

VIOLENT & DOMESTIC OFFENSES

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Murder: Self-Defense

- Defendant killed his wife by beating her to death after she asked him for a divorce.
- 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.

Held: Defendant Not Entitled to Instruct Jury on Self-Defense

- 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.
- *Cheatham v. Commonwealth*, Va. Ct. App. (February 16, 2016)

Attempted Capital Murder of a Police Officer

- *Williams v. Commonwealth*, Va. Ct. App. (November 10, 2014)
- Defendant, intoxicated and riding a horse, shot at police while cursing at them.
- Held: Conviction Affirmed.
- Evidence sufficiently demonstrated he had the intent to kill the police, since a natural consequence of shooting a gun repeatedly at people in their direction is to kill them.

Malicious Wounding

- *Conway v. Commonwealth*, Va. Ct. App. (June 2, 2015)
- Defendant beat the victim with his fists, causing swelling below the victim's eyes, hemorrhages in both eyes, and caused victim to not be able to move one eye.
- Court: Conviction Affirmed.
- The word "wound" requires a breaking or breaching of the skin, but a wound need not be external. Internal wounds are sufficient.
  - Attack with fists is sufficient
  - Note: "Wound" is different than "bodily injury"

Strangulation: Two Cases

- *Chilton v. C/w* (11/12/15)
- Defendant placed his hands on victim's neck.
- She "saw black" when she closed her eyes, but did not lose consciousness.
- His hands were on the general area of her neck.
- The victim did not otherwise appear to suffer any injury.
- *Conviction REVERSED*

- *Ricks v. C/w* (11/12/15)
- Defendant held victim down by the neck.
- She could not breathe for several seconds until he kicked her away. Defendant cut off her breathing completely.
- Defendant told her he was going to leave her for dead.
- Victim could not call for help because she could not speak; her voice did not come back until days later.
- *Conviction AFFIRMED*

Court's Explanation

- "Bodily injury" under § 18.2-51.6 is any bodily injury whatsoever.
- Definition 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 law does not require observable wounds, cuts, or breaking of the skin.

Attempted Robbery

- *Howard v. Commonwealth*, Va. Ct. App. (July 21, 2015)
- 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.
- *Held:* Attempted Robbery Conviction Affirmed
- Victim perceived that the defendant was trying to rob him.
  - An explicit demand for property is not required so long as it can be inferred.

Violation of Protective Order

- *Lee v. Commonwealth*, Va. Ct. App. (July 28, 2015)
- Protective order prevented defendant from having any contact with, or being within 1000 feet of, the victim.
- Victim saw the defendant's car in the parking lot of the shopping center where she was picking up her child, within 1,000 feet of where she was parked.
- Victim left the parking lot and saw defendant's vehicle in front of her at a stoplight.
- 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.

Held: Conviction Affirmed

- Evidence was 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.

Rape: Physical Helplessness

- *Quisque v. Commonwealth*, Va. Ct. App. (February 23, 2016)
- Defendant raped a woman with whom he had been drinking after she fell asleep. When she awoke, she struck him and he fled.
- Defendant claimed that he thought that victim was his girlfriend.
- Court: *Conviction Affirmed*.
  - States of sleep can be more or less debilitating, and in this case the evidence sufficiently demonstrated the victim was physically helpless

Sexual Assault

- *Harrison v. Commonwealth*, Va. Ct. App. (October 13, 2015)
- Defendant and victim had exchange 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 refused and told him no.
- Defendant forcibly removed her clothes, object-sexually penetrated her and sodomized her, despite her telling him "no" and hitting him.
- She told the defendant to leave and he left.

Defense at Trial

- At trial, 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 he claimed she expressed interest in that.
- The defendant claimed that he suffered from Asperger's, which prevented him from reading subtle social cues.

Held: Convictions Affirmed

- The victim's refusal was not a "subtle social cue", but a clear statement.
- The Court refused to find that the victim's previous statements or actions invited an assault on her person.

Domestic Assault & Battery

- *Spitler v. Commonwealth*, Va. Ct. App. (December 15, 2015)
- 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.

Court: Conviction Affirmed

- The Court observed that victims of domestic violence are naturally reluctant to testify.
- The Court agreed that the trauma that the victim suffered may explain the tenor of her testimony.

Child Victims

CRIMES AGAINST CHILDREN

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Indecent Liberties

- *Jackson v. Commonwealth*, Va. Ct. App. (March 1, 2016)
- Defendant, 46 years old, visited a child at her 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 girl to go to the vehicle.
- The defendant stated that he wanted the victim to "sit on his face."
- The child heard that statement from a few feet away.

Court: Evidence Sufficient

- 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
- The evidence proved that defendant invited the victim to enter his vehicle for purpose of engaging in sexual activity.

Indecent Liberties: Force

- *Le v. Commonwealth*, Va. Ct. App. (July 28, 2015)
- Defendant sexually abused a child who was his martial arts student for many years, repeatedly having sexual intercourse with her.
- *Held*: Proof of sexual intercourse is sufficient to prove a conviction for §18.2-370.1.
- The Court rejected the argument that "Sexual Abuse" under §18.2-67.10(6)(a) requires proof of force.

Indecent Liberties: Custody

- *Taylor v. Commonwealth*, Va. Ct. App. (December 8, 2015)
- 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: Conviction Affirmed

- Defendant was acting “in the nature of a baby-sitter” at the time of the assault.
- The Court also noted that one can assume custody or care of a child through a course of conduct.

Internet Solicitation

- *Dietz v. Commonwealth*, Va. Ct. App. (May 3, 2016)
- Defendant, a school teacher, began texting with an 11-year-old boy in her class.
- While police posed as the child, the defendant asked the child if he had ever seen a woman's "boobs" before.
- She then sent pictures of herself in the bathtub, including a photo of the upper portion of her breasts.
- She also sent a picture of her lips while formed in a kiss, and then told him to delete the photos and hide her contact information from his parents.

Conviction Affirmed

- The Court 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 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.

Abuse & Neglect: Drugs & Guns

- *Wiggins v. Commonwealth*, Va. Ct. App. (April 26, 2016)
- Police execute a search warrant at the defendant's residence while he and his son were in the home.
- Police find 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.

Court: Abuse & Neglect Conviction Reversed

- 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.
- Evidence merely showed that the child was in a home with two loaded firearms.
  - No 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.
  - 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.

Contributing to the Delinquency

- *Brown v. Commonwealth*, Va. Ct. App. (July 21, 2015)
- Defendant and his girlfriend rented a hotel room.
- Hotel staff found the defendant's 2 year-old son in diapers wandering outside the hotel.
- Police responded and found the hotel room empty, full of drug residue and paraphernalia, and the tub full of water.
- Defendant and his girlfriend 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.

Court: Conviction 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.

Involuntary Manslaughter By Neglect

- *Artis v. Commonwealth*, Va. Ct. App. (June 2, 2015)
- Defendant's 2 year-old daughter accidentally ingested Suboxone.
- As soon as she discovered it, the defendant began to attempt to help the child, notified poison control and took the child to the hospital.
- After several hours, the hospital discharged the child, with instructions noting that the ingestion was "nontoxic" and was "not likely to 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."

Child's Death

- 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.
- Trial Court convicted the defendant of Involuntary Manslaughter

Held: Conviction Reversed

- The defendant was entitled to rely on the hospital's assurances
- Evidence not sufficient to show 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.

Assault & Battery – School Employees

- *Lambert v. Commonwealth*, Va. Ct. App. (December 22, 2015)
- 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.

Trial Court Ruling

- 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.

Court: Conviction Reversed

- 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, requires that a trial court give "due deference" to "reasonable judgments" made by the employee.
- The trial court improperly substituted the School Board's standards of conduct for the standards contained in the statute.
- The defendant was clearly acting as an employee in the scope of her duties at the time of the offense.
- The trial court failed to give due deference to the defendant by accounting for her mistaken impression that the student had abandoned her backpack and coat.

Larceny, Fraud, and Property Offenses

PROPERTY CRIMES

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Attempted Arson

- *Wilson v. Commonwealth*, Va. Ct. App. (February 9, 2016)
- 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.

Conviction Affirmed

- The Court addressed the meaning of the word "storehouse" and noted that it was different than "structure" under the Burglary statute.
- Court: 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 country store in this case was a "storehouse" under 18.2-79.

Burglary

- *Alston v. Commonwealth*, Va. Ct. App. (June 30, 2015)
- Defendant fled from police 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.

Court: Conviction Affirmed

- Defendant's Argument: 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.
- Court: Evidence demonstrated 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, he also possessed the intent to assault her upon entering the home.

Breaking & Entering

- *Beck v. Commonwealth*, Va. Ct. App. (April 26, 2016)
- 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 and the landlord shared a common utility room and garage between the residences.
- The defendant did not have permission to enter the landlord's residence, but the landlord had invited him over a few times.

Court: Burglary Conviction Affirmed

- A breaking must be *into* a dwelling, rather than *within* the dwelling.
- However, 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.
- The evidence demonstrated that the living quarters and the apartment were separate dwellings and that the garage and utility room constituted common areas.

Attempted Burglary

- *Henderson v. Commonwealth*, Va. Ct. App. (December 15, 2015)
- 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.
- The police arrived and the defendant fled.
- Police captured him carrying a baseball bat nearby.

Held: Conviction Affirmed

- 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.
- By smashing the windows, the defendant committed a sufficiently overt act to be convicted of attempt.

Burglary Tools

- *Simmons v. Commonwealth*, Va. Ct. App. (December 15, 2015)
- Defendant stole property from a store.
- Police recovered the items, none of which showed any signs of tampering.
- Defendant carried a hidden X-acto knife, which the defendant claimed he found on the ground.
- *Court:* Conviction Affirmed.
  - Evidence demonstrated defendant possessed the hobby knife with the intent to use it to commit a theft.

Grand Larceny: Family Property

- *Russell v. Commonwealth*, Va. Ct. App. (November 24, 2015)
- Defendant and his sisters jointly inherited a house and its furnishings from their mother
- 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: Conviction Reversed

- 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.

Embezzlement & False Pretense

- *Holt v. Commonwealth*, Va. Ct. App. (April 12, 2016)
- 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.

Theft of Truck

- 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.
- Trial court convicted defendant of Embezzlement & Larceny by False Pretense.

Court Ruling

- **<u>Guilty of Larceny by False Pretense</u>**
- Defendant never intended a romantic relationship.
- Defendant took advantage of the victim's relative youth and inexperience to obtain financial support.
- By reclaiming the title at DMV, the defendant demonstrated that she lied to the victim when she told him that she would sell him the truck.
- The defendant's statement that the vehicle was for sale was, itself, a false representation, since she had no intention of selling it.

- **<u>NOT Guilty of Embezzlement</u>**
- The truck was not entrusted to her care at the time that her ex-boyfriend took the vehicle.
- The vehicle was titled to and in the custody and control of the victim, even when the defendant obtained the fraudulent replacement title.

Larceny by False Pretense

- *Reid v. Commonwealth*, Va. Ct. App. (February 2, 2016)
- Defendant defrauded two victims using the same scheme: He told the victims 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 victims drove him to an ATM, gave him money, and then drove him to a residence, where the defendant disappeared

Convictions Affirmed

- 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.

Larceny by False Pretense

- *Cummings v. Commonwealth*, Va. Ct. App. (November 10, 2015)
- 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.
- *Held*: "Permission to build a swimming pool" is not property under 18.2-178.
- However, the defendant received a permit, which can be the subject of a larceny, so evidence was sufficient.

Construction Fraud

- *Bowman v. Commonwealth*, Va. Supreme Court (October 29, 2015)
- 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.

Held: Conviction Reversed

- 18.2-200.1 requires a 15-day notice letter
- 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).
- The evidence was insufficient to demonstrate the contents of the letter.

Failure to Return Rental Property

- *Outsey v. Commonwealth*, Va. Ct. App. (December 8, 2015)
- 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: Conviction Affirmed

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

Forgery of Public Record

- *Moreno v. Commonwealth*, Va. Ct. App. (August 11, 2015)
- Prior to trial for A&B, defendant handed a handwritten letter that purported to be from the victim to the Judge and the Commonwealth's Attorney.
- 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 as an "Accord & Satisfaction."
- The letter was a forgery.

Held: Conviction Affirmed

- The purported "accord and satisfaction" was a public record for purposes of Va. Code §18.2-168.
- The term "public record" is defined by §42.1-77.
- The letter was written regarding a transaction by or with a governmental actor, in this case, the General District Court.

DRUG & GUN OFFENSES

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Conspiracy to Distribute

- *Livingston v. Commonwealth*, Va. Ct. App. (March 29, 2016)
- Defendant was the driver while his passenger sold drugs to informant during a "buy-bust."
- Police found an "owe-sheet" in plain view in the center console and their "buy-money" in the passenger's possession.
- Court: Evidence sufficient when, during controlled buy, 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.

Conspiracy to Distribute

- *Cahoon v. Commonwealth*, Va. Ct. App. (March 29, 2016)
- Police stop defendant and his brother in their car.
- Police discover a large amount of pills in the car, along with a list of their street values and a drug ledger.
- 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: Evidence Sufficient

- 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: the defendant "offered no innocent explanation for the note, and we cannot think of one."

Possession: Knowledge

- *Stallings v. Commonwealth*, Va. Ct. App. (November 10, 2014)
- 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 he could lawfully possess the pills, which he claimed belonged to his uncle.

Held: Evidence Sufficient

- The Commonwealth must prove that the defendant knew that the substance he possessed was a controlled substance,
- The Commonwealth does NOT need to prove that the defendant knew *what* controlled substance he possessed.
- The evidence demonstrated that the defendant knew that he possessed drugs that were not lawful to possess.

Constructive Possession

- *Moore v. Commonwealth*, Va. Ct. App. (November 24, 2014)
- Defendant stole property from a store and left in a car driven by another man in that man's sister's car.
- Police stopped the car and the defendant surrendered the stolen items.
- Police found a small quantity of cocaine and marijuana under the defendant's seat.

Held: Conviction Reversed

- 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.
- Additional facts that might point to knowledge of the presence of illegal drugs include: furtive movements, odors, and false statements.

Concealed Weapon

- *Williams v. Commonwealth*, Va. Ct. App. (December 8, 2015)
- 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 and the way the coat hung off him.
- The defendant crashed and EMTs loaded him into an ambulance, where the long coat covered his firearm.
- He did not tell the EMTs or an investigating officer that he had a handgun on his person.

Held: Conviction Affirmed

- The defendant only revealed the firearm when asked by a police officer if he had a gun.
- Defendant explained that he tried to keep the gun visible but could not because of the coat.
- Court: 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.

Possession of Firearm by Felon

- *Hampton v. Commonwealth*, Va. Ct. App. (November 17, 2014)
- Witness testified that defendant, a felon, had 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 going to shoot her with the gun.
- Another witness testified that the gun looked like an assault rifle.
- Both witnesses were familiar with guns.

Held: Evidence Sufficient

- At trial, the defendant testified that the object was merely a BB gun.
- The Court agreed that the circumstantial evidence was sufficient to conclude the object was a real firearm.

DUI & TRAFFIC OFFENSES

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DUI Maiming

- *Rich v. Commonwealth*, Va. Ct. App. (November 10, 2015)
- Defendant, intoxicated, crashed into a man crossing the street.
- 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, leaning over for her boyfriend to light a cigarette for her.

Held: Conviction Affirmed

- There were no skid marks before the crash.
- The defendant told the officer that she had only slept for 2 hours the night before.
- The evidence was sufficient, in light of her inattentiveness, consumption of alcohol, and decision to drive without sleep.

Felony Racing

- *Doggett v. Commonwealth*, Va. Ct. App. (April 12, 2016)
- Defendant and his friend begin a race 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 speeding cars both maneuvered around the double-yellow line to get in front, even when the road narrowed down to one lane of traffic.
- Defendant accidentally struck his friend's vehicle, which crashed, severely injuring a passenger.

Held: Conviction Affirmed

- The plain meaning of “race” is “a contest of speed between two or more motor vehicles.”
- The evidence was clearly sufficient to demonstrate a “race”.
- 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.
- Racing another vehicle in this situation created 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.

Held: Defendant Caused Crash

- §46.2-865.1 is consistent with the principle of "proximate causation."
- The friend's failure to maintain control was completely foreseeable.
- The friend's negligence in hitting the defendant's car did 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.

Hit & Run

- *Smith v. Commonwealth*, Va. Ct. App., (May 10, 2016)
- 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.
- 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: Conviction Affirmed

- §46.2-894 requires that a driver involved in an accident identify himself as the driver.
- The U.S. and Virginia Supreme Court have already rejected the argument that the statute unfairly requires the defendant to incriminate himself.

Felony Eluding

- *Jones v. Commonwealth*, June 30, 2015
- Defendant fled from an officer in a vehicle into a wooded area.
- 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.
- *Held:* Conviction Affirmed.
- The danger need not be imminent and the speed was excessive for the terrain
  - The distance was short but unusually perilous.

DUI

- *Ramos v. Commonwealth*, Va. Ct. App. (September 22, 2015)
- 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 noted the vehicle's engine was still warm.
- The defendant refused to take a breath test.

Held: Evidence Sufficient for DUI

- The circumstantial evidence demonstrated that the defendant operated his vehicle on a highway within three hours of his arrest.
- 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.

Drive Revoked DUI-Related

- *Croft v. Commonwealth*, Va. Ct. App. (June 30, 2015)
- Defendant never had a driver's license
- Defendant never applied for his license after the one-year period of suspension ended for his DUI conviction.
- Defendant drove again after the one year suspension period had expired.
- The trial court convicted him of Driving Revoked, DUI-related under 18.2-272.

Held: Conviction Reversed

- 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.

Trial & Evidence

EVIDENTIARY ISSUES

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Trespassing & Hearsay

- *Stackfield v. Hampton*, Va. Ct. App. (December 28, 2015)
- *Held:* Error to allow a police officer to testify that a manager told him that the defendant was barred from the property.
- The manager did not testify at trial.
- The manager's statement that the defendant was barred from the property was hearsay under Rule 2:801(a).

Credit Card Statements: Hearsay

- *Ballard v. Commonwealth*, Va. Ct. App. (May 3, 2016)
- *Held:* Error to allow a victim to testify about the unauthorized activity on her card 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.
- *Conviction Reversed*

JURISDICTION & VENUE

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Unlawful Dissemination of Nude Images

- *Morehead v. Commonwealth*, Va. Ct. App. (April 19, 2016)
- *Held*: Williamsburg was the proper venue when the defendant maliciously disseminated images by posting them on the Internet and notifying the victim about his actions by sending her copies of the images and links to the website
- The venue was proper because the victim received the images in Williamsburg
- Court agreed that there are often multiple possible venues under this statute

Obstruction: Witness Threat

- *Williams v. Commonwealth*: Va. Ct. App. (February 2, 2016)
- Defendant threatened a witness in Virginia Beach regarding a case in Norfolk.
- *Held*: Venue was proper in Virginia Beach, not Norfolk.

Other Offenses: Sufficiency of the Evidence

MISCELLANEOUS STATUTES

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Wearing a Mask in Public

- *Stith v. Commonwealth*, Va. Ct. App. (July 7, 2015)
- Trial Court found, simply by appearance, that defendant was over 16 years old at the time of the offense.
- *Held:* Court is entitled to use physical observations to determine a defendant's age.

Child Pornography

- *Kobman v. Commonwealth*, Va. Ct. App. (October 27, 2015)
- 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."

Child Pornography Found

- The investigator found the images in the computer's "unallocated space" using special software that allowed him to retrieve information that was not accessible to the user
- However, images in the computer's "recycle bin" were easily accessible by the defendant.

"Unallocated Space"

- Definition: "Clusters of a media partition not in use for storing any active files. They may contain pieces of files that were deleted from the file partition but not removed from the physical disk"
- Once you delete a file, it remains possible to retrieve and restore a file until the space is "overwritten"
- Even if new files are saved, the computer must overwrite the same "unallocated space" as the deleted file to truly destroy the file.
- Unallocated space can only be accessed by specialist tools

Conviction Partially Affirmed

- The Court found the evidence sufficient to demonstrate that the defendant exercised "dominion and control" over the images in the recycle bin.
- Any user could easily retrieve the images from the computer's recycle bin.

Conviction Partially Reversed

- There was not sufficient evidence to convict the defendant using the images in the computer's "unallocated space"
- There was no evidence of the defendant's dominion and control over those images.

The Commonwealth *Can* Prove Possession in Unallocated Space

- Court: "The Commonwealth must point to evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the defendant was aware of both the presence and character of the contraband and that it was subject to his dominion and control."

- "No evidence showed other indicia of knowledge, dominion, or control of the forty-five photographs found in the unallocated space on the specific date of the indictments."
- "While the evidence may suggest appellant at one time possessed the photographs in the unallocated space, there was no evidence that he had dominion or control of them **on or about May 19, 2013**, as the indictments charged."

BUT – "Unallocated Space" is Still Relevant Evidence

- The existence of images in "Unallocated Space" was a circumstance probative of the defendant's possession of the other images.
- Court: "That the computer had pornographic images in the unallocated spaces established a greater likelihood that appellant, not a virus, website, or other family member, put the child pornography on the computer."

Animal Cruelty

- *Pelloni v. Commonwealth*, Va. Ct. App. (February 2, 2016)
- 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.
- There were no food or water bowls available to any of the puppies.
- Officers discovered one dog, Hannibal, among the others, who had starved to death over the course of 2-3 weeks.
- Hannibal was infected with parasites that had been in his system for at least two weeks

Hannibal's Death

- 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.
- He admitted that he knew Hannibal had been sick for at least a week but didn't take him for treatment because he couldn't afford it.
- An expert for the Commonwealth testified that Hannibal's death would easily have been prevented by food, water, and basic care.

Held: Conviction Affirmed

- "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.

Possession of Explosive Device

- *Callahan v. Commonwealth*, Va. Ct. App. (October 6, 2015)
- Defendant put firework powder in a pipe, inserted a fuse, and sealed the pipe, detonating it at a golf course.
- In text messages, defendant repeatedly called the device a "bomb."
- He claimed he intended to make a "fountain firework."
- *Held:* Evidence sufficient.
  - Device was a bomb, not a firework
  - Possession of illegal fireworks is not a lesser-included offense of possession of explosives

Computer Invasion of Privacy

- *Ramsey v. Commonwealth*, Va. Ct. App. (December 29, 2015)
- *Held:* State Trooper who used NCIC/VCIN to run records on a girlfriend and other people for personal reasons knew or should have known that she was acting in a manner that exceeded her right, agreement, or permission to use VCIN.
- Defendant had no authority to examine the information on VCIN for non-criminal justice purposes.

OBSTRUCTION & DISORDERLY CONDUCT

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Obstruction of Justice

- *Thorne v. Commonwealth*, Va. Ct. App. (April 19, 2016)
- Stopped for a window tint violation, defendant opened her window about three to four inches to provide her identifying information.
- When the officer asked her to lower the window further so that he could test the tint and also see into 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.

Held: Conviction Affirmed

- Court: 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.
- Her eventual compliance did not make her not guilty

Obstruction of Justice

- *Miles v. Commonwealth*, Va. Ct. App. (November 3, 2015)
- Police attempted to seize defendant's brother's car during a narcotics arrest, but the defendant refused to exit the car and locked the doors.
- The detective then reached into the window to unlock the door, but the defendant closed the window on his arm.
- 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.
- *Conviction Affirmed*. Defendant's conduct constituted direct action calculated to prevent and obstruct the detective's performance of his duties

Obstruction of Justice

- *Molinet v. Commonwealth*, Va. Ct. App. (December 8, 2015)
- Officers responded to a call for a fight.
- A sergeant stood nearby to keep people away.
- The defendant, who did not know the people involved, walked up from the street and started to speak to them.
- The Sergeant told the defendant to step away, but the defendant refused, and stepped forward in an aggressive and angry manner, saying, “Shut the fuck up!”
- *Conviction Affirmed*. The Court found that the defendant prevented the Sergeant from performing his duty of keeping the scene safe and keeping the perimeter clear for the other officers.

Disorderly Conduct

- *Cary v. Commonwealth*, Va. Ct. App. (October 20, 2015)
- Defendant was shouting and walking along the road around 1 am, so loudly that people across the road could hear and drawing their attention.
- When an officer asked the defendant for his name, he faced the officer but he refused to identify himself to the officer.
- *Held:* Guilty of Disorderly Conduct
- Court found conduct was *not* Obstruction of Justice.

Resisting Arrest

- *Perry v. Commonwealth*, Va. Ct. App. (December 29, 2015)
- *Held:* Defendant who was under arrest and pulled away from an officer, breaking free from his grasp and taking a few steps away, was guilty of 18.2-479.1, even though the officer was able to restrain him again immediately.

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