2017 VIRGINIA LAW ENFORCEMENT APPELLATE UPDATE MASTER LIST

Cases Reported from June 1, 2016 to June 1, 2017

Criminal Procedure

Discovery & Brady

Virginia Court of Appeals
Published

Nimety v. Commonwealth: June 28, 2016

Lee: Defendant appeals his convictions for Possession of Child Pornography on discovery grounds.

Facts: Defendant possessed approximately 75,000 images of child pornography in digital format, which police located while executing a search warrant. The Commonwealth tried the defendant on 104 counts of possessing child pornography. Prior to trial, the defendant filed a motion seeking copies of the images that the prosecutor intended to introduce into evidence at trial, arguing that merely viewing them in the CA's office was insufficient.

The trial court overruled the request, instructing the Commonwealth to make the images available to the defendant's attorneys at their convenience, adding that the Commonwealth may have to make the images available after hours and on the weekend. The trial court later amended its order to provide the right to inspect copies large enough to enable the attorneys to "actually see" each photograph's contents, in whatever format that the photos would be introduced at trial, and also to view the photos outside the presence of law enforcement.

Held: Affirmed. The Court first re-affirmed that there is no general Constitutional right to discovery in a criminal case, and that the granting or denying of discovery is a matter within the discretion of the trial court. In this case, the Court noted that in the event of a conflict between a statute and a rule of court, the statute prevails, and the statute directly on point is Virginia Code § 19.2-270.1:1.

Va. Code § 19.2-270.1:1, which governs discovery in obscenity or child pornography cases, states that "neither the original data nor a copy thereof shall be released to the defendant or his counsel . . . except as provided herein." The statute further states that the defendant and his attorney "shall be allowed the reasonable opportunity to review such evidence in accordance with the rules of discovery." Id. In this case, the Court found that, pursuant to Code § 19.2-270.1:1, and despite the language of 3A:11, the defendant's attorneys were not entitled to copies of the images absent a showing that inspecting them as permitted by the statute and Rule 3A:11(b)(2) was insufficient and that producing copies was both material and necessary to the defendant's defense. The Court found that mere inconvenience was not a sufficient objection to the discovery order in this case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1209153.pdf

Massey v. Commonwealth: December 13, 2016

Fairfax: Defendant appeals his convictions for Rape and Abduction on admission of a victim's previous testimony and *Brady* grounds.

Facts: The defendant abducted and raped his former girlfriend. At the preliminary hearing, the victim testified that the defendant physically forced her to the bed, repeatedly raped her, and then refused to let her leave her apartment. Later, she explained that the defendant forced her to accompany him to his residence, binding her with packing tape and dropping her off near her parents' residence. On cross-examination, the defense attorney asked the victim many questions about the events surrounding the attack. The victim often stated she did not recall certain details or facts. She denied having called the defendant the night of the attack, however.

After the preliminary hearing, the Commonwealth disclosed that the victim had made inconsistent statements about whether she named on the defendant's lease. The defendant also learned that the victim, while she had denied on cross examination taking any naked pictures for the defendant, in fact had posed for such a picture for the defendant. The defendant also obtained phone records that demonstrated that she had, in fact, called him on the night of the rape. Finally, the defendant learned that the victim sent several texts in which she appeared to brag or gloat about refusing to answer the defense attorney's questions at preliminary hearing.

The victim died prior to trial. At trial, the Commonwealth presented the victim's testimony through the preliminary hearing transcript. The Commonwealth also presented a SANE nurse, who testified to significant injuries that she observed on the victim, as well as testimony from the defendant's friend, who testified that the defendant told her that he "kind of made [the victim] have sex."

The defendant attempted to admit one of the texts the victim sent after the preliminary hearing, where she stated "Is it sick that I'm making myself look really good right now just to piss him off?." However, the trial court refused to admit the text. Nevertheless, the trial court admitted the naked picture and the phone records that reflected the victim calling the defendant. The jury convicted the defendant at trial.

On appeal, the defendant made several arguments, including that:

1. His preliminary hearing was defective because the Commonwealth failed to timely disclose the victim's inconsistent statements about the lease pursuant to *Brady,* depriving him of the opportunity to fully cross-examine the victim.
2. The defendant discovered potential impeachment evidence after the preliminary hearing, and therefore the cross-examination at the preliminary hearing was defective and the transcript should have been inadmissible.
3. The victim's repeated failure to remember things during the cross-examination at the preliminary hearing rendered her "unavailable" for cross-examination and therefore the transcript should have been inadmissible,
4. The charges changed after the preliminary hearing and therefore the transcript should have been inadmissible.
5. The trial court erred by not admitting the victim's text regarding her preliminary hearing testimony.

Held: Affirmed.

First, regarding the victim's inconsistent statements about being on the defendant's lease, the Court examined the *Brady* issue. The Court refused to find that the inconsistent statements were "impeachment" material. The Court pointed out that, although there was evidence that the victim made statements that were inconsistent with each other, none of the pertinent statements were inconsistent with her preliminary hearing testimony. The Court reiterated that the mere fact that prior to testifying, a witness has made multiple statements that are inconsistent with each other, does not render such inconsistencies admissible.

The Court declined to rule on whether the Commonwealth should have produced the statements prior to the preliminary hearing, rather than prior to trial. Instead, the Court examined whether the defendant had shown any prejudice under *Brady*. The Court found that the statements did not directly touch on the defendant's guilt or innocence, but dealt with purely collateral matters that would not have been properly admitted and were unlikely to have had any effect on the jury's verdict if they had been admitted.

Second, the Court addressed the defendant's argument that, because he found impeachment evidence after the preliminary hearing, the trial court should not have admitted the preliminary hearing transcript. The Court refused to find that the defendant "had a right for the factfinder to see [the victim] squirm when confronted with the potential inconsistencies" in her testimony. Instead, the Court noted that the defendant had the opportunity to cross-examine the victim at the preliminary hearing and introduced the subsequently discovered impeachment materials. The Court therefore held that the defendant's right of confrontation was satisfied.

Third, the Court refused to hold that the Sixth Amendment is violated every time a witness for the Commonwealth testifies on cross-examination that he or she does not remember something. In a footnote, the Court reviewed at length how victims of crime often have difficulty remembering details, directly quoting the SANE nurse's testimony comparing memories of sexual assault to a deck of cards. The witness stated that "it takes [victims] a while to retrieve all the cards. Sometimes they never retrieve them in their lifetime; sometimes they may retrieve a card years or months later. So they have a hard time . . . to tell a story in a complete start to finish."

Fourth, the Court reaffirmed that, under *Fisher*, although the Commonwealth added an additional charge after the preliminary hearing, the preliminary hearing transcript was still admissible. The Court pointed out that the factual basis of the new charge was fully developed at the preliminary hearing and the defendant could and did conduct a thorough cross-examination related to those facts.

Lastly, the Court found that the victim's text message on the morning of the preliminary hearing was, at best, tangential to whether or not the defendant raped and abducted her.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1421154.pdf

Eyewitness Testimony

Virginia Supreme Court

Payne v. Commonwealth: December 29, 2016
Aff'd Court of Appeals Ruling of September 8, 2015

Roanoke: Defendant appeals his convictions for Robbery and Use of a Firearm on refusal of jury instructions and exclusion of an email from a detective.

Facts: Defendant and a confederate robbed a man at gunpoint in an apartment laundry room. The room was well lit and the witness testified he had no problem seeing the defendant's face. The defendant told the police he was not involved. However, in a photo line-up, the victim identified the defendant; at an early court appearance, the victim immediately recognized the defendant, seated in the back of the courtroom.

The detective delayed in charging the defendant because she was concerned that the defendant's statement seemed credible and she was not confident enough of the victim's ID to get a warrant. At trial, the defense sought to admit an email from the detective that she wrote to the prosecutor to that effect, arguing that the email was admissible under *Workman* as evidence relating to the reliability, thoroughness, and good-faith of a police investigation. The defendant also argued that the email was admissible under *Massey* because it showed that there was an alternative suspect who looked like the defendant but whom the police never investigated. The trial court granted the Commonwealth's objection to the evidence.

At trial, the defendant requested a jury instruction regarding the reliability of eyewitness testimony generally, especially in light of the cross-racial identification in this case. He also requested a jury instruction regarding the reliability of eyewitness testimony in the presence of a weapon, but the trial court refused the instructions. The defendant's proffered instructions included a list of factors that the jury could consider in evaluating eyewitness testimony, factors that the Fourth Circuit had also listed in *Telfaire* and other cases. The trial court refused the instructions.

Held: Affirmed. The Court first ruled that the trial court properly refused to admit the detective's statement about whether she believed the defendant. The Court found that whether the detective believed the defendant when he denied participating in the robbery was an opinion on the ultimate issue of fact, i.e., whether he was guilty or not. The Court also found that it was irrelevant whether the officer documented her doubts in her report, finding that such evidence does not have "any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence" under Rule 2:401.

The Court then explicitly rejected the Fourth Circuit's arguments and proposed jury instruction as articulated in the *Telfaire* case. The Court refused to consider the cross-racial identification issue. The Court also noted that the defendant did not preserve his argument that the identification procedures in this case were unduly suggestive. Instead, the Court ruled that "an instruction that the jury may consider eyewitnesses' 'opportunity for knowing the truth and for having observed the things about which they testified' does inform it that it may consider not only whether the eyewitness honestly believes what he or she testifies to on the stand, but also whether he or she had the capacity and opportunity to accurately and reliably form that belief."

The Court explicitly rejected the defendant's instruction, finding that it called improperly called attention to certain factors that the jury should use in weighing eyewitness testimony. The Court reaffirmed that it is not appropriate to focus the jurors' attention on certain evidence in a jury instruction because the jury should be free to weigh the evidence how it chooses. In this case, the Court criticized the defendant's instruction, pointing out that it failed to inform the jury that it could also consider any other circumstances it believed were important in weighing the eyewitness' testimony.

However, the Court also cautioned that its ruling does not mean that no trial court may give a jury instruction modeled on *Telfaire*. Instead, the Court reaffirmed that, under *Daniels*, a trial court could give a properly-formed cautionary instruction on eyewitness identification.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151524.pdf

Fifth Amendment: Collateral Estoppel

Virginia Supreme Court

Currier v. Commonwealth: December 8, 2016
Aff'd Court of Appeals decision of December 15, 2016

Albemarle: Defendant appeals his conviction for Possession of a Firearm by Felon on Collateral Estoppel grounds.

Facts: Defendant and a confederate stole a safe from a man's home. Police found the defendant's DNA in the victim's home. Prior to trial, the parties agreed to sever the firearm charge from the grand larceny and the breaking and entering charges. The defendant's confederate testified against him at trial, pursuant to a plea agreement. The case proceeded to trial on the burglary and grand larceny charges, but a jury acquitted the defendant of both of those charges.

Later, prior to the trial on the firearm charge, the defendant argued that the collateral estoppel protections embodied in the Double Jeopardy Clause precluded his retrial on the felon in possession of a firearm charge or, in the alternative, barred the Commonwealth from presenting evidence of his involvement in the theft and burglary. The trial court denied the motion, a jury convicted the defendant, and the Court of Appeals affirmed the conviction.

Held: Affirmed. The Court issued a brief ruling adopting, as a whole, the reasoning of the Court of Appeals. The Court of Appeals had noted that all the charges were brought by a single grand jury, and would have been heard in a single proceeding, but the cases were severed to avoid any undue prejudice to the defendant that would stem from a single trial. The Court of Appeals reasoned that this scenario does not bring into play the concern that lies at the core of the Double Jeopardy Clause: the avoidance of prosecutorial oppression and overreaching through successive trials.

The Supreme Court did not accept or hear the appeal on the other issue that had been argued in the Court of Appeals: whether admitting evidence of the burglary and larceny was overly prejudicial.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1160102.pdf

Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1428142.pdf

Fifth Amendment: Double Jeopardy

U.S. Supreme Court

Puerto Rico v. Sanchez Valle: June 9, 2016

Certiorari to the Supreme Court of Puerto Rico: Defendant appeals his conviction for Gun Trafficking on Double Jeopardy grounds.

Facts: Defendant sold an illegal gun to an undercover police officer. The Federal Government indicted and convicted the defendant of the offense. At the same time, the Commonwealth of Puerto Rico commenced a prosecution of the defendant.

Held: Reversed. The Court found that the Double Jeopardy Clause bars Puerto Rico and the Federal Government from successively prosecuting a single person for the same conduct under equivalent criminal laws. The Court reviewed the history of Puerto Rico's government and its authority. While the Court agreed that the separate States and Indian Tribes are separate sovereigns, the Court found that U.S. Territories, such as Puerto Rico, are not separate sovereigns because the "ultimate source" of their power is the U.S. Congress.

Full Case At:
http://www.supremecourt.gov/opinions/15pdf/15-108_k4mp.pdf

Bravo-Fernandez v. United States: November 29, 2016

Certiorari to the First Circuit Court of Appeals: Defendants appeal their Bribery convictions on Double Jeopardy grounds.

Facts: The defendants engaged in a bribery scheme in Puerto Rico. At trial, the jury issued inconsistent verdicts, convicting the defendants of bribery, but acquitting them of conspiracy and violations of the travel act. However, the court of appeals vacated the convictions for bribery because of error in the judge's instructions. The errors were unrelated to the verdicts' inconsistency.

The defendants then argued that the appellate court's vacatur of a conviction prevented the government from retrying the defendants, under the issue-preclusion doctrine of the Double Jeopardy Clause. The defendants argued that the only contested issue at trial was whether the one defendant had offered, and the other had accepted, a bribe. However, the trial court and court of appeals both found that the verdicts were merely inconsistent and denied the motion.

Held: The Court ruled that the government may retry the defendants for bribery. The Court held that "issue preclusion" under the Double Jeopardy clause does not apply when the verdict's inconsistency does not answer "what the jury necessarily decided." In the same way that, under *Powell*, issue preclusion does not apply when a jury returns inconsistent verdicts (convicting on one count and acquitting on another count) where both counts turn on the very same issue of ultimate fact, the Court found that the same reasoning applied in this case. The Court noted that one cannot know from a jury's report why it returned no verdict.

In its opinion, the Court reviewed the "issue preclusion" doctrine in detail. The Court again cautioned that courts should be guarded in their application of preclusion doctrine in criminal cases, given that there is no appellate review of an acquittal.

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/15-537_ap6b.pdf

Virginia Court of Appeals –
Published

Jin v. Commonwealth: February 14, 2017

New Kent: Defendant appeals his convictions for Attempted Murder and Aggravated Malicious Wounding on Double Jeopardy and Cross-Examination grounds.

Facts: Defendant attempted to kill his estranged wife. First, the defendant attempted to run over the victim with his car. The victim's brother pulled her away just in time, resulting in a glancing blow to the victim's face. A few minutes later, the defendant entered the nearby restaurant where witnesses were caring for the victim and attempted to bludgeon the victim with a hammer.

At trial, the defendant asked the defendant's brother about his payment of rent to the victim. The trial court sustained the Commonwealth's objection. The defendant argued that the trial court improperly limited his cross-examination, which was intended to show bias on the part of the Commonwealth's witness.

The trial court convicted the defendant of two counts of attempted murder and two counts of aggravated malicious wounding. The defendant argued that the trial court violated his double jeopardy rights by convicting him of two counts of attempted murder when his acts were part of one continuing offense.

Held: Affirmed. Regarding the defendant's double jeopardy claim, the Court concluded that the two attacks constituted two separate offenses and that the defendant's double jeopardy rights were therefore not implicated.

Regarding the cross-examination issue, the Court found that the question was, at most, only marginally relevant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0457162.pdf

Virginia Court of Appeals –
Unpublished

Tomlin v. Commonwealth: March 14, 2017
(*See elsewhere for this case on other issues*)

Sussex: Defendant appeals her convictions for Embezzlement and False Pretenses on amendment of the indictment, denial of a bill of particulars, and sufficiency of the evidence.

Facts: The defendant worked as a social worker at a home for elderly and disabled patients. On multiple occasions, the defendant asked for and received advance payments from the patient's funds to shop for the patients. She was authorized to make such requests as part of her job. However, she then used those funds to purchase expensive items. She then turned in receipts to her employer, who reimbursed her. The patients did not receive any of the items. Using photocopies of the receipts, the defendant returned many of the items, keeping the refunds for herself.

The defendant also obtained a cash advance for patient clothes which she then spent on clothes for herself, although she turned in the receipt and claimed it was for a patient. Prior to trial, the Commonwealth moved to amend four indictments from "obtaining signatures by false pretenses" to "obtaining money by false pretenses". The trial court granted the motion over the defendant's objection. Prior to trial, the defendant also moved to compel the Commonwealth to elect between Embezzlement and Larceny by False Pretense, alleging that the charges were duplicative and convicting her of both would violate double jeopardy. The trial court denied the motion. The defendant also requested a bill of particulars, but the trial court denied the motion.

The trial court convicted the defendant of Larceny by False Pretense and Embezzlement regarding the patient funds and the false returns. The trial court convicted the defendant of Grand Larceny regarding the clothes.

Held: Affirmed. The Court first ruled that the trial court did not err when it granted the Commonwealth's motion to amend four indictments from obtaining signatures by false pretenses to obtaining money by false pretenses because those amendments did not change the nature or character of the offenses.

The Court also found the evidence sufficient to convict for obtaining money by false pretenses, embezzlement, and grand larceny. The Court rejected the argument that she could not embezzle patient funds because the patients were not her employers. The Court pointed out that she obtained the money by virtue of her employment, which was sufficient. The Court also found that the evidence also demonstrated larceny by false pretense. The Court explained that the defendant's use of photocopied receipts was a false representation to her employer that those transactions were final, when the defendant had, in fact, kept the original receipts to obtain and keep the proceeds from the returns. Third, the Court found that the trial court did not err in denying the defendant's pretrial motion to elect between Embezzlement and Larceny by False Pretense. The Court examined the offenses and found that, under *Blockburger*, the offenses were distinct and therefore the trial court properly denied the motion to force election.

Lastly, the Court agreed that the trial court properly denied the defendant's pretrial motion for a bill of particulars. The Court examined each of the indictments and noted that they named the defendant, identified the County where the offense took place, recited the date of the offense, named the victim, and set forth the elements of the offenses. The Court agreed that these allegations were sufficient to give appellant notice of the nature and character of each charge.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1946152.pdf

Fifth Amendment: Interviews & Interrogations

Fourth Circuit Court of Appeals

United States v. Lara: March 14, 2017

U.S. District Court W.D. Va: Defendant appeals the admission at sentencing of his statements during probation on Fifth Amendment grounds.

Facts: The defendant was convicted in Grayson County in 2008 of sexual assault of a mentally incapacitated person. After release from incarceration, the state court placed him on probation that included sexual offender treatment. The defendant signed a probation agreement that stated, in part: ""I have read the above . . . and by my signature or mark below, acknowledge receipt of these Conditions and agree to the Conditions set forth." He also signed another waiver form that waived any confidentiality he had with his sexual offender treatment clinician.

The defendant then moved to Texas without permission. The Federal government arrested the defendant and convicted him of violating the Sex Offender Registration and Notification Act (SORNA). At sentencing in Federal Court for failure to register as a sex offender, the government offered statements the defendant made while participating in sex offender treatment. The defendant objected, contending that the statements he made in interviews conducted as part of the treatment program are protected by the psychotherapist-patient privilege and the Fifth Amendment privilege against self-incrimination. The trial court overruled the objection.

Held: Affirmed. The Court ruled that the defendant affirmatively waived any psychotherapist-patient privilege when he agreed as part of his conditions of probation in the state case to the disclosure of any statements he made in the treatment program. The Court also ruled that that the Fifth Amendment privilege against self-incrimination did not apply to those statements, because the defendant voluntarily made the statements while participating in the treatment program.

The Court explained that a defendant's agreement to be bound by court-imposed conditions of release is not rendered involuntary by the sole fact that he will be incarcerated in the absence of such acquiescence. The Court reasoned that, under Minnesota v. Murphy, in order for conditions of probation to provide a sufficient "penalty" to overcome a defendant's free choice to remain silent, the threat of revocation must be nearly certain.

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/154767.P.pdf

Virginia Court of Appeals
Unpublished

Taylor v. Commonwealth: September 13, 2016

Prince William: Defendant appeals his convictions for Rape and Aggravated Sexual Battery on Fifth Amendment and Rape Shield grounds.

Facts: Defendant sexually assaulted an unconscious child. Police asked the defendant if he would come to the police station to answer questions and he agreed. Police gave him a ride to the station and brought him back to an interview room in a secured area, where they closed the door and interviewed the defendant. During the interview, the defendant asked to leave to make a phone call and police agreed to let him. When he returned, police served a search warrant on him and collected DNA from his penis and mouth.

When police told the defendant that his story did not match the facts, the defendant began to panic and requested to leave. The police continued to ask him to stay and answer questions, however, and he continued to answer their questions. Ultimately, the defendant confessed. Police permitted him to leave and he left.

The defendant requested to suppress his statements, arguing that he was in "custody" and also that, due to his anxiety disorder, police obtained his statements involuntarily. The trial court denied the defendant's request to suppress his statements. Prior to trial, the trial court also denied the defendant's request to cross examine the victim regarding "any prior sex acts that might account for the injuries documented in the SANE report and the presence of two Y chromosomes in her underwear."

Held: Affirmed in part, reversed in part. The Court first ruled that initially, the defendant was not in "custody" for purposes of *Miranda*. However, the Court ruled that police later subjected the defendant to custodial interrogation when the police served the defendant with a search warrant, confronted the defendant as the primary suspect, and kept questioning him and did not tell him that he was free to leave after the defendant asked to go home. While the Court pointed out that each of these factors, standing alone, would not have transformed the interrogation into a "custodial" interrogation, in the totality of the circumstances the Court found that the defendant was in "custody" at that point.

While the Court did not give the search warrant much weight, the Court focused especially on the fact that the detectives deliberately ignored the defendant's request to leave, coupled with the previously executed search warrant, which signaled "to a reasonable person sitting in appellant's position that he was not free to leave".

However, the Court rejected the defendant's argument that his pre-confession, pre-custodial statements were involuntary. The Court found that, in the totality of the circumstances, his statements appeared relaxed, calm, and voluntary. The Court reviewed the statements and found that the interview bore no markings of a coerced confession; police did not engage in misconduct, the interview was not particularly long, and the police did not exert "any moral and psychological pressures."

Regarding the "Rape Shield" motion, the Court found that § 18.2-67.7 and *Blackmon* controlled. The Court ruled that, because the defendant failed to proffer evidence of specific instances of alleged sexual conduct under the statute, the defendant was not entitled to a hearing.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1031144.pdf

Secret v. Commonwealth: February 14, 2017

Louisa: Defendant appeals his convictions for Arson and Attempted Murder on sufficiency of the evidence, Fifth Amendment, and Jury Instruction grounds.

Facts: The defendant set a rooming house on fire. The defendant poured fuel around a building in the early morning hours when people were still sleeping, outside of bedrooms, offices, and the main living area throughout the first floor.

A deputy responded and located the defendant, surrounded by residents of the building. The deputy detained the defendant and placed him in handcuffs. The deputy asked the defendant if he would be willing to come to the Sheriff's Department to talk to a State Police Investigator. The defendant agreed. The deputy told the defendant he would have to transport him handcuffed, per policy, but that he was not under arrest. The deputy removed the handcuffs when the defendant arrived at the Department.

The investigator spoke with the defendant in a closed room for almost an hour. After the defendant admitted to setting the fire, the investigator read the defendant his *Miranda* rights. Thereafter, the defendant explained that he set the fire to eliminate the "holograms" who lived inside

the building. During his interview, the defendant denied being under the influence of either drugs or alcohol. During a motion to suppress, the trial court found no evidence of impairment.

At trial, the trial court refused the defendant's jury instruction, quoting *Thacker,* which stated: "To do an act with intent to commit one crime cannot be an attempt to commit another crime, though it might result in such other crime." The defendant argued that the Commonwealth failed to prove the specific intent to kill each individual victim. The trial court disagreed and convicted the defendant of arson and nine counts of attempted murder.

After the defendant filed his notice of appeal, he discovered that the record transmitted to the Court of Appeals was missing a key transcript. The trial court agreed to amend the record and add that transcript.

Held: Affirmed. First, regarding the addition of the transcript, the Court ruled that it was proper to add the transcript. As no petition for appeal had yet been filed in the Court of Appeals at the time the circuit court conducted its hearing to determine whether the transcripts had been omitted due to a "clerical mistake," the Court ruled that the trial court retained jurisdiction to make its decision on that matter.

The Court then rejected the defendant's argument that, because the investigator first obtained a confession, and then administered *Miranda* warnings, the statement violated *Elstad* and *Seibert*. The Court stated that the key inquiry is whether the investigator purposefully utilized a "two-step interrogation technique" as proscribed by *Seibert.* The Court agreed that the investigator did not deliberately employ a two-step interrogation technique, nor did he use any deliberately coercive or improper tactics in obtaining the initial statement.

The Court found that the evidence proved the defendant's specific intent to kill each victim. The Court noted that the Commonwealth was not required to prove that the defendant intended to kill specific victims by name. Instead, the Commonwealth needed only show he intended to kill the people he knew were in the building, whether he knew their identities or not, at the time he set it on fire.

Regarding the defendant's jury instruction, the Court agreed that the instruction improperly misled the because it suggested that a person could not hold two intents at the same time.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0853152.pdf

Garcia-Tirado v. Commonwealth: March 7, 2017

Arlington: Defendant appeals his conviction for Rape on Fifth Amendment grounds.

Facts: The defendant raped a 14-year-old child. The defendant's native language was "Mam", a Mayan language. The defendant had only lived in the United States for 2 years, but had learned Spanish in school in Guatemala and had approximately 12 years of experience with Spanish. During an interview, police asked the defendant if he would be willing to speak with them in Spanish. The defendant stated "Spanish would be fine." The officers read him a *Miranda* form in Spanish and he agreed to speak with them. The defendant then confessed to the offense, mostly in Spanish but occasionally also speaking in English. He also wrote an apology letter to the victim in Spanish. A video captured the entire interview.

During a motion to suppress, the defendant alleged that he did not waive his *Miranda* rights and voluntarily make the incriminating statements that followed because his native language is Mam, not English or Spanish, and that he was not provided a Mam interpreter to translate the exchange he had

with the police regarding his rights. The defendant pointed out that his written apology was riddled with grammatical and spelling errors.

Held: Affirmed. The Court reviewed the facts and pointed out that the defendant appeared to understand his rights and the conversation with the officers. The Court noted that he gave no indication that he did not understand the questions posed to him, and his answers in Spanish were responsive and consistent with the questions asked. The Court found that the defendant's spelling and grammatical errors in his written apology letter do not show he did not understand Spanish or the words he selected to write the letter.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1982154.pdf

Fourth Amendment – Search and Seizure

U.S. Supreme Court

Utah v. Strieff: June 20, 2016

Certiorari to the Supreme Court of Utah: Defendant appeals his conviction for Drug Possession on Fourth Amendment grounds.

Facts: After receiving an anonymous tip and observing the defendant at what the officer believed was a drug house, a police officer stopped a defendant on suspicion of drug activity. While the officer believed he had reasonable suspicion, the State later agreed that the stop lacked reasonable suspicion and therefore was unlawful.

However, during the stop, the officer learned that the defendant had an outstanding warrant and arrested the defendant on that warrant. The officer searched the defendant incident to arrest and recovered methamphetamine. The defendant entered a conditional guilty plea but appealed the denial of his motion to suppress.

Held: Affirmed. In a 5-3 decision, the Court held that the evidence discovered on the defendant's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant.

The Court applied the "Attenuation Doctrine," which provides that evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. The Court explained that the doctrine has three factors: First, the timing of the violation vis-à-vis the timing of finding the evidence; Second, the presence of intervening circumstances; and Third, the flagrancy of the official misconduct.

In this case, the Court found that the officer was, at most, negligent in stopping the defendant unlawfully, but also found that his error in judgment did not rise to a purposeful or flagrant violation of the defendant's Fourth Amendment rights, nor was it part of any systemic or recurrent police misconduct. In addition, the officer's intrusion by running a wanted check on the defendant was a

"negligibly burdensome precaution" for officer safety. Thereafter, he conducted a lawful search incident to arrest.

The dissents strenuously criticized the opinion, noting that law enforcement has tens of thousands of unserved warrants and arguing that the majority's rule permits a "stop first-develop suspicion later" tactic by law enforcement. [*Echoing Justice Scalia, Justice Sotomayor ended her opinion with an unusually perfunctory "I dissent", rather than the standard "I respectfully dissent." – Ed*.]

Full Case At:
http://www.supremecourt.gov/opinions/15pdf/14-1373_83i7.pdf

Fourth Circuit Court of Appeals

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 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.

Full Case at:
http://www.ca4.uscourts.gov/Opinions/Published/124659A.P.pdf

United States v. Wharton: October 24, 2016

Baltimore: Defendant appeals her convictions for Fraud, Embezzlement, and related charges on Fourth Amendment grounds.

Facts: Defendant and her husband embezzled social security income that was intended for their grandchildren. Agents investigated the case and interviewed the defendant and her husband, who was her co-defendant, together at their home. The agents obtained a search warrant for the residence. The probable cause largely consisted of allegations against the defendant's husband, rather than the defendant herself. The affidavit stated that the couple had been married and lived together for 43 years, that the power bill for the house went to the husband, and that both defendants shared a television bill.

However, in their affidavit, the agents did not include that several of the children had told the agents that the couple lived in separate parts of the house, although they shared a kitchen and common areas.

The defendant moved to suppress the results of the search warrant, arguing that the agents had recklessly omitted material exculpatory evidence from the affidavit, namely that the defendant's husband lived only in the basement of the house. The trial court granted a *Franks* hearing. After that hearing, the trial court suppressed evidence obtained from the defendant's personal bedroom, but admitted the remaining evidence found in the home's common areas.

Held: Affirmed. The Court focused on the "materiality" element of the *Franks* standard, noting that a defendant must prove that the affiant either intentionally or recklessly made a materially false statement or that the affiant intentionally or recklessly omitted material information from the affidavit.

The Court repeated that its test for materiality is to "insert the facts recklessly or intentionally omitted, and then determine whether or not the corrected warrant affidavit would establish probable cause. If the corrected warrant affidavit establishes probable cause, there is no *Franks* violation." In this case, the Court examined the warrant as if the agent had included the information that the defendant and her husband resided in separate parts of the home. The Court concluded that the evidence still

demonstrated probable cause that the husband had access to the common areas of the house and therefore demonstrated probable cause to search the common areas.

The Court pointed out that the agents interviewed the defendant and her husband together in a common area and that the co-defendants maintained common power and television accounts. The Court also noted that none of the children stated that the husband *lacked* access to the common areas. The Court ruled that the omitted information was not material and so did not defeat the probable cause to search the common areas.

[Note: The Court did not review whether it was proper to grant a *Franks* hearing – *EJC*].

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/154103.P.pdf

United States v. Clarke: November 18, 2016

E.D. Va. Alexandria: Defendant appeals his convictions for Child Solicitation on Fourth Amendment grounds.

Facts: Using an online chatroom, defendant requested to have sex with two children. However, the two "children" were, in fact, fictitious children that a DHS agent created using a false identity. The defendant and the agent spoke extensively online regarding the defendant's desire to have sex with the children. The defendant planned with the agent to meet the children for sexual purposes. However, when the defendant arrived, the Virginia State Police arrested him and seized and searched his vehicle. Inside the vehicle, officers found various sexual implements, a paper with the children's names and ages, and a bag of candy.

The trial court denied the defendant's motion to suppress the search of the vehicle. The trial court ruled that the search was a lawful "inventory search", conducted per Virginia State Police General Order OPR 6.01 "Vehicle Impoundment and Inventory," and the standard search-inventory form issued by the Virginia State Police.

Held: Affirmed. The Court applied the "inventory search" exception and found that the search of the car was lawful. The Court repeated that, for the inventory search exception to apply, the search must have been conducted according to standardized criteria, such as a uniform police department policy, and performed in good faith. The Court permitted that the government may prove the existence of standardized criteria "by reference to either written rules and regulations or testimony regarding standard practices."

In this case, the Court observed that the officer completed the inventory search form in accordance with the inventory search policy. The Court ruled that the evidence was sufficient to establish that the inventory search was conducted pursuant to standardized criteria.

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/154299.P.pdf

U.S. v. Robinson, January 23, 2017
En Banc, Rev'd Panel Decision of February 23, 2016

U.S. D.Ct., Northern District of W.Va.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: Police received an anonymous tip that a man was carrying a concealed firearm on his person and was traveling in a vehicle. Nearby, in a "high-crime" area, officers stopped a vehicle for a traffic violation in which the defendant was a passenger. The vehicle and the defendant matched the description in the tip. The officers asked the defendant to step out the vehicle. They asked him if he had any weapons and the defendant acted startled, and then refused to answer. Officers frisked him, recovered a firearm, and discovered he was a felon.

The defendant moved to suppress the pat-down, arguing that the officers had no articulable facts demonstrating that he was dangerous since, as far as the officers knew, the State could have issued him a permit to carry a concealed firearm. The District Court denied the motion to suppress, but a panel of the Court of Appeals reversed.

Held: Affirmed, motion properly denied. In a 12-4 decision, the Court first noted that the officers had the right to stop the vehicle, based on the traffic violation, had the right to ask the defendant to exit the vehicle, and that the tip was sufficiently corroborated under *Navarette* to give the officers reasonable suspicion to believe the defendant was armed. The Court then addressed the issue raised in the appeal.

The Court, relying on *Mimms* and its progeny, ruled that an officer who makes a lawful traffic stop and who has a reasonable suspicion that one of the automobile's occupants is armed may frisk that individual for the officer's protection and the safety of everyone on the scene. The Court found that it is inconsequential that the passenger may have had a permit to carry the concealed firearm. Instead, the Court reasoned that the danger justifying a protective frisk arises from the combination of a forced police encounter and the presence of a weapon, not from any illegality of the weapon's possession.

The Court said it was "illogical" to argue that the risk of danger to police officers posed by the firearm is eliminated when a person forcefully stopped may be legally permitted to possess the firearm. The Court reviewed *Terry* itself, as well as data regarding the risks to officers that traffic stops pose, and re-articulated that there are only two requirements for a *Terry* frisk:

1. That the officer have conducted a lawful stop, which includes both a traditional *Terry* stop as well as a traffic stop; and
2. That during the valid but forced encounter, the officer reasonably suspects that the person is armed and therefore dangerous.

Lastly, the Court also found that the facts of the stop, standing alone, also gave the officers the authority to frisk the defendant, even if they hadn't already suspected he was armed.

[*Note: This case is an interesting contrast to Commonwealth v. Simpson, an unpublished case from January 17, 2017, which addressed a seizure under a "probable cause" standard of a firearm when officers did not have any reason to believe that the possession of the firearm was unlawful. – EJC]*

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/144902A.P.pdf

U.S. v. Kimble: April 2, 2017

U.S. Dist. Court Baltimore: Defendant appeals her convictions for Immigration and Tax Fraud on Fourth Amendment grounds.

Facts: The defendant engaged in a long series of immigration and tax fraud schemes. During the scheme, the defendant submitted a fraudulent green card application using a marriage certificate listing herself as someone else. The defendant also perjured herself in her brother's trial for distribution of heroin, claiming that she had traveled to Africa when she had not. The defendant also engaged in numerous tax frauds and identity frauds, earning hundreds of thousands of dollars.

Federal agents obtained a search warrant for the defendant's home, demonstrating probable cause to believe that the home contained evidence of perjury, marriage and immigration fraud, and false statements. In their affidavit, the agents requested to seize documents related to the defendant's perjury about travel, such as "documents, correspondence, notes, statements, receipts or other records that reference or indicate the fraudulent activity and items evidencing the obtaining, secreting, transferring, concealment and/or expenditure of illegal proceeds and currency to include cash." The affidavit also requested to seize potential "evidence of the obtaining, secreting, transferring, concealment and/or expenditure of illegal proceeds" of the defendant's crimes.

While executing the warrant, agents discovered over $41,000 in a laundry hamper. They asked the defendant if it belonged to her, but she stated that she had merely collected it from a stranger and was holding it for a man who was currently detained on narcotics charges. Agents seized it, believing it to be potential drug proceeds. When the defendant came forward later and claimed that the money was the proceeds of an insurance settlement, the agents investigated and found that it was the proceeds of her fraud. The defendant moved to suppress the seizure of the cash and the results of that investigation but the trial court denied the motion.

Held: Affirmed. The Court first observed that the face of the warrant the warrant itself lists the property to be seized as the "fruits, evidence and instrumentalities of marriage fraud, false statements, unlawful procurement of citizenship, and perjury." Thus, the Court found that the scope of the items to be seized was not limited to mere perjury.

The Court then found that the agents properly seized the cash under the terms of the warrant, as both the fruits, evidence, and instrumentality of the crimes in this case, as well as evidence of the obtaining, secreting, transferring, concealment and/or expenditure of illegal proceeds. In approving the seizure, the Court emphasized that items seized pursuant to a validly issued warrant are not required, on their face, to necessarily constitute evidence of an offense identified in the relevant warrant—rather, they only *potentially* have to be evidence of such an offense.

In this case, the Court observed that, given the large quantity of cash at issue, as well as the defendant's unusual explanation for the source of the funds, an agent executing the warrant could reasonably have concluded that the cash was potentially proceeds of marriage and immigration fraud, i.e., cash received as payment for the defendant's participation in the scheme to obtain a fraudulent green card.

The Court also rejected the argument that the agents acted outside the warrant because they believed the cash constituted drug proceeds, and not fraud proceeds. The Court noted that, in a motion to suppress, a court must look to the objective facts and not the subjective motivations of the officers.

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/154672.P.pdf

Va. Supreme Court

Bland v. Commonwealth: June 6, 2016

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

Facts: A caller to 911 reported that she was watching someone brandishing a firearm and described the person's race and clothing. The caller stated that the defendant was walking away with the gun in his pocket. Police responded and saw the defendant near the location, wearing clothes similar to what the caller described. The officers walked towards the defendant, and as they did, the defendant patted his front right pocket, his right rear pocket, and then pulled his shirt down on the right side. At a motion to suppress, one of the officers described this action as a "weapons check," which, in his training and experience, indicated that the defendant may have been armed.

As an officer went to pat the defendant down, the defendant knocked the officer's hand away and ran away. However, the officers captured him and recovered a handgun.

Held: Affirmed. The Court likened this case to the U.S. Supreme Court's *Navarette* case from last year, repeating that an anonymous tip need not include predictive information when an informant reports readily-observable criminal actions. The Court found that, in this case, the caller's eyewitness knowledge of the events gave significant support to the tip's reliability. The Court also agreed with *Navarette* that the caller's use of the 911 system also added credibility to her statement.

The Court ruled that, given the knowledge that an individual matching the defendant's description had been seen minutes before brandishing a weapon, which he then placed in his pocket, a reasonably prudent person in the officers' position could have believed that the defendant posed a risk to their safety, and thus was authorized to perform a frisk. The officers' belief was further supported by the inference that the defendant performed a "weapons check" when he became aware of the officers' presence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0864152.pdf

Collins v. Commonwealth: September 15, 2016
Affirming Panel Decision of July 21, 2015

Albemarle: Defendant appeals his conviction for Possession of Stolen Property on Fourth Amendment grounds.

Facts: Defendant purchased 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 told police 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 of that conversation, an 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 the driveway, lifted the tarp, and found that the motorcycle now had different plates, which came back to another vehicle. The officer ran the Vin # and confirmed that 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. Prior to trial, the defendant argued that the officer's examination of the motorcycle violated the Fourth Amendment. The trial court denied the motion to suppress. The Court of Appeals affirmed the trial court's ruling under the "exigent circumstances" exception, but did not address the "automobile exception" to the Fourth Amendment.

Held: Affirmed. Unlike the Court of Appeals, the Supreme Court addressed this case under the "automobile exception", as articulated by *Carroll*. The Court agreed that, in this case, the officer had probable cause to examine the motorcycle when he saw it from the side of the road. The Court reviewed the automobile exception in detail and noted that it does not require any separate exigency, other than the presence of a readily-mobile automobile.

The Court rejected the argument that, in this case, there was no specific concern that someone would have driven the motorcycle away. The Court repeated that a vehicle's inherent mobility—not the probability that it might actually be set in motion—is the foundation of the automobile exception's rationale. The Court found that the automobile exception is a "bright-line rule" that applies whenever a vehicle is clearly operational and therefore readily movable.

The Court also rejected the argument that the automobile exception does not apply on private property. Although the Court of Appeals appeared to agree with that argument, citing the U.S. Supreme Court's opinion in *Coolidge*, the Virginia Supreme Court repeated that there is no reasonable expectation of privacy in a vehicle parked on private property that is exposed to public view.

The Court also rejected the argument that, even if he had the authority to search the motorcycle for the VIN number, the officer also needed special authority to first lift the tarp that covered the motorcycle. While the dissent argued that the search of the tarp was unlawful, the Court likened this case to *New York v. Class*, where an officer moved papers on a dashboard to read a VIN number. The Court observed that when a police officer lifts a tarp and reveals contraband, courts typically describe the search as a search of the contraband rather than a search of the tarp itself.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151277.pdf

Virginia Court of Appeals
Published

Edmond v. Commonwealth: August 2, 2016

Richmond: Defendant appeals his convictions for Murder, Robbery, Conspiracy, and Use of a Firearm on Fourth Amendment grounds.

Facts: Defendant robbed a jewelry store and shot and killed the store clerk. He fled to North Carolina with his confederates in a Dodge Durango. However, police were able to identify him because of an incident that took place earlier in the day.

The detective, through his investigation, learned from another officer that a man and a woman had been in a nearby bank a few hours before, acting strangely. They appeared to have a note of some kind and the woman was wearing a wig. The man and the woman spoke quietly to one another until finally asking for change for a dollar. They left driving a Dodge Durango, which had been parked on the shoulder of the road with the hazard lights on, and the teller provided police with the license plate.

Police then learned that the Durango was in the area of the jewelry store within the hour when the murder took place. Police identified the suspects' clothing on the bank surveillance video.

The detective also obtained video from behind the jewelry store of several people, including two who were wearing the same clothes as the two people in the bank earlier that day, loading bags and boxes from the jewelry store into the Durango at the time of the murder.

Police later learned that the Durango was in North Carolina and contacted North Carolina police. There, an officer located the Durango. Based on the Virginia detective's request, a U.S. Marshall directed the North Carolina officer to stop the Durango and identify the occupants. The North Carolina officer complied and provided the identities to the Virginia detective, who identified two of the occupants as the people from the bank incident and also the jewelry store surveillance video by their clothing. One of those occupants made a statement that implicated the defendant in the homicide and police arrested the defendant as well.

The defendant moved to suppress the stop and the evidence flowing therefrom, but the trial court denied the motion.

Held: Affirmed. The Court found that the North Carolina officer had reasonable suspicion to stop the Durango and identify the passengers, based on the "collective knowledge" doctrine.

The Court first formally held that the "collective knowledge" doctrine applies in Virginia. The Court reviewed previous cases from the U.S. Supreme Court and Fourth Circuit that approved of this doctrine, which holds that an officer is justified in acting upon an instruction from another officer if the instructing officer had sufficient information to justify taking such action himself.

The Court then found that the Virginia detective had sufficient reasonable suspicion to stop the vehicle. The Court pointed out that the detective could place Durango in the area of the jewelry store at the time of the robbery and homicide, repeating that proximity to the scene of a recently committed crime is another factor which police may consider in determining whether to engage in a *Terry* stop. In addition, he was able to match the clothing from the jewelry store video to the clothing at the bank incident, earlier that day. Thus, the Court held that the Virginia detective possessed a reasonable, articulable suspicion that the vehicle and/or its occupants were involved in, or had recently been involved in, criminal activity.

The Court rejected the argument that, because the Virginia detective did not directly call for the stop, instead relying on a U.S. Marshall to give the order, that the Commonwealth could not rely on the Virginia detective's knowledge. The Court found that the U.S. Marshall was little more than a conduit or "go between" transmitting information. The Virginia detective was the person who developed the suspicion for the stop, and the Court examined his knowledge to determine whether the requisite knowledge for reasonable suspicion existed at the time of the stop.

The Court cautioned, however, that the "collective knowledge" doctrine does not allow law enforcement to aggregate knowledge from officers who have not communicated with one another. The Court agreed with the Fourth Circuit's *Massenburg* opinion that the "collective knowledge" doctrine does not permit a Court to aggregate bits and pieces of information from among myriad officers, nor does it apply outside the context of communicated alerts or instructions.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0557152.pdf

Taylor v. Commonwealth: September 13, 2016

Tazewell: Defendant appeals his convictions for Possession with Intent to Distribute and Importation of Drugs on Fourth Amendment grounds.

Facts: Defendant imported Methylone (a.k.a. "bath salts") from a city in China. Police learned of the scheme and interviewed his girlfriend, who described the scheme and provided a waybill for a previous shipment. The defendant received that shipment at his residence. Several months later, border agents intercepted a package bound for the defendant at a nearby address. They attempted a controlled-delivery of that package, but the resident refused the package. Later, however, border agents intercepted another package, also directed to the defendant, again at the same incorrect address.

Police obtained an anticipatory search warrant for the defendant's own residence, seeking authority to search the residence at the moment that the defendant accepted the package. In the affidavit, the detective checked the box that stated that the affidavit was based on his "personal knowledge", rather than that of an informant. Armed with the warrant, police made a controlled delivery of the package. The defendant accepted the package outside his home, although the package was directed to the other residence. Police arrested him and executed the warrant, searching his residence.

Held: Affirmed. The Court reviewed the law of anticipatory search warrants in some detail, and particularly focused on the U.S. Supreme Court's 2006 decision in *Grubbs*. Quoting that case, the Court noted that, because the probable cause requirement looks to whether evidence will be found when the search is conducted, all warrants are, in a sense, "anticipatory." The main difference, as the *Grubbs* Court noted, is that if the government were to execute an anticipatory warrant before the anticipatory "triggering condition" occurred, there would be no reason to believe the item described in the warrant could be found at the searched location because, by definition, the triggering condition which establishes probable cause has not yet been satisfied when the warrant is issued. *Grubbs* did not agree, however, that there be probable cause that the contraband is on a "sure course" to the premises to be searched, as the Court of Appeals had previously required in *McNeil*.

The Court ruled that, under *Grubbs*, anticipatory warrants must be supported by probable cause establishing: (1) that the triggering condition of the warrant is likely to occur, and (2) that contraband or evidence of crime will likely be found on or in the premises to be searched upon the occurrence of the triggering condition. The Court of Appeals concluded that the "sure course" requirement it had set forth in *McNeil* was an unnecessary requirement; although it noted that, in some cases, an affiant may demonstrate probable cause by demonstrating that the contraband is on a "sure course" to the premises.

In this case, the Court found probable cause existed to issue the anticipatory warrant. First, the intended recipient listed on the intercepted package directly linked it to the residence. In addition, the waybill that the girlfriend provided to the police showed that the defendant had received a similar package from the same location in China at his residence months earlier. Lastly, police already had developed information from the girlfriend and a previous package that the defendant was dealing in "bath salts."

The Court also rejected the argument that, because the defendant accepted the package outside his residence, there was no probable cause to search the inside of his residence. The Court held that, as a general matter, a magistrate may reasonably infer that drugs, drug paraphernalia, or other evidence of drug-related activity will be found in a suspected drug dealer's residence.

Third, the Court rejected the argument that the detective checked the wrong box on the search warrant and indicated that the information was based on his personal knowledge, without establishing the reliability of the informant. The Court pointed out that the affidavit indicated that it was based on more than the detective's personal knowledge. In particular, the Court observed that officers

corroborated the informant's information with their own investigation. The Court also noted that the detective probably told the magistrate about who the informant was in his oral testimony, although the detective never testified about that.

Lastly, the Court found that the information from the informant was not stale, considering that police had corroborated it by intercepting a package just a few days earlier.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1340153.pdf

Campbell v. Commonwealth: October 25, 2016

Amherst: Defendant appeals his conviction for Possession with Intent to Distribute Methamphetamine on violation of the Search Warrant statute.

Facts: Police obtained a search warrant for the defendant's residence. The same day, police executed the search warrant and seized evidence of the defendant's methamphetamine operation. The next day, the Magistrate transmitted the paperwork to the clerk's office, but failed to send the entire affidavit. The clerk's office only received one page of the affidavit, a page that lacked most of the relevant information. The defendant moved to suppress the evidence on the grounds that the complete affidavit supporting the warrant had not been filed within thirty days as required by §19.2-54.

The trial court granted the motion to suppress, but found that probable cause and exigent circumstances justified a warrantless search of the property.

Held: Reversed. The Court ruled that a search is invalid and evidence obtained in the search is inadmissible if the search warrant affidavit, including the sworn statements providing probable cause, is not filed with the clerk within a period of thirty days from the issuance or execution of the warrant. The Court quoted §19.2-54, which provides:

> "Failure of the officer issuing such warrant to file the required affidavit shall not invalidate any search made under the warrant unless such failure shall continue for a period of 30 days. If the affidavit is filed prior to the expiration of the 30-day period, nevertheless, evidence obtained in any such search shall not be admissible until a reasonable time after the filing of the required affidavit."

The Court agreed that the Fourth Amendment's exclusionary rule does not extend to statutory violations. The Court also repeated that mere violations of state law do not normally result in exclusion of evidence, even for procedural violations of §19.2-54. For example, the Court pointed out that in *Lockhart*, the Court refused to suppress a search where the law enforcement officer, rather than the magistrate, filed the affidavit with the clerk. However, interpreting the paragraph quoted above, the Court ruled that the language provides implicitly that a search is invalid if the failure to file the required affidavit continues for thirty days.

In a footnote, the Court also rejected the argument that exigent circumstances justified the search, finding that law enforcement could not rely on that exception while still obtaining a search warrant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1404153.pdf

Salahuddin v. Commonwealth: January 31, 2017

Fredericksburg: Defendant appeals his convictions for Possession with Intent to Distribute Heroin and Obstruction of Justice on Fourth Amendment grounds.

Facts: Defendant had heroin for sale in a hotel room. A friend had rented the room for the defendant; the friend gave the defendant the key and the defendant reimbursed him for the room. The hotel did not prohibit registered guests from having unregistered overnight guests. However, the defendant's friend signed a registration card that permitted the hotel to enter the room at any time to conduct inspections of the room. The agreement also stated that, should the occupant violate any laws, the agreement was subject to immediate termination, without regard to landlord-tenant laws.

After watching several people enter the room in a suspicious manner, the hotel clerk waited until the room was empty and entered the hotel room. Therein, she found a large amount of drugs and drug paraphernalia. The clerk summoned the police, who responded and entered the room along with the clerk. While police were present, the clerk continued to search the room and found additional evidence. The clerk showed the evidence to the police, who photographed it, left the room, and obtained a search warrant.

While police waited nearby for the warrant to arrive, several people entered the room, including the defendant. An officer knocked on the door and the occupants opened the door. Seeing the officer, the defendant grabbed some of the drugs and flushed them down the toilet. The officer entered and secured the room.

At a motion to suppress, the defendant argued that he had a reasonable expectation of privacy in the hotel room because he was an overnight guest there. He also argued that law enforcement violated his privacy by entering the room with the hotel manager because it was not reasonable for them to conclude that the manager had authority to consent to the entry. Further, the defendant argued the hotel manager was acting as a government agent when she conducted a full search of the room while the officers were present. The trial court denied the motion.

Held: Affirmed. The Court first held that the officers' entry into the hotel room was reasonable under the Fourth Amendment. While the Court did not gainsay the trial court's finding that the defendant had a *subjective* expectation of privacy in the hotel room, the Court refused to find that the defendant's expectation of privacy was reasonable. The Court pointed out that a reasonable expectation of privacy often rests on who owns, has possessory interest in, or is legitimately on the premises of property and whether he "had the right to exclude others from it" at the time of the entry.

The Court agreed that a registered hotel occupant has a reasonable expectation of privacy "equivalent to that of the rightful occupant of a house," and that an overnight guest in a residence also has an objectively reasonable expectation of privacy in the premises for purposes of challenging an entry by the police. In this case, however, the Court explicitly dodged the question of what rights an overnight guest in a hotel room has. Instead, the Court found that an overnight guest, while possessing some expectation of privacy, has no right to contest the entry of others whom his host, the registered occupant, allows to enter. In this case, the defendant's friend signed an agreement that allowed the hotel to enter at any time.

The Court then held that the hotel manager's act of telephoning the police—after observing suspicious "foot traffic" and then seeing drugs in plain view during an authorized inspection of the room—constituted an invocation of the express provision of the rental agreement permitting the hotel to exclude a renter from the premises for unlawful behavior, even though the renter was not expressly notified of this exclusion. The Court ruled that the defendant no longer had a reasonable expectation of privacy in that room once the clerk found the drugs and summoned the police.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1874152.pdf

Hairston v. Commonwealth: April 11, 2017

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

Facts: Defendant passed several cars over a double-yellow line in view of an officer who was on her way to work. The officer took a photograph of the driver and recorded the license plate of the vehicle, but was not immediately able to identify the driver. Later in the day, she saw the defendant again, driving the same vehicle. She and another officer stopped the defendant, learned his identity, smelled the odor of marijuana inside the vehicle, searched it, and located cocaine and other contraband.

Held: Affirmed. The Court rejected the defendant's argument that the information regarding the "mere traffic infraction" that the officer had observed earlier had become "stale." The Court held that the officers had probable cause to arrest the defendant for the earlier offense of reckless driving, and the fact that several hours passed after the officer saw the defendant commit the reckless driving offense and before she seized him for further investigation or arrest did not defeat the existence of probable cause. The Court also found that it was irrelevant that the defendant ultimately never faced charges for the reckless driving offense.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0714163.pdf

Virginia Court of Appeals
Unpublished

Commonwealth v. Donald: August 23, 2016
Commonwealth v. Sampio: August 23, 2016

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

Facts: Deputies saw the defendants "jaywalking" across Route 1 and stopped them. The defendants were crossing where there was neither an intersection nor marked crosswalk. The nearest intersection was approximately one-tenth of a mile away, but it lacked a crosswalk; the stoplight was visible from where the defendants crossed Rt. 1. There was no traffic in the roadway when the defendants crossed the road.

During the stop, the deputies learned that the defendants were wanted, found a firearm and ultimately learned the defendants were participating in gang activity. The defendants moved to suppress the stop. The trial court ruled that pedestrians are not required by Code § 46.2-923 to cross a highway at an intersection wherever possible. The trial court suppressed the stop and the Commonwealth appealed.

Held: Affirmed, Motion to Suppress properly granted. The Court based its ruling on the language of the "jaywalking" statute, § 46.2-923, which provides:

> "When crossing highways, pedestrians shall not carelessly or maliciously interfere with the orderly passage of vehicles. They shall cross, wherever possible, only at intersections or marked crosswalks. Where intersections contain no marked crosswalks, pedestrians shall not be guilty of negligence as a matter of law for crossing at any such intersection or between intersections when crossing by the most direct route."

The Court observed that there are two ways to violate this statute: First, by carelessly or maliciously interfering with the orderly passage of vehicles when crossing a highway; or second, by failing to cross at an intersection or marked crosswalk where it is possible to do so. The Court agreed that the defendants did not interfere with traffic in this case. The Court also agreed that the defendants did not cross at an intersection or crosswalk; however, the Court interpreted the last sentence of § 46.2-923 to mean that the defendants were not negligent, and therefore not guilty of an offense, in crossing between intersections, so long as the route they took was the most direct.

In a footnote, the Court rejected the argument that the defendants should have walked to the intersection to cross the road. The Court found that it is not reasonable for pedestrians to be expected to walk one-tenth of a mile out of the way to cross at a congested intersection with no crosswalk where approximately twenty lanes of traffic meet, and then walk one-tenth of a mile back to their destination. The Court wrote "Such inconvenience and risk is not required by the statute and is unreasonable."

In another footnote, the Court also found that the Commonwealth had waived any argument regarding *Heien* at the trial court level, and refused to rule on whether the officers reasonably relied on a misinterpretation of the law.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0376162.pdf

Commonwealth v. Garrick: September 13, 2016

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

Facts: Officers found the defendant in a truck, alongside another sedan, stopped close together in a high crime area at night. The vehicles were stopped side-by-side with their engines running, facing the same direction. The officers knew that people frequently visited the area to use drugs. The area was industrial rather than residential and that the businesses in the area were closed. When the officers activated their emergency lights and stopped the sedan to investigate a potential traffic violation, the defendant and his passenger immediately got out of the truck and approached the officers without being asked to do so.

Officers ran the defendant's information and discovered a warrant for his arrest. Officers arrested the defendant, placed him in handcuffs, and removed a bottle of prescription medication bearing another individual's name from his pocket. Police also found crumpled currency in his pocket. At that point, they searched his truck.

The trial court overruled the defendant's objection to the search of his person, however.

Held: Reversed, motion to suppress improperly granted.

The Court first agreed that, under the 2016 U.S. Supreme Court ruling in *Utah v. Strieff*, the defendant could not suppress the officers' search of his person. Regardless of whether it was lawful to

stop and detain him, the Court found that the discovery of the active warrant for the defendant's arrest attenuated the connection between the evidence obtained from the search of his person and any potentially illegal conduct by the police. Applying the factors in *Strieff*, the Court also found no "purposeful or flagrant" police misconduct that would have supported suppressing the arrest.

The Court then ruled that, under the totality of the circumstances, the officers had sufficient probable cause that evidence of drug distribution would likely be inside of the vehicle. The Court found that the time of the evening, the character of the surrounding area, and the positioning of the vehicles implied that their occupants may have potentially been engaged in criminal activity. In addition, as the pills in the bottle were prescribed to another individual, the officers could reasonably suspect that the defendant possessed them illegally. The officers also could have inferred that the medication and the crumpled currency found in the defendant's pocket may have been obtained in a recent drug transaction and that further evidence pertaining to the distribution of narcotics would be found in the truck.

The Court also pointed out that the defendant and his passenger attempted to divert the officers' attention from the SUV when they initially approached it. The Court concluded that the particular positioning of the cars in a high crime area at night suggested that their occupants may have been engaged in criminal drug-related activity, and that suspicion was corroborated by evidence lawfully seized from Garrick's person and his behavior following the traffic stop.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0533161.pdf

Carter v. Commonwealth: November 1, 2016

Lee: Defendant appeals his convictions for Murder and Use of a Firearm on numerous grounds, including Fourth Amendment, Prosecutorial Misconduct, Adverse Witness, and sufficiency grounds.

Facts: The defendant killed his wife by shooting her in the neck with a revolver. The defendant claimed that his wife killed herself and that he attempted to stop her. The defendant claimed that he suffered an injury to the webbing of his hand between his thumb and forefinger was due to him jamming it into the hammer area of the revolver, attempting to stop it from going off. However, the defendant also told witnesses that he got the injury from a lawn mower blade.

Police obtained a search warrant for the defendant's home. The affidavit noted that the defendant's explanation for his wife's death was not consistent with the facts and that witnesses had stated they were having drug and financial problems. In the affidavit, the officer wrote that the defendant's claims were inconsistent with the facts and therefore he was seeking to seize the phone or any devices that may contain electronic data, as well as records and documents. The defendant moved to suppress the search, but the trial court denied the motion.

At trial, one of the Commonwealth's witnesses claimed he did not recall the facts of a conversation he had with the defendant, where the defendant threatened the victim. The trial court permitted the Commonwealth to treat the witness as adverse, over the defendant's objection.

During a break in the trial, a juror approached the prosecutor's car while his secretary was getting out of the vehicle. She asked the secretary for a cigarette and the secretary provided the juror with the cigarette. No other discussion took place, other than an observation about the weather. After trial, the defendant moved for a new trial on the grounds of improper contact with the juror.

Held: Affirmed. After finding the evidence sufficient, the Court agreed that there was no actual prejudice nor an imputation of bias as a result of the juror receiving a cigarette from the secretary.

The Court then found that it was improper for the trial court to permit the Commonwealth to treat its witness as hostile. The Court repeated that, under *Ragland*, it is not sufficient merely that the witness gave a contradictory statement on a prior occasion. Rather, the "testimony offered must be injurious or damaging to the case of the party who called the witness," as well as being unexpected. In this case, the Court noted the witness did not make any substantive statements that were inconsistent with his prior statements to law enforcement. He simply claimed to not remember the facts. However, the Court then found this error to be harmless.

The Court then rejected the defendant's argument that the search was invalid. The Court rejected the argument that the officers demonstrated no basis to search the cellphone, writing that: "The question of what evidence may be relevant to a criminal prosecution is ultimately determined at trial and not by a magistrate at the time a search warrant is issued when it is often unknown what evidence the search will uncover." The Court ruled that the evidence of the drug use permitted a magistrate to conclude that the request to seize computers, cell phones, and other electronic devices was relevant.

The Court also ruled that the search was lawful under the "good faith" exception to the search warrant. The Court noted the lack of any knowing or reckless false statements in the affidavit. At the motion to suppress, the trial court had permitted the officer to testify about his own observations at the crime scene, even though that information was not in the affidavit. The Court also held that the trial court correctly permitted testimony at the hearing beyond the affidavit's "four corners", and held that in assessing the officer's good faith, the trial court could consider the information known to the officer as well.

The Court also rejected a number of other arguments as lacking any evidence or basis or due to the defendant's failure to make a timely objection at trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0048163.pdf

Johnson v. Commonwealth: November 16, 2016

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

Facts: Police stopped a vehicle for a defective taillight. The defendant was a passenger in the vehicle. Upon retrieving the vehicle registration and identifying information from the two male passengers, the officer returned to his vehicle and, prior to running the information through DMV and VCIN/NCIC, he immediately called for a K9 officer. He learned that the driver was licensed, but never ran any other checks on the occupants of the vehicle.

Six minutes later, the K9 officer arrived. For about 4 minutes, the officer assisted a citizen with an unrelated issue, and then for the next 6 minutes, the officer assisted the K9 officer in conducting a dog sniff of the vehicle. Thereafter, the officer spoke to the defendant and other passengers for a couple of minutes until the defendant confessed he had drugs on his person. The officer seized the drugs and searched the car. He never addressed the defective taillight again and never completed any other computer checks on any of the occupants.

The defendant moved to suppress the search on the grounds that the length of his detention exceeded what *Rodriguez* permits.

Held: Reversed. The Court repeated that, under *Rodriguez*, that a police officer "may conduct certain unrelated checks during an otherwise lawful traffic stop," but "may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual;" thus, "Authority for the seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed." The Court then concluded that, under a plain reading of *Rodriguez,* the officers' drug investigation leading to the defendant's confession violated the defendant's Fourth Amendment rights and likewise, the search was tainted by the illegal investigation and arrest.

In this case, the Court criticized the officer's actions for not being focused on the reason for the stop. The Court concluded that, because the officer performed no further computer checks on the driver or the two other occupants after the K9 officer's arrival, he must have had all the information reasonably necessary to complete the equipment violation citation process by the time the K9 officer arrived. At that point, approximately ten minutes into the stop, the Court ruled that the justification for the traffic stop no longer existed.

However, the Court did not end the analysis there. Noting that the *Rodriguez* case had not been announced until after this case had taken place, the Court then addressed whether to apply the Exclusionary Rule in this case. However, the Court applied the now-defunct "*de minimis*" standard that had been the rule in Virginia before *Rodriguez* and found that even under that test, the search would have been unlawful.

In examining the impact of *Rodriguez*, the Court discussed a two-prong test for the officer's actions during the stop. Under the first prong, a court must assess whether the articulated basis for the traffic stop were legitimate. Under the second prong, a court must examine whether the actions of the authorities during the traffic stop were 'reasonably related in scope' to the basis for the seizure.

Thus, the Court quoted *Rodriguez* to emphasize that, although an officer is entitled to conduct safety-related checks that do not bear directly on the reasons for the stop, such as requesting a driver's license and vehicle registration, or checking for criminal records and outstanding arrest warrants, an officer's focus must remain on the basis for the traffic stop, in that the stop must be "sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1215151.pdf

Morris v. Commonwealth: December 6, 2016

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

Facts: Officers stopped the defendant's car after running the license plate, which indicated that the vehicle was currently impounded in Henrico County. The defendant explained that he had just redeemed the car and provided paperwork reflecting that. An officer returned to his cruiser to confirm the paperwork, while another remained and called for a drug dog. When the dog arrived, the officers asked the defendant to step out of the vehicle. The other officer was still in his car checking the paperwork. The defendant refused to exit the vehicle and instead drove away at a high speed.

Officers fled and chased the defendant into a rural area, where they captured him. They noticed that the glove compartment was open, as were the passenger side windows, and neither had been open earlier. The dog alerted on the glove compartment. Retracing the path of the chase, the officers found a bag with 136 grams of heroin in 400 glassine packets on the side of the road. At trial, the defendant

testified that he fled the scene simply because he was scared of the police and so that he could get "somewhere where there was a lot of witnesses."

Held: Affirmed. The Court first found the evidence sufficient to prove the defendant possessed the heroin. The Court noted that the defendant's flight, the dog alert, and the observation that the defendant lowered the window and opened the glove box, all proved that he possessed the heroin. The Court also rejected the defendant's explanation for his flight, noting that he did not head for a populated area, but instead fled to a remote location.

The Court also rejected the defendant's Fourth Amendment challenge. The Court first noted that, under *Rodriguez*, the officer did not impermissibly extend the stop. Instead, in this case the officer was still performing his check on the defendant's documents when the dog arrived. The Court rejected the argument that once the defendant produced his license and registration, together with the receipt from the impound yard, the stop should have been over and any further detention became illegal.

The Court also ruled that, under *Hodari D*, the drugs found at the side of the road after the pursuit were not the fruits of a seizure and ruled that the "Fourth Amendment is not implicated in any way." The Court quoted the Commonwealth's argument during the trial court's motion to suppress hearing: "What's to suppress? Nothing was seized from [the defendant]. There was some property found abandoned by the side of the road which the police took into possession."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1144151.pdf

Watts v. Commonwealth: December 20, 2016

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

Facts: An officer saw the defendant driving erratically and noticed that the front windshield had two large cracks in it. The officer stopped the vehicle. Once the officer had inspected the windshield, he walked to the open passenger's side window to explain what he was doing. There, he saw the top of a clear cellophane wrapper of the type "familiar" to cigarette smokers protruding from one of them. Based on his training and experience, the officer knew that cellophane wrappers are "commonly used" for packaging marijuana and cocaine. The officer asked the defendant, "What's in the bag?" The defendant, without being asked to do so, lifted the bag, and the officer saw marijuana underneath.

In a motion to suppress, the defendant argued that the officer impermissibly prolonged the stop by walking to the passenger side window after looking at the front windshield and then asking about the cellophane bag.

Held: Affirmed. The Court noted that the stop in this case occurred more than ten months prior to the United States Supreme Court's decision in *Rodriguez*. Thus, as in *Matthews*, the Court held that the officer's actions fell within the law in place at the time and therefore refused to apply the exclusionary rule and suppress the evidence. The Court ruled that, at best, the officer's actions caused a *de minimis* delay in the stop.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0117162.pdf

Commonwealth v. Simpson: January 17, 2017

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

Facts: Police stopped a vehicle in which the defendant was a passenger for an equipment violation. The officers quickly learned that the defendant was wanted and arrested him. While standing outside the vehicle, an officer observed a firearm in the center console of the vehicle. Although it was difficult to see, the officer could see the firearm with the aid of a flashlight. The officers seized the gun and learned the defendant was a felon.

The trial court suppressed the evidence and the Commonwealth appealed.

Held: Affirmed, motion to suppress properly granted. The Court first addressed the issue of standing. The Court found that the defendant did not have standing to challenge the search of the car, but did have standing to challenge the seizure of the firearm. The Court ruled that, as a mere passenger, the defendant did not have a reasonable expectation of privacy or property interest in the areas of the car searched. However, because the defendant asserted a property interest in the gun, and the Commonwealth implicitly conceded his interest by alleging it was his gun, the Court ruled the defendant had standing to challenge the seizure of the gun.

In the trial court, the Commonwealth had argued that the firearm was in plain view. However, on appeal, the Attorney General abandoned that argument and did not allege that the handgun was in plain view. Instead, on appeal, the Attorney General argued that there was probable cause to seize the gun and that there was an exigent circumstance, which was that the gun was in a motor vehicle. The Attorney General also argued, alternatively, that even if a Fourth Amendment violation occurred, the exclusionary rule should not apply to suppress the gun because the gun would have been inevitably discovered through lawful means.

However, the Court rejected both arguments. The Court found that the mere existence of a weapon, without more, does not automatically equate to probable cause to seize it pursuant to the Fourth Amendment. The Court also contended that the Commonwealth's argument was dependent upon the weapon being in "plain view" at the time of its seizure, but pointed out that the Commonwealth had also alleged it was concealed for the purposes of probable cause to actually seize it.

The Court also rejected the argument that the officers could seize the gun for their safety. The Court wrote: "a bare assertion of 'officer safety' without concomitant probable cause that a crime has been committed and that the weapon seized is contraband, evidence of a crime or fruits of a crime—none of which obtain in this case—is insufficient to support a constitutional seizure." Despite finding that the defendant had no standing to challenge the search of the car, the Court seemed to find it significant that the officers lacked any authority to enter or search the car at all.

The Court also rejected the argument that, because the defendant was a felon and the police would inevitably have discovered that, the seizure was lawful under inevitable discovery. The Court noted that the record lacked any testimony that the police inevitably would have run the defendant's criminal history. The Court also noted the lack of any other evidence that law enforcement would have searched the car for another reason.

[*Note: Despite finding that the defendant lacked the standing to object to the search, the Court seemed to place great weight on the unlawfulness of the search. However, because this case was a Commonwealth's Appeal, there are limited options for review of this case.*]

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/1348164.pdf

Al-Hayani v. Commonwealth: January 24, 2017

Louisa: Defendant appeals his conviction for Possession of More than 500 cigarettes with Intent to Distribute on Fourth Amendment grounds.

Facts: The defendant carried over 700 cartons of cigarettes in his vehicle, intending to sell them in New York. An officer stopped the defendant for speeding. The officer, who had prior training in identifying interstate cigarette trafficking, immediately noticed the cargo and suspected he was smuggling cigarette cartons. The defendant appeared unusually nervous and provided inconsistent answers to the officer's questions about his destination. The officer noticed that the defendant was driving the vehicle outside of the geographic boundaries, and past the expiration date, set forth in the rental contract. The officer also learned that the defendant had a prior conviction for smuggling cigarettes. The officer searched the vehicle and located the cigarettes.

Held: Affirmed. The Court ruled that, based on the facts, the officer had probable cause for the search of the defendant's rental vehicle. Thus, under *Carroll*, the officer's search was lawful.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1962152.pdf

Williams v. Commonwealth: March 21, 2017

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

Facts: Officers stopped a vehicle in which the defendant was a back-seat passenger for a traffic violation. The officers noticed the defendant furtively moving around in the back seat. A K-9 alerted on the vehicle and the officers searched the inside, finding marijuana residue throughout the floorboard in the front and back of the vehicle. The officers searched the defendant and found cocaine. At trial, the defendant objected to the search of his person.

Held: Affirmed. The Court held that the residue found on the floorboard throughout the vehicle provided probable cause that the defendant possessed marijuana, and therefore, the officers had probable cause to believe that the defendant possessed marijuana either individually or jointly with the other occupants of the vehicle. The Court ruled that this probable cause entitled the officers to search the defendant.

The Court also held that the when Officer Sanchez found the marijuana residue in the car, he had probable cause to arrest the car's occupants, including the defendant, and therefore the search was also justified as a search incident to arrest.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0233161.pdf

Porter v. Commonwealth: May 23, 2017

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

Facts: The defendant was sitting in his parked car late at night with another adult. An officer approached and noted that the defendant was extremely nervous when he lowered the window and spoke with the officer. The officer asked to see the defendant's identification, and the defendant agreed. As the two conversed, the officer saw two pill bottles in the appellant's lap.

The officer asked to see the pill bottles, and the defendant handed them to him. The labels on the bottles identified prescriptions in the defendant's name. One bottle was labeled as morphine and had a sticker with the words "controlled substance." The officer noticed that the morphine label indicated that the prescription had been filled with ninety pills seven days prior and that there were only two pills in the bottle. The defendant stated that he had been taking two to three pills a day.

The officer detained the defendant, who soon admitted to having sold the missing pills.

Held: Affirmed. The Court found that the totality of the circumstances demonstrated reasonable articulable suspicion of illegal activity. The Court agreed it was proper for the officer to deduce that, based on the prescription label noting that it had been filled seven days earlier, the bottle should have been mostly full rather than containing only two pills. The Court rejected the defendant's argument that there might have been an innocent explanation for his pill bottles, pointing out that the possibility of an innocent explanation for the suspicious conduct does not necessarily forbid an officer from making a brief, investigatory stop or detention to confirm or dispel his suspicion.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0631161.pdf

Joinder & Severance

Virginia Court of Appeals – Published

Severance v. Commonwealth: May 23, 2017
(See same case below on different issue)
Fairfax (Alexandria): Defendant appeals his convictions for Capital Murder on refusal to sever the charges and for sentencing him to two sentences of Capital life.

Facts: The defendant murdered three people, first killing the wife of a Sheriff in 2003, next a local official in November 2014, and then the sister of a local judge in February 2014. The three murders occurred within a mile and a half of each other in a low-crime residential area, where murder was unusual. The defendant committed his murders during late weekday mornings and shot all three of his victims near their front doors. There was no evidence in any case of a robbery or break-in and although money and jewelry were easily accessible, nothing was taken.

[Note: The crimes took place in Alexandria but the trial took place in Fairfax County, due to a venue change – EJC].

Police investigated and discovered that the defendant's motive for the murders was revenge against the court system and the local government over perceived injustices, especially the loss of

custody of his son. At trial, the Commonwealth introduced his writings where he expressed anger against Alexandria officials, including comments such as "[a]ssassinate . . . Family vendetta will settle the score after the kangaroo court . . . [k]ill all the local cops and murder all members of the enforcement class."

At trial, expert testimony established that the victims were all shot by an unusual .22 caliber handgun. The ammunition in each case was either cyclonic or subsonic Remington long-rifle plain lead hollow point bullets. At trial, three experienced firearm experts testified that they had only seen this particular ammunition three times in their long careers, and all three times were in these murders.

The defendant objected to the joinder of the three charges at trial, but the Court agreed to try the three crimes together. The jury convicted the defendant of all three murders, including two counts of Capital Murder and one count of First Degree Murder. The two counts of Capital Murder were charged under §18.2-31(8), as the killing of more than one person in a three-year period. The Court sentenced the defendant to two capital life terms over the defendant's objection.

Held: Affirmed. The Court agreed that it was proper under Rule 3A:10(c) to join the three charges, observing that the three offenses were sufficiently idiosyncratic and demonstrated a common scheme or plan. The Court noted that the three victims were prominent citizens of Alexandria; each murder was not committed in isolation, but part of a plan of retaliation against people appellant considered part of "the establishment class." The Court viewed the murders as separate expressions of the defendant's general plan.

The Court also pointed out that the circumstances of each murder, including the location, time of day, and murder weapon were idiosyncratic. In addition, the Court noted that even if the trials had been separate, the evidence of the other murders would have been admissible under Rule 2:404(b) to show a common scheme or plan.

The Court also agreed that the trial court properly sentenced the defendant to two sentences of Capital Life for the two murders the defendant committed in a three-year period. The Court rejected the argument that the Blockburger test applied in this case, noting that the Blockburger test only applies to "the same act or transaction," whereas in this case there were two separate murders.

The Court distinguished this case from the Andrews case, where the trial court had convicted the defendant of multiple capital murders under different subsections of §18.2-31. The Court pointed out that, in that case, it had prohibited sentencing a defendant repeatedly for the same murder. However, in this case, the murders were separate crimes and events. The Court explicitly rejected the defendant's argument that § 18.2-31(8) mandates that the first of the two murders is a predicate murder and only the second is a capital murder.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0308164.pdf

Virginia Court of Appeals -
Unpublished

Parker v. Commonwealth: February 21, 2017

Pittsylvania: Defendant appeals his convictions for Armed Burglary and related charges on refusal to sever his charges and admission of medical records.

Facts: The defendant and his co-defendant burst into the victim's home with rifles and shot at the victim, but the victim returned fire and wounded both the defendant and the co-defendant. The defendants fled to a local hospital. When police investigated, the defendant claimed that he and his co-defendant were together at a party somewhere else, when they were both inadvertently caught in cross-fire between unknown individuals who began shooting. The defendants could not recall where the party was or who attended the party. However, the co-defendant's cell phone records, the projectiles recovered from his gunshot wounds, and the blood evidence in their car demonstrated that the defendants were at the crime scene and not at the "party."

The Commonwealth moved to try the defendants jointly and the trial court agreed, over the defendant's objection. Prior to trial, the Commonwealth subpoenaed the defendant's medical records. The trial court overruled the defendant's objection that the subpoena violated his medical privacy. At trial, the defendant objected to the Commonwealth's introduction of his medical records, arguing that the Commonwealth failed first to obtain the defendant's consent in accordance with § 32.1-127.1:03(A)(3).

Held: Affirmed. The Court first found that it was proper to join the two defendants. In this case, the Court noted that his alibi defense made his co-defendant's location at the time and date of the home invasion relevant and admissible, and would have been admitted even if the trials had been separate.

The Court then rejected the argument that § 32.1-127.1:03(A)(3) prohibited the Commonwealth from disclosing the defendant's records unless the purpose behind their original disclosure was to submit them into evidence at trial. The Court ruled that the defendant's consent was only required if the Commonwealth sought to re-disclose the medical records beyond the original purpose for which they were obtained, which was to present evidence that would link the defendants to the home invasion.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0113163.pdf

Jury Selection

Virginia Court of Appeals –
Published

Vay v. Commonwealth: January 31, 2017

Charlottesville: Defendant appeals his convictions for Abduction and Sexual Assault on voir dire, sufficiency of the evidence, and failure to inquire into his decision not to testify.

Facts: Defendant abducted, raped, and sodomized a woman while at a party. The defendant forced the victim through a crowd against her will into a kitchen, down a hallway, and into a bathroom. There, he locked the door and sexually assaulted her.

During jury selection, one of the jurors revealed that she worked at the nearby university, supervising students who conduct research on sexual assault. However, she indicated that she could be impartial and the trial court refused the defendant's request to strike her for cause.

Prior to trial, the defendant's counsel indicated that the defendant would not testify. During his case in chief, defense counsel asked for time to consult with his client about testifying. Thereafter, the

defendant's attorney again indicated that the defendant would not testify. The trial court did not conduct any direct inquiry or examination with the defendant about the issue.

At trial, the trial court denied a motion to strike the abduction charge, stating that it was a "jury issue." The defendant later asked that the trial court give an instruction to the jury explaining the "incidental detention" doctrine, but the trial court refused.

After trial, the defendant terminated his attorney and obtained a new attorney. The defendant then claimed that he had wanted to testify at trial, but his attorney told him not to, and the defendant moved to set aside the verdict on the ground that the trial court failed to conduct adequate *voir dire* on his desire to testify on his own behalf.

Held: Affirmed. The Court first concluded that the victim's testimony made clear that the defendant's actions created a state of both shock and fear, and thereby supported a finding of the defendant seizing, taking, transporting or detaining by force or intimidation. The Court also concluded that the detention was not merely incidental to the rape and sodomy. The Court refused to find that, by stating at the issue was a "jury question", the trial court was abdicating its role.

The Court also agreed that the defendant's instruction on "incidental detention" was inappropriate. The Court repeated that, under *Hoyt,* whether the detention established by the evidence is the kind of restraint which is an intrinsic element of crimes such as rape, robbery, and assault is a question of law to be determined by a court, not the jury. In a footnote, the Court also rejected the argument that the *Hoyt* ruling violates *Apprendi* by substituting a judge's finding for a jury's determination.

Regarding the defendant's decision not to testify, the Court ruled that a trial court is not required to conduct a colloquy with a defendant to determine whether he has knowingly and intelligently waived his right to testify in his own behalf. The Court also concluded that, in this case, the defendant was fully aware of his right to testify and elected not to exercise that right.

Regarding the juror whose students were conducting research on sexual assault, the Court refused to find that a person affiliated with women and gender studies in a university setting can never fairly sit as a juror in a sexual assault case in which the defendant is a male.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0053162.pdf

Taylor v. Commonwealth: March 14, 2017

Montgomery: Defendant appeals her conviction for Murder on refusal to strike a juror for cause.

Facts: The defendant murdered her father-in-law. At trial, during voir dire one of the potential jurors stated that he had already heard about the case in the media. When the prosecutor asked him if had formed an opinion about the case, the juror stated he was "probably more leaning towards guilty", at least "sitting there before hearing any evidence." However, on further questioning, he also stated that his opinion was not so firmly rooted that he could not put it aside and listen just to what was presented in the courtroom. The juror affirmed that he could render a fair and impartial verdict based solely on what was said in the courtroom.

The defendant moved to strike that potential juror for cause, but the trial court overruled the objection. The defendant then struck him using a preremptory strike.

Held: Affirmed. The Court reaffirmed that "impartiality" includes an unequivocal commitment to set aside preconceived opinions and view the defendant as innocent until proven guilty beyond a reasonable doubt. The Court, as it had before, placed great weight on the trial court's determination of the juror's sincerity that he would be able to be impartial by laying aside any preconceived notions.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0543163.pdf

Virginia Court of Appeals -
Unpublished

Holmes v. Commonwealth: August 2, 2016

Richmond: Defendant appeals his convictions for Carjacking, Robbery and Abduction on refusal to strike a juror in voir dire.

Facts: Defendant stood trial for carjacking, robbery, and abduction. During voir dire, defense counsel had the following exchange with a juror:

Counsel: Do you feel like if Mr. Holmes doesn't testify, there is just no way you could find him not guilty?

Juror: Yeah, because if you [sic] innocent, you have something to tell [sic].

Counsel: Ms. Greene, you feel like an innocent person would testify?

Juror: Yes.

The trial court brought the juror back for further questions. Ultimately, the juror agreed that if the defendant did not testify, she would not consider that against him. The defendant asked to strike the juror for cause, but the trial court refused, finding that she demonstrated that she would follow the trial court's instructions. The defendant did not use a preemptory strike against the juror and she heard the case and convicted the defendant.

Held: Affirmed. The Court pointed out that the juror was able to answer the trial court's questions and both attorneys' questions in a manner that demonstrated to the trial court her ability to be a fair and impartial juror. The Court agreed that, irrespective of her view that an innocent person "has a story to tell" and should testify, it was appropriate to find that she could set aside that view and decide the case solely based upon the law and the evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0602152.pdf

Weis v. Commonwealth: October 18, 2016

Matthews: Defendant appeals his conviction for Domestic Assault and Battery on refusal to strike a juror.

Facts: The defendant and the victim had a confrontation after the victim found him naked in bed with another man. The defendant attacked the victim repeatedly, at one point trying to drag her into a creek. The defendant claimed that the victim attacked him and that he only held her to protect himself; he denied striking her at any point.

At trial, during voir dire, one juror agreed with the statement: "no man ever has a right to raise a fist to a woman." During further voir dire, the juror expressed a belief that self-defense should be judged different for men than for women, because men are generally stronger and should therefore not have to use as much force. However, the juror also agreed that he could apply the law and that he would consider the facts of each case in doing so. When the Commonwealth's attorney asked whether, if the trial court instructed him on what constituted justified force, he could follow that instruction and give both sides a fair trial, the juror responded, "I think so, yes, sir." The trial court overruled the defendant's request to strike the juror for cause.

Held: Affirmed. The Court repeated the warning that "evidence of a venireman's impartiality "should come from him and not be based on his mere assent to persuasive suggestions." The Court noted that the juror's own opinions took into account legally relevant factors in a self-defense case and that the juror ultimately expressed a willingness and ability to apply the law.

Full case at:
http://www.courts.state.va.us/opinions/opncavwp/0785151.pdf

Juveniles

Fourth Circuit Court of Appeals

LeBlanc v. Mathena: November 7, 2016

Virginia Beach: In a *Habeas* proceeding, Defendant appeals his life sentences, imposed while he was a juvenile, on Eighth Amendment grounds pursuant to *Graham v. Florida*.

Facts: At the age of 16, the defendant committed Rape and Abduction with the Intent to Defile. The trial court sentenced the defendant to two life terms without the possibility of parole. After the U.S. Supreme Court's ruling in *Graham v. Florida*, the defendant filed a *Habeas* claim. *Graham* had held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."

The Virginia trial court denied *Habeas* relief, concluding that Virginia's "geriatric release" constituted an appropriate mechanism that rendered the defendant's sentence an appropriate sentence under *Graham*. The defendant appealed to the Federal District Court, which reversed the decision. The Commonwealth appealed.

Held: Sentence reversed. In a 2-1 decision, the Court ruled that Virginia's parole procedures do not comply with *Graham* and remanded the case with instructions to resentence the defendant in accordance with *Graham* and the Eighth Amendment.

In the 2011 case of *Angel v. Commonwealth*, the Virginia Supreme Court had ruled that Virginia courts could lawfully impose a life sentence in a non-homicide juvenile case, because DOC still retains discretion to release the defendant early pursuant to §53.1-40.01. In *Angel*, the Virginia Supreme Court held that that section provides the "meaningful opportunity" for release required by the Eighth Amendment.

However, the Fourth Circuit examined the procedures regarding release that Virginia has established under the terms of §53.1-40.01 (a.k.a. "Geriatric Release"). The Court was concerned that

Virginia's Geriatric Release Administrative Procedures authorize the State Parole Board to deny geriatric release for any reason, without considering a juvenile offender's maturity and rehabilitation.

The Court found that *Graham* set forth three key requirements:

(1) That juvenile non-homicide offenders sentenced to life imprisonment must have the "opportunity to obtain release based on demonstrated maturity and rehabilitation."

(2) That the opportunity for parole must be "realistic" and more than a "remote possibility." Mere executive clemency is insufficient.

(3) That a state parole or early release program must account for the lesser culpability of juvenile offenders.

In particular, the Court noted that the Parole Board may refuse to entertain a petition for Geriatric Release without regard to the substance of the petition. While the Administrative Procedures allow the Parole Board to consider certain characteristics of the offender, including "the individual's history, physical and mental condition and character, . . . conduct, employment, education, vocational training, and other developmental activities during incarceration, prior criminal record, behavior while incarcerated, and changes in motivation and behavior," the Court expressed concern that the regulations do not offer a "guarantee" that the Parole Board will ever review those factors.

The Court wrote: "Indeed, under the Geriatric Release Administrative Procedures, the Parole Board could allow Petitioner to die in prison without ever having considered whether Petitioner had matured or was rehabilitated." The Court therefore ruled that these procedures deny the defendant the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" that *Graham* demands.

The Court explicitly criticized the holding in *Angel*, writing that "it was objectively unreasonable, therefore, for the Supreme Court of Virginia to take the position that a penal regime under which it concedes early release is the exception, rather than the expectation, complies with *Graham's* meaningfulness requirement."

The Court also criticized the Virginia Administrative Procedures, arguing that *Graham* favors legal regimes that clearly state who will be eligible to be considered for parole, and details the standards and procedures applicable at that time, allowing prisoners "to predict, at least to some extent, when parole might be granted." The Court contented that, under *Graham*, regulations that permit a Parole Board to deny parole "for any reason without reference to any standards" offer inmates nothing more than a "bare possibility" of release and therefore do not constitute "parole" for purposes of the Eighth Amendment.

The Court was also concerned that the defendant in this case cannot apply for geriatric release until roughly twenty years later than most inmates, due to the manner in which the statute calculates eligibility to apply for geriatric release. For example, a fifty-year-old sentenced to life in prison will be eligible to apply for Geriatric Release in ten years, but the defendant will have to serve forty-four years before receiving his first opportunity to apply for Geriatric Release. Thus, the Court concluded that the Virginia regime did not comply with *Graham* because it punished juvenile offenders more harshly than adult offenders.

Lastly, the Court found that Virginia's regime failed to comply with *Graham* because it did not explicitly weigh the defendant's youth at the time of his offense.

In a footnote, the Court refused to speculate whether a statute or regulation requiring only that a state decision-maker consider "maturity and rehabilitation" satisfies *Graham*'s requirement that juvenile offenders have the opportunity to obtain release "based on demonstrated maturity and rehabilitation."

In another footnote, the Court also noted that it was not addressing the question of whether a lengthy term-of-years sentence for a juvenile is the "functional equivalent" of life without parole under *Graham*.

[*Note:* The decision in this case was 2-1, and the deciding vote was case by a judge sitting by designation. *En Banc* review would not be a surprise – *EJC*].

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/157151.P.pdf

Virginia Supreme Court

Vasquez v. Commonwealth: February 12, 2016
Valentin v. Commonwealth: February 12, 2016

Rockingham: Two juvenile defendants appeal their aggregate sentences on Eighth Amendment grounds.

Facts: Defendants, both juveniles, broke into a college student's residence and raped her at knifepoint. The trial court imposed sentences of 133 years for Vasquez and 68 years for Valentin. The defendants argued that these sentences exceeded what is permitted under the Eighth Amendment under the U.S. Supreme Court's ruling in *Graham*.

Held: Affirmed. The Court refused to extend *Graham's* prohibition on life-without-parole sentences to non-life sentences that, when aggregated, exceed the normal life spans of juvenile offenders.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1141071.pdf

Johnson v. Commonwealth: December 15, 2016
Aff'd Court of Appeals Decision of March 25, 2014

Lynchburg: Defendant appeals his life sentence for Murder as a juvenile on imposition of a life sentence.

Facts: Defendant, two months before his 18th birthday, shot and killed a man during a home-invasion robbery. The trial court convicted the defendant of 1st degree murder. Prior to sentencing, the defendant requested that the trial court appoint a neuropsychologist, at the Commonwealth's expense, to testify regarding the defendant's maturity and brain development. The defendant argued that there was no other evidence regarding his physiology or psychology. The trial court denied the motion and sentenced the defendant to life, plus additional years for other offenses.

After sentencing, the defendant argued that the trial court failed to consider, under *Miller v. Alabama,* the psychological differences between adults and juveniles before imposing a life sentence and failed to make an "individual determination" regarding his case.

Held: Affirmed. The Court first rejected the argument that the defendant was entitled to an expert. The Court noted that the defendant sought the assistance of an expert at the Commonwealth's expense with no idea what evidence might be developed or whether it would assist him in any way.

Thus, the Court concluded that the defendant did not demonstrate a "particularized need" for the assistance of a neuropsychologist.

The Court also ruled that the law does not require a probation officer to investigate a defendant's current physiology or psychology. However, the Court did note that it was conceivable that a defendant might demonstrate a "particularized need" for an expert, under *Husske,* or justify an expert's testimony as "additional facts bearing upon the matter," in response to the presentence report. under § 19.2-299(A).

The Court then rejected the argument that the sentence violated *Miller v. Alabama*, noting that this sentence allowed for the possibility of parole via geriatric release under Code § 53.1-40.01, whereas *Miller* merely prohibited mandatory sentencing of a juvenile to life without the possibility of parole. The Court reaffirmed its holding in *Angel*, that the code provides the "meaningful opportunity" for release required by the Eighth Amendment. Thus, the Court found that the trial court only sentenced the defendant to life in prison, rather than life without parole.

[*Note: This case was different, on the facts, from the 4th Circuit's case of LeBlanc v. Mathena, decided in November, because in that case the trial court explicitly imposed a sentence of life without parole, whereas here the trial court merely sentenced the defendant for a Class 2 felony* – EJC].

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1141623.pdf

Jones v. Commonwealth: February 2, 2017
Affirming Ruling of October 31, 2014, after Remand by U.S. Supreme Court

York: Defendant appeals his sentence for Capital Murder on Eight Amendment grounds

Facts: Defendant murdered a convenience store clerk at the age of 17. He pled guilty to capital murder in exchange for a sentence of life without parole. In his plea agreement, he waived his right to appeal. After the U.S. Supreme Court's ruling in *Miller v. Alabama*, the defendant moved to vacate his sentence and argued that the Eighth Amendment forbids mandatory life imprisonment for juvenile offenders without affording the decision-maker the opportunity to consider mitigating circumstances.

The Virginia Supreme Court affirmed the ruling, but the U.S. Supreme Court vacated and remanded the case for reconsideration in light of *Montgomery v. Louisiana*. *Montgomery* held that *Miller* was retroactive, and thus, juvenile defendants must be given the opportunity at the time of sentencing to show their crime did not reflect irreparable corruption; and, if it did not, "their hope for some years of life outside prison walls must be restored by the possibility of future parole."

Held: Affirmed. The Court noted that the U.S. Supreme Court, in remanding this case and 39 others for rehearing, directed the Virginia courts to determine whether the defendant forfeited or waived any entitlement to relief (by, for example, entering into a plea agreement that waived any entitlement to relief), or whether the defendant's sentence actually qualifies as a mandatory life without parole sentence.

As it had in the first ruling in 2014, the Court ruled that the trial court had the ability under §19.2-303 to suspend all or part of the life sentence imposed and therefore the statutory sentence was not a "mandatory life without parole" scheme. The Court further found that nothing in Virginia law denied the defendant the opportunity to request a suspension and to present evidence of his "youth and attendant characteristics," as required by *Miller* and *Montgomery*, in support of a suspended sentence.

The Court agreed that, under *Miller* and *Montgomery,* State law cannot impose "mandatory" penalties that make "youth (and all that accompanies it) irrelevant" to the decision to imprison a juvenile for life without parole. However, the Court rejected the argument that Virginia's sentencing procedure fundamentally violates *Miller*'s requirement of a hearing where youth and its attendant characteristics are considered as sentencing factors in order to separate those juveniles who may be sentenced to life without parole from those who may not.

The Court also pointed out that *Montgomery* acknowledged that "Miller did not require trial courts to make a finding of fact regarding a child's incorrigibility" and "did not impose a formal factfinding requirement" on this mitigation issue.

The Court also noted that the defendant stipulated to the imposition of a life sentence without parole as part of a plea agreement and explicitly waived his right of appeal. Thus, rather than being denied the opportunity to offer mitigation evidence of his "youth and attendant characteristics," the defendant waived that right.

Lastly, the Court indicated that defendants must raise future *Miller* claims either on direct appeal or by *habeas* under Virginia law. The Court refused to find that the trial court's sentence was void *ab initio* and refused to find it was subject to a motion to "vacate." In viewing future cases, the Court explained that there are "only two scenarios: (i) mandatory life-without-parole sentences that can be remedied by the availability of parole and (ii) those for which parole is unavailable and which therefore require remand for discretionary resentencing." The Court wrote that "Both the *Miller* and *Montgomery* remedies presuppose that the original life sentence was mandatory such that no mitigating evidence presented at the original sentencing hearing could have precluded the entry of a mandatory sentencing order 'condemning him or her to die in prison.'"

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1131385.pdf

Virginia Court of Appeals –
Unpublished

J.K.N. v. Commonwealth: August 23, 2016

Arlington: Defendant, a juvenile, appeals her adjudication on the terms of her probation order.

Facts: After adjudicating a juvenile of misdemeanor computer harassment, the juvenile court withheld a finding of guilt and placed the defendant on probation, including a curfew and an order to live with her mother. After several months of dispositional hearings, the juvenile court entered an order on July 25, 2014 that placed additional conditions upon the defendant and continued the case for three more months. The juvenile court ruled that the computer harassment charge would be dismissed if the defendant was compliant. In August of 2014, the defendant left home without permission and without reporting her whereabouts.

At a violation hearing, the defendant argued that nothing in the juvenile court's order of July 25, 2014 stated explicitly that she remained on probation. The juvenile court disagreed and imposed a finding of guilt.

Held: Affirmed. The Court held that the conditions of probation contained in the juvenile court's order were still in effect at the time the defendant ran away from home. The Court reasoned that the juvenile court's failure to restate the previously-imposed conditions of deferral did not release the

defendant from compliance with those conditions. The Court ruled that the juvenile court's silence left the prior obligations in place, rather than removing them. The Court distinguished the *White* case; in *White,* the Circuit Court had placed a specific end-date for probation, and then continued the case for six months thereafter. The Court pointed out that according to the trial court's order in *White*, the probation period explicitly terminated on a specific date.

The Court refused to find that the juvenile court's order of July 25, 2014 was a sentencing order, and ruled that it was nothing more than an order deferring, or postponing until a later time, disposition of the matter before the court. The Court reasoned that the defendant's probation was in effect "pending disposition" of her case, and therefore prior to disposition of the case, the probation continued. The Court dismissed the argument that, because the hearings were "dispositional hearings", they necessarily disposed of the case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0455154.pdf

Preliminary Hearings & Indictment

Va. Supreme Court

Bass v. Commonwealth: June 2, 2016
Rev'd Unpublished Court of Appeals Ruling of July 7, 2015

Richmond: Defendant appeals his conviction for Robbery on the form of the indictment

Facts: Defendant attempted to rob one man, while robbing another. The Commonwealth accidentally mixed up the indictments, indicting the attempt as a completed robbery and the completed robbery as an attempt. At trial, the agreed-upon jury instructions conformed to the facts, although not to the indictments. The jury convicted the defendant of robbery on the indictment that only charged an attempted robbery. The defendant did not raise an objection until his appeal.

The Court of Appeals reversed the conviction, finding that the "ends of justice exception" permitted the Court to reverse the conviction in the absence of an objection at trial or prior to sentencing.

Held: Conviction Affirmed, reversing the Court of Appeals. The defendant had conceded that he was procedurally barred from raising this argument, but for the "ends of justice" exception. The Court agreed that a conviction for a crime other than the one charged in the indictment is plainly reversible. However, the Court also noted that an indictment is required only by statute, not the Constitution, and in this case, there was no defect in the proceedings that would render any aspect of the judgment void.

The Court distinguished *Legette* and *Ferguson*, upon which the Court of Appeals had relied, and repeated that "no grave injustice occurs" merely because a variance exists between an indictment and the evidence offered at trial — even where the defendant is convicted of a greater crime than the one charged in the indictment. In this case, the Court found that the defendant had notice of the charges against him and he proceeded throughout trial apparently under the assumption that he was charged with the robbery of the correct person.

The Court also noted that if it *had* reversed the conviction due to a variance with the indictment, the Commonwealth could have properly obtained a new indictment for robbery and proceeded to trial on that charge notwithstanding the prior proceeding.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151163.pdf

Virginia Court of Appeals
Published

Epps v. Commonwealth: May 31, 2016

Danville: Defendant appeals his convictions for Abduction and Assault and Battery on Presentment of the Indictment and sufficiency of the evidence.

Facts: Defendant assaulted his girlfriend and prevented her from escaping the residence. He first attempted to strangle her and then chased her to the door, where he pushed her away from the door, told her that he would not allow her to leave, and punched her.

The grand jury indicted the defendant in October, 2014, and on that day the indictment was presented in open court. Trial took place in November, 2014. However, the trial court did not enter an order memorializing the grand jury's actions, i.e. the "presentment order", until January of 2015.

At trial in November, 2014, the defendant pled guilty to the indictment for assault & battery. The defendant then argued that the abduction was merely incidental to the assault and that he could not be convicted of both assault & battery and also of abduction.

The defendant also argued that the indictment was invalid because, at the time of trial, the trial court had not entered the presentment order.

Held: Affirmed. The Court first reviewed the defendant's argument regarding the presentment order, which was based on a case from 1826 and another case from 1892. The Court noted that the requirement that a case begin with an indictment is merely statutory and the defendant can waive the requirement. The Court repeated that reading the indictments aloud, verbatim, is not required for an indictment to be valid; what is important is that the indictment be presented in court. Although the Court likened the failure to enter a presentment order to a mere procedural defect, the Court also noted that § 17.1-123 does not set a time limit for the Court to enter a presentment order at all. Thus, the Court ruled that the defendant had been properly indicted and tried under these facts.

Regarding sufficiency, the Court agreed that a trial court can find abduction only when the detention committed in the act of abduction is separate and apart from, and not merely incidental to, the restraint employed in the commission of battery. Thus, the question is whether the detention exceeded the minimum necessary to complete the required elements of the other offense. The Court then examined the facts in this case and found that blocking the door and detaining the victim was not necessary to complete the crime of assault and battery that had occurred earlier, when the defendant tried to strangle her.

Full Case at:
http://www.courts.state.va.us/opinions/opncavwp/0148153.pdf

Restitution

Virginia Court of Appeals
Unpublished

Phillips v. Commonwealth: March 28, 2017

Norfolk: Defendant appeals her conviction for Embezzlement on Sufficiency of the Evidence and an Award of Restitution

Facts: The defendant worked as a clerk in a store that sold money orders. One day, the defendant sold 9 money orders worth $3,500 to a customer without taking any payment. Soon after, both the defendant and the customer left the store. When the store discovered the theft, the store put a "stop" on the embezzled money orders and fired the defendant. There was no evidence that anyone ever negotiated the stolen money orders.

At trial, the defendant argued that there is no statutory presumption that the value of a money order is the amount printed on its face, and therefore the common-law value of a money order was simply the value of the paper upon which it is printed. The trial court convicted the defendant and ordered her to pay restitution for the value of the money orders.

Held: Affirmed in part, reversed in part. The Court affirmed her conviction, but vacated her restitution obligation.

Regarding the value of the money orders, the Court agreed that the Commonwealth might only have been able to prove the value of the paper in a prosecution for simple Grand Larceny. However, in this case the Court pointed out that the Commonwealth charged Embezzlement. The Court noted that the Embezzlement statute specifies that the object of embezzlement may be "any money, bill, note, check, order, draft, bond, receipt, bill of lading or any other personal property, tangible or intangible." The Court further reasoned that the law does not require that a thief be permitted to enjoy the fruits of his crime before he may be charged with the theft. Instead, the Court ruled that the embezzlement was complete when the defendant gave away the money orders without taking the commensurate cash as payment

The Court also noted that the Commonwealth could have charged the defendant using §18.2-98, which states, in part, that "the money due on or secured by the writing, paper or book, and remaining unsatisfied, or which in any event might be collected thereon, or the value of the property or money affected thereby, shall be deemed to be the value of the article stolen."
However, the Court reversed the award of restitution. The Court pointed out that just because the defendant stole property worth a specific dollar amount does not automatically justify a restitution award of that amount, since in this case, the theft caused no financial loss to the owner. The Court noted that there was no evidence that the money orders were negotiated prior to the stop-payment order.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0237161.pdf

Right to Counsel

Virginia Supreme Court

Clarke v. Galdamez: June 9, 2016

Fairfax: The Commonwealth appeals the granting of a *Habeas* petition on Ineffective Assistance grounds.

Facts: Defendant, drunk, ran another vehicle off the road and fled the scene. The defendant accepted a plea agreement in which he pled guilty to misdemeanor hit and run as well as DUI, receiving a sentence of 180 days with 170 days suspended on the hit and run offense. However, due to his two misdemeanor convictions, DHS revoked the defendant's "Temporary Protected Status" in the United States.

In his *Habeas* petition, the defendant insisted that he never would have pled guilty if he had known that he would have lost his Temporary Protected Status and faced deportation. The defendant claimed that he did not intend to flee the scene and that he returned to the scene before police arrived. He claimed that he did not realize that he hit anyone or anything until he arrived home and that, as soon as he realized he had crashed, he returned to the scene. The *Habeas* court found that his attorney gave him erroneous advice regarding the plea agreement's impact on his immigration status. The *Habeas* court also found that, had the defendant received proper advice, he would have rejected the plea agreement and gone to trial.

Held: Affirmed, *Habeas* petition properly granted. In a 4-3 ruling, the Court reviewed the facts of the case and the defendant's potential defense at trial. The Court found a number of factual issues that could have been contested or tested had the case gone to trial. The Court noted that, in a Hit & Run case, knowledge necessarily is an essential element of the crime.

In order to be guilty of violating the statute, "the driver must be aware that harm has been done; it must be present in his mind that there has been an injury; and then, with that in his mind, he must deliberately go away without making himself known." Thus, the Court observed that a person must stop "immediately" if and only if he knew or should have known involved personal injury or property damage. The Court concluded that the defendant had a potential defense at trial and would have gone to trial if he had known the immigration consequences of his guilty plea.

Full Case at:
http://www.courts.state.va.us/opinions/opnscvwp/1151022.pdf

Walker v. Forbes: September 8, 2016

Fairfax: The Commonwealth appeals the granting of a Habeas Petition on Sixth Amendment right to counsel grounds.

Facts: In 2001, the trial court convicted the defendant of Petit Larceny, 3rd or Subsequent Offense, and placed the defendant on probation. While on probation, the defendant committed robbery and abduction. After his conviction for those new offenses, the trial court brought the defendant back for a probation revocation hearing. The defendant admitted violating his probation by committing new crimes and did not otherwise contest revocation, although he asked for a lenient punishment. The Court found the defendant in violation and imposed part, but not all, of his suspended sentence.

Later, however, the defendant argued that the trial court had lacked an indictment for the 2001 petit larceny charge, and requesting that his probation violation counsel appeal the revocation. His counsel refused. The defendant then filed a *Habeas* petition, wherein he argued that his probation violation counsel was ineffective in failing to inform the court that it lacked jurisdiction for want of an indictment, in failing to present the defendant with information concerning that jurisdictional ground for a direct appeal, and in refusing to file an appeal after the defendant made known his desire to do so. The trial court granted the petition and granted the defendant a delayed appeal to the Virginia Court of Appeals.

Held: Revered, *Habeas* petition improperly granted. The Court ruled that the defendant had no Constitutional right to counsel at all, much less to effective assistance of counsel. The Court found that the statutory right to counsel in post-conviction proceedings arises from legislative grace and does not create a Constitutional right to counsel, nor the concomitant Constitutional right to the effective assistance of counsel.

While the Court agreed that a probation revocation hearing must provide due process, the Court repeated that due process does not always require the presence of counsel at revocation hearings. The Court quoted *Gagnon*: "the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings." The Court agreed that counsel *may* be Constitutionally necessary, such as when the defendant contests the grounds for revocation, or when the defendant argues the grounds for the imposition of the sentence, or otherwise lacks the ability to represent himself. In this case, however, the Court pointed out that the defendant admitted violating his probation by committing new crimes and did not otherwise contest revocation, and he did not present any circumstances mitigating or justifying the violation. Thus, none of the exceptions in *Gagnon* applied and he did not have any Constitutional right to counsel at all.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151848.pdf

Second Amendment

4th Circuit Court of Appeals

U.S. v. Hosford: December 6, 2016

U.S. District Court for Maryland: Defendant appeals his convictions for Unlicensed Firearms Dealing on Second Amendment grounds.

Facts: Over a period of several months, the defendant bought almost a dozen firearms from gun shows and sold them at a profit to an undercover officer, although he was not a licensed firearms dealer. The defendant moved to dismiss the indictment on Second Amendment grounds.

Held: Affirmed. The Court quoted the U.S. Supreme Court opinion in *Heller*, noting that the decision was not to "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial

sale of arms," and pointed out that in a footnote, the Supreme Court identified these kinds of prohibitions as "presumptively lawful regulatory measures."

The Court reaffirmed the test articulated in *Chester* for Second Amendment challenges. First, a reviewing court must ask "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." If it does not, then the law comports with the Second Amendment. But if the challenged regulation does burden conduct within the scope of the Second Amendment as historically understood, the court must apply "an appropriate form of means-end scrutiny." Regarding the standard for that analysis, the Court reaffirmed that laws burdening "core" Second Amendment conduct receive strict scrutiny, while less severe burdens receive only intermediate scrutiny.

The Court ruled that the prohibition against unlicensed firearm dealing is a longstanding condition or qualification on the commercial sale of arms and is thus facially constitutional. The Court also ruled that, even assuming that the prohibition implicates conduct protected by the Second Amendment, the prohibition against unlicensed sales does not touch on the Second Amendment's "core protections" and therefore subjected it only to intermediate scrutiny. Applying that standard, the Court found a reasonable fit between the prohibition against unlicensed firearm dealing and the government's objectives.

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/154284.P.pdf

Sixth Amendment: Co-Defendant Testimony

Virginia Court of Appeals –
Published

Reyes v. Commonwealth: October 25, 2016

Loudoun: Defendant appeals his convictions for Malicious Wounding on Sixth Amendment grounds.

Facts: The defendant stabbed a man in the chest outside a bar. During an interview, a co-defendant told police that the defendant wasn't at the scene of the crime. Prior to trial, however, the co-defendant pled guilty and agreed to testify truthfully at trial if called by the Commonwealth. The defendant filed a motion to compel the co-defendant's testimony at trial. The co-defendant moved to quash that subpoena, however, on Fifth Amendment self-incrimination grounds.

During a hearing on the motion to quash, the defendant explained that he wanted to ask the co-defendant if he had pled guilty to a reduced offense, if he was at the scene of the crime, and whether the defendant was there at the scene as well. The trial court granted the motion to quash and refused to permit the defendant to call his co-defendant as a witness at trial.

Held: Affirmed. The Court repeated that a defendant has no right to compel his co-defendant to testify if the co-defendant elects to invoke his right against self-incrimination. The Court agreed that a trial court must balance the defendant's Sixth Amendment rights against the co-defendant's Fifth Amendment rights, and explained that the trial court must decide, question by question, whether a proffered question has an incriminating implication. If so, the privilege rests with the witness and its assertion must be honored by the court.

In this case, the trial court asked the defendant outside of the presence of the jury to proffer each specific question that he planned to ask the co-defendant in order to determine whether the co-defendant could invoke his privilege for that question. The Court agreed that the proffered questions could still implicate the co-defendant despite his previous guilty plea. The co-defendant hadn't been sentenced yet, and therefore could have suffered a worse punishment, or even Federal prosecution, as a result of his answers. The Court found that it was proper to prohibit the questions at trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1349154.pdf

Sixth Amendment: Right to Jury

U.S. Supreme Court

Pena-Rodriguez v. Colorado: March 6, 2017

Certiorari to the Supreme Court of Colorado: Defendant appeals his convictions for Child Sexual Assault on Sixth Amendment grounds.

Facts: Defendant sexually assaulted two girls. A jury convicted the defendant at trial. However, after trial, two jurors approached the defendant's attorneys. They indicated that a juror had expressed racially-biased reasons for his verdict, stating during deliberations, "I think he did it because he's Mexican and Mexican men take whatever they want." The juror also did not find the defendant's alibi witness credible because, among other things, the witness was "an illegal."

The Colorado courts denied the defendant's motions for a new trial, based upon the "no-impeachment rule", which prevents jurors from testifying about their own subjective beliefs, thoughts, or motives during deliberations.

Held: Reversed. The Court held that that, where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the "no-impeachment rule" give way to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

The Court agreed that the "no impeachment rule", which has existed since 1785, is a vital rule that protects jury deliberations from intrusive inquiry. However, the Court explored the conflict that exists between the no-impeachment rule and the goal of eliminating racial bias in the jury system. The Court decided that there must be an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.

Although the Court acknowledged a danger that, post-conviction, defendants would seek to harass jurors or improperly delve into the substance of jury deliberations, the found it significant that 17 U.S. jurisdictions have already recognized a racial-bias exception to the no-impeachment rule. The Court found no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations in those jurisdictions. The Court also noted that, in some jurisdictions, post-trial juror contact is restricted or forbidden and that, in this case, the jurors came forward on their own. The Court explicitly dodged two questions. First, the Court did not address what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias.

Second, the Court also did not decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted.

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/15-606_886b.pdf

Virginia Court of Appeals –
Published

Richardson v. Commonwealth: March 7, 2017

Nottoway: Defendant appeals his conviction for Indecent Exposure on Failure to Grant a Jury Trial.

Facts: Defendant unlawfully exposed himself after two previous convictions for that offense. Prior to trial, he complained to the court about his attorney, who in turn requested a continuance. The trial court overruled the defendant's complaints and refused the continuance. Thereafter, the defendant refused to speak at all, refusing to answer regarding whether he wanted a bench or jury trial. The trial court then stated "I'm going to read through the questions and assume that unless you speak up, you agree with me." The trial court then stated that it was assuming that the defendant was waiving his right to a jury trial. In a bench trial, the trial court convicted the defendant.

Held: Reversed. The Court looked to the explicit language of the Virginia Constitution, Art. I §8. The Court held that, under the Constitution of Virginia, a circuit court cannot try a criminal defendant without a jury unless it enters the defendant's affirmative consent in the record. The Court ruled that the absence of an affirmative waiver, on the record, is a jurisdictional defect that the defendant cannot waive by failing to object at trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0051162.pdf

Sentencing

U.S. Supreme Court

Bosse v. Oklahoma: October 11, 2016

Writ of Certiorari to the Oklahoma Court of Criminal Appeals: Defendant appeals his death sentence on admission of Victim-Impact Testimony.

Facts: The defendant murdered a woman and her two children. At sentencing, over the defendant's objection, the State asked three of the victims' relatives to recommend a sentence to the jury. All three recommended death, and the jury agreed. The defendant appealed.

Held: Reversed. In a *per curiam* opinion, the Court chided the Oklahoma appeals courts for having misread *Booth* and *Payne*'s rulings regarding victim-impact testimony in capital cases. In *Booth*,

the Court had held that the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence that does not "relate directly to the circumstances of the crime." However, in *Payne*, the Court modified that rule and held that evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family was admissible.

The Oklahoma courts had found that *Payne* implicitly overruled the portion of *Booth* that prohibited victim-impact testimony that contained characterizations of the defendant and opinions regarding the sentence. The Supreme Court rejected that conclusion and reaffirmed that *Booth* prohibits victim-impact testimony that contains characterizations of the defendant and opinions of the sentence.

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/15-9173_q86b.pdf

Virginia Supreme Court

Du v. Commonwealth: September 22, 2016

Danville: Defendant appeals his sentencing for Rape and Malicious Wounding on the terms of probation.

Facts: The defendant raped his 13-year-old half-sister. His father and stepmother walked into the room while the defendant was assaulting the child. The defendant attacked them with a baseball bat and beat them into unconsciousness. As a result of his injuries, the defendant's father never regained his cognitive functions; he is now under full nursing home care. As the case was pending, the defendant communicated with the victims and attempted to entice them to fail to appear and to refuse to cooperate with the prosecution.

At sentencing, the trial court imposed a fifty-year sentence, followed by lifetime probation. In her victim impact statement, the stepmother stated that the defendant left her in a constant state of fearful panic at the very thought of him. The prosecutor had stated that the stepmother requested that the court not impose a no-contact provision regarding her, but the trial court stated that it found her victim-impact statement to be a clear statement that she did not want contact with the defendant. The trial court ordered that the defendant have no contact with the stepmother for the remainder of his probation, i.e. the rest of his life.

The defendant appealed, arguing that the trial court abused its discretion by ordering lifetime probation and imposing a lifetime no-contact condition with the step-mother on his suspended sentences.

Held: Affirmed. The Court began by repeating that the sole statutory limitation placed upon a trial court's discretion, in its determination of probation conditions, is "reasonableness." The Court then agreed that the order of lifetime probation was lawful. The Court noted that the maximum possible sentence was life plus thirty years. Because the imposition of lifetime probation is far less severe than life imprisonment, the Court rejected the defendant's argument that "lifetime probation" was excessive.

In a footnote, the Court also noted that the Commonwealth has legitimately elevated concerns for public safety with sex offenders, especially those who are on probation for child molestation.

Regarding the no-contact provision, the Court also agreed that it was appropriate. Given that the defendant had earlier attempted to manipulate his mother into abandoning the prosecution, the Court of Appeals found that it was reasonable for the trial court to infer that the defendant might continue that same effort during his imprisonment. The Court also found it was reasonable for the trial

court to discount the prosecutor's representation of the stepmother's desires, given the clarity of her victim-impact statement.

In another footnote, the Court explicitly rejected the "*expressio unis*" argument that the "no contact" provisions of the gang provisions of §19.2-303 preclude a court from ordering no contact with family members, other than in gang cases.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151058.pdf

White v. Commonwealth: May 2, 2017

Gloucester: Defendant appeals his conviction for False Statement on a Firearms Form on the court's refusal to withhold a finding of guilt and grant a deferred disposition

Facts: While purchasing a firearm, the defendant denied that he had a previous conviction for Domestic Assault and Battery on his firearms form. In fact, the defendant had a previous conviction for Domestic Assault and Battery. An officer investigated and the defendant told him that he did not understand that his conviction was a crime of "Domestic Violence."

The defendant pled guilty in circuit court, but the trial court deferred entering a conviction until after the preparation of a presentence report and continued the case. At sentencing, the defendant claimed he lacked the intent to commit the offense. The defendant asked the court to reduce the offense to a misdemeanor or dismiss the case entirely.

Held: Affirmed. The Court centered its analysis on the cases of *Starrs, Taylor, and Hernandez*, and in doing so openly acknowledged: "To say that the law on this issue is unclear is an understatement." However, the Court reviewed the cases in detail and concluded that "The only thing that is clear is that a trial court may take a case under advisement until a written conviction order is entered. However, that inherent authority 'is neither a gateway nor a loophole for acquitting or refusing to convict a defendant whose guilt has been established beyond a reasonable doubt.'"

The Court interpreted *Starrs* as simply acknowledging that a trial court has authority to take a case under advisement and continue it to a future date. The Court reviewed many cases that have examined the scope and limits of that power. The Court pointed out that under *Harris*, which interpreted *Starrs*, if the trial court had doubts as to the defendant's guilt, it had the option of deferring disposition and taking more evidence to determine guilt or innocence or degree of guilt. However, under *Hernandez*, once the trial court has entered a judgment of conviction, the court has no inherent authority to depart from the range of punishment legislatively prescribed.

The Court explained that, without some other source of authority, the trial court cannot use its inherent authority as a source of judicial clemency or as a pardon power. In this case, since the trial court found at the plea hearing that the evidence proved the crime beyond a reasonable doubt, the Court agreed that the trial court did not have the authority to acquit the defendant and convict him of some other crime.

In a separate concurrence, Justice Humphreys agreed with the Court and criticized other judges and attorneys who, in his view, read the *Starrs* case too broadly.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1150161.pdf

Virginia Court of Appeals –
Unpublished

Moore v. Commonwealth: July 19, 2016

Fairfax: Defendant appeals his sentences for Pandering on admission of jail phone calls at sentencing.

Facts: Defendant arranged to sell sexual acts by a mentally incapacitated, mentally ill Russian immigrant for profit at a motel. After the defendant pled guilty to Pandering, at sentencing the Commonwealth submitted a CD with a recording of a telephone conversation between the defendant and a character witness. In the call, the defendant admitted that he was writing a letter in the witness' name and claiming that the victim had no disability or disadvantage. The defendant never actually submitted the letter and the witness did not testify. The defendant objected to the admission of the recording, but the trial court listened to the recording and considered it in sentencing.

Held: Affirmed. The Court pointed out that, given that letters that the defendant submitted on his own behalf were relevant, his willingness to subvert the process by surreptitiously writing or editing such letters was equally relevant. The Court rejected the argument that, by not submitting the forged letter, the defendant rendered the recording irrelevant. Instead, the Court found that his attempt, alone, was relevant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0706154.pdf

Holley v. Commonwealth: September 20, 2016

Fairfax: Defendant appeals his sentencing for Conspiracy to Commit Robbery on calculation of the sentencing guidelines.

Facts: The Defendant and his confederates robbed a woman and fled the scene. During the attack, the victim reported that she saw a gun, but the defendant denied there was a firearm. The defendant pled guilty to conspiracy to commit robbery and eluding pursuant to a plea agreement. In exchange, the Commonwealth entered a *nolle prosequi* on a Use of a Firearm offense. At the plea colloquy, the Commonwealth related the facts, including the victim's report about a firearm. However, at sentencing, the defendant objected to the guidelines on the grounds that they scored the defendant for having a firearm. The trial court overruled his objection and sentenced the defendant within the guidelines as calculated.

Held: Affirmed. The Court found that the trial court's sentence was not reviewable. The Court repeated that, under § 19.2-298.01(F), a court's failure to follow any or all of the provisions of the sentencing guidelines, or failure to follow any or all of the provisions of the sentencing guidelines in the prescribed manner, shall not be reviewable on appeal, nor the basis of any other post-conviction relief. Instead, the Court described the guidelines as merely a tool for the court to exercise its discretion.

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/0998154.pdf

Culberson v. Commonwealth: March 21, 2017

Hampton: Defendant appeals his sentence for Possession of Cocaine on exceeding the jury's recommended sentence.

Facts: The defendant possessed cocaine. At trial, the jury convicted the defendant and recommended a sentence of twelve months in jail. The trial court amended that sentence to five years of incarceration with four years suspended, for a period of five years. The defendant failed to object to the sentence at trial, but objected on appeal.

Held: Reversed. The Court repeated that a trial judge may reduce a sentence but may not exceed the 'maximum punishment' fixed by the jury. Although the Court agreed that the trial court could have imposed an additional term of up to three years of post-release supervision under § 19.2-295(A), the Court noted that the trial court did not specify that the additional time was imposed pursuant to Code § 19.2-295.2. The Court also noted that the trial court imposed a sentence that exceeded what was statutorily permissible.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2006151.pdf

Speedy Trial

Va. Supreme Court

Wallace v. Commonwealth: June 2, 2016
Affirming Court of Appeals Opinion of July 28, 2015

Newport News: Defendant appeals his conviction for Indecent Liberties on Speedy Trial grounds.

Facts: Police arrested defendant on August 23, 2012, after which he remained in continuous custody. After a December 5, 2012 preliminary hearing, a January 14, 2013 indictment resulted in a February 19, 2013 trial date. Thereafter, the defendant requested a continuance, then requested a new attorney, then his attorney moved to withdraw. The Commonwealth requested and obtained a continuance, but during that period, he again asked for a new attorney, obtained a new attorney, and received another continuance. Then the defendant obtained several more continuances.

The day before trial, the Commonwealth's Attorney assigned to the case had a family medical emergency. The trial court granted a two-month continuance over the defendant's objection. The defendant then requested a new attorney, obtained a new attorney, and obtained more continuances, another new attorney, more continuances, and then finally pled guilty under a conditional guilty plea, after the trial court denied his motion to dismiss on speedy trial grounds.

Held: Affirmed. The Court summarily affirmed the opinion of the Court of Appeals, stating that it agreed with the reasoning stated in the Court of Appeals opinion.

The Court of Appeals had noted that almost all of the delays were attributable to the defendant. Even when the Commonwealth obtained continuances over the defendant's initial objection, the Court of Appeals found that the defendant tolled speedy trial when he requested and obtained new counsel and continuances of his own.

The Court of Appeals also had found that the prosecutor's family emergency tolled speedy trial, even though that exception is not explicitly stated in §19.2-243. The Court of Appeals rejected the argument that the Commonwealth's Attorney's office could have simply assigned another prosecutor, noting that to do so would violate the Rules of Professional Conduct. The Court of Appeals had written that this argument "is based on a faulty premise: that prosecutors are interchangeable and can be substituted, one for another, on the eve of trial without adequate preparation."

Full Case at:
http://www.courts.state.va.us/opinions/opnscvwp/1151296.pdf

Herrington v. Commonwealth: November 12, 2016
Aff'd Court of Appeals Ruling of February 12, 2014

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

Facts: Defendant possessed Oxycodone with the intent to sell. At preliminary hearing on August 28, the General District Court certified the charge of Possession of Oxycodone under §18.2-250. However, the Commonwealth sought and obtained an indictment for Possession with Intent to Distribute Oxycodone under §18.2-248 at Grand Jury on October 1.

Trial was set for January 8, but at trial his attorney moved for a continuance due to a conflict of interest. The defendant asked to represent himself on January 8 and go forward on that day, but the trial court refused and continued the case to January 24. Thereafter, the defendant obtained new counsel and trial proceeded in March. The defendant was in custody during the entirety of the proceedings.

Held: Affirmed. The Court first rejected the defendant's argument that the Commonwealth was bound to indict only the offense as certified by the General District Court. The Court ruled that a ruling in a preliminary hearing does not preclude the Commonwealth from seeking a new charge, as a new indictment supplants the finding of probable cause made by the district court.

Regarding speedy trial, the Court then considered the effect of the indictment and found that once the Commonwealth presented an indictment for a new, different offense, that indictment supplanted the previous proceeding and re-started the speedy trial clock as of October 1. Therefore, speedy trial did not run until 5 months after October 1, rather than August 28.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1150085.pdf

Virginia Court of Appeals –
Published

Harvey v. Commonwealth: February 21, 2017

Roanoke: Defendant appeals his convictions for Aggravated Malicious Wounding and Attempted Murder on speedy trial grounds.

Facts: On November 5, 2014, the Commonwealth served the defendant with several direct indictments. The parties set the matter for trial, but three and a half months later, on February 23, 2015, both parties jointly moved for a continuance of the trial date, which the trial court granted.

However, on April 23, 2015, within twenty-four hours of the scheduled jury trial, the Commonwealth orally moved for a continuance due to the absence of a subpoenaed witness. The defendant strenuously objected. The next day, the trial court heard the defendant's motion for bond and heard further argument on the Commonwealth's motion to continue, which the trial court had granted the day before. The defendant again noted his objection to the continuance and stated that he was not waiving his speedy trial rights. At that point, the parties engaged in the following dialogue:

> Commonwealth: Your Honor …. we have picked a trial date I believe June 12th.
> Defendant: Yes.
> Commonwealth: [Counsel] and I both have done the math and that is still within the
> Defendant: Yes.
> Commonwealth: The time frame set.
> Defendant: Yes, yes.
> Commonwealth: We both agree that that is within the Commonwealth's statutory limit of speedy trial. And that is as the Court has stated there may be need for a further continuance on this case.

The Court set the matter for June 12th. However, prior to trial, the defendant moved to dismiss the charges on speedy trial grounds. The trial court denied the motion, in part because it found that the defendant had attempted to approbate and reprobate, by previously agreeing that the time was within speedy trial and then arguing that it was not.

Held: Reversed. The Court found that the defendant did not agree to the continuance on April 24, 2015, setting the trial on June 12, 2015, and that this objection was noted on the record and in the order dated April 24, 2015. Thus, since the defendant objected to the continuance, the Court found that speedy trial had not tolled from April 24, 2015 to June 12, 2015 and, as a result, when the case went to trial it was outside the five-month speedy trial period.

The Court rejected the argument that the defendant had tried to approbate and reprobate. The Court stated that it could not determine, from the record, whether the defendant's counsel was (1) continuing her discussion with the trial court when the Commonwealth interjected, (2) acknowledging that she was available on the new date, or (3) agreeing that the date was in fact within speedy trial if bond was granted for the defendant. The Court also pointed out that the Court's order from that hearing stated that the defendant was "not waiving his speedy trial rights with th[e] continuance."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1460153.pdf

Virginia Court of Appeals - Unpublished

Thorsted v. Commonwealth: July 12, 2016

Orange: Defendant appeals his convictions for Manufacturing Methamphetamine and Possession of a Firearm on Speedy Trial grounds.

Facts: Defendant manufactured methamphetamine while possessing a firearm. After the defendant waived preliminary hearing, the Grand Jury indicted him on November 25, 2013. The Circuit Court released the defendant on bond and set a trial date of April 3, 2014. The court revoked and reinstated the defendant's bond a number of times while the case was pending.

Prior to trial, the parties continued the trial date. At that hearing, the defendant's attorney stated "we are going to waive speedy trial to whatever date the Commonwealth wants to set." The Court then verified the waiver with the defendant and set the case for July 17, 2014. However, prior to that trial date, the defendant again moved for a continuance, which was granted until September 29.

On that new date, the court informed the defendant that his attorney had left the practice of law. The Court appointed new counsel. On October 2, that new counsel asked to set the case for trial and the court provided possible dates. When the court suggested possible dates, the defendant's attorney stated "if that's the earliest dates, then we can just go ahead and set it for that." The Court set the case for trial on January 22. However, the defendant moved to dismiss the trial on speedy trial grounds on January 21. The trial court overruled the motion.

Held: Affirmed. The Court first noted that the 9-month period applied in this case because the defendant was released on bond for a period of time while he was awaiting trial. The Court then rejected the defendant's argument that his speedy trial rights were violated because the continuance between October 2, 2014 and January 22, 2015 was not a delay attributable to him despite his failure to object to the court setting the January 22 trial date at the October hearing.

The Court distinguished the cases that, before 1995, did not require the defendant to affirmatively object to a trial date in order to preserve his speedy trial right. The Court noted that the 1995 amendment to §19.2-243 meant that, under *Hutchins*, acquiescence in the entry of any order that continues a case – whether at the request of the Commonwealth or on the court's own motion – even where the new date is within the speedy trial limit, effectively tolls the running of the speedy trial statute.

Thus, in this case, by stating "if that's the earliest dates, then we can just go ahead and set it for that," the defendant tolled speedy trial from October 2 until January 22.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1039152.pdf

Commonwealth v. White: November 1, 2016

Halifax: The Commonwealth appeals the dismissal of a charge on speedy trial grounds.

Facts: The Commonwealth held a preliminary hearing on September 14, 2015 for the defendant, who was in custody. The Grand Jury indicted the defendant on October 1, 2015. The defendant appeared in Court on October 27, 2015 and signed an order in which the defendant agreed to waive "any applicable speedy trial objection," and hand-wrote in "until 11/12/15." On November 12, 2015, another order continued the matter again and the defendant waived any speedy trial objection without noting the duration of the waiver. However, the case number for the charge did not appear on that order. In the next few orders, the case was again continued and the defendant waived speedy trial, this

time hand-writing in "until 1/7/16" and then "until 2/4/16." However, that order was not entered until February 10, 2016.

The next few orders of the trial court did not make clear what had taken place regarding setting the matter for trial, but the case was continued until April 19, 2016, when the parties set the case for a bench trial on May 13, 2016. Both parties endorsed the continuance order as "we ask for this." The defendant's attorney also struck through a portion of the order stating that he waived his speedy trial objection. On May 13, the defendant's attorney moved to withdraw and the court appointed a new attorney, who filed a motion to dismiss on speedy trial grounds several days later. The trial court granted the motion and the Commonwealth appealed.

Held: Affirmed. The Court reached back in time to find support for its ruling, past numerous published cases, including the Virginia Supreme Court's 2011 ruling in *Howard*, and instead quoted a Court of Appeals case, *Cantwell,* from 1984. In that case, the Court of Appeals had written: ""An accused is not required to take any action to avail himself of his statutory right to a speedy trial" and instead "may stand mute without waiving his right so long as his actions do not constitute a concurrence in or necessitate the delay."

The Court then found that the defendant's speedy-trial waivers were simply waivers of limited duration that had explicit end dates. The Court then calculated the dates for which there was no waiver as follows:

September 14, 2015 to October 27, 2015: 42 days.

November 12, 2015 to December 9, 2015: 27 days. The Court found this period was chargeable, even though the defendant waived speedy trial in the order, because the order did not have the case number printed on it.

January 7, 2015 to February 4, 2016: 28 days. The Court found this period was chargeable, even though the defendant waived speedy trial in the order, because the order was entered on February 10, even though it set the case for February 4. That order, the Court wrote, "makes no sense on its face, and can have no legal effect."

February 4, 2016 to April 19, 2016: 75 days. The Court again quoted *Cantrell*, rather than *Howard*: "Without anything in a court order or elsewhere in the record to show that a defendant agreed to or concurred in the delay of his trial . . . the delay must be attributed to the Commonwealth."

April 19, 2016 to May 13, 2016: 24 days. The Court found that even though the defendant signed "We ask for this" on the continuance order, the defendant sufficiently noted his objection by crossing out the speedy trial waiver on the continuance order. Since this was the first time the matter was set for trial, the Court ruled that the period was not a "continuance" at all, but rather the initial setting of trial, a time period that counts against the Commonwealth even when the defendant agrees to it under the 1995 *Ballance* case.

The total time the Court of Appeals calculated was 196 days, which exceeded the statutory maximum of 152 days.

[*Note:* In 2011, the Virginia Supreme Court wrote that a defendant must affirmatively object to a continuance on the record in order to preserve a speedy trial objection, writing "in order to avoid the tolling provision, the defendant must be adverse to the granting of the continuance and must affirmatively express his objection even when a new trial date is set within the speedy trial time limits for the commencement of the trial." The Court of Appeals never acknowledged *Howard* in this case. – *EJC*]

[*Note* also that, because this case was a Commonwealth's Appeal, the Attorney General's options for appeal are more limited. However, I understand that the Attorney General's Office is considering its options – *EJC*]

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0831162.pdf

Simmons v. Commonwealth: December 13, 2016

Richmond: Defendant appeals his conviction for Distribution of Heroin on Speedy Trial grounds.

Facts: Defendant sold heroin after having two prior convictions. After indictment, the trial court set the matter for trial in November, 2014. Thereafter the Commonwealth moved to join the case with another defendant's case. The defendant objected, but the trial court overruled the objection, continued the defendant's trial for a few weeks, and set the matters for a joint trial in December, 2014.

However, the trial court then continued the joint trial on its own motion. The trial court proposed a February, 2015 date. The defendant's attorney then stated: "We may run into speedy trial issues on that date, Judge." The Judge proposed an earlier date in response, and the parties discussed various options, before settling back on the original date in February, 2015. The defendant's attorney raised no further objection and the trial court set the matter for trial on that date.

In January, 2015, the defendant moved to dismiss on violation of speedy trial, but the trial court denied the motion.

Held: Affirmed. The Court ruled that the defendant's counsel acquiesced in the continuance of the trial to February, 2015 when he failed to clearly object to the continuance, which resulted in tolling the period from December, 2014 to February, 2015 for speedy trial purposes, pursuant to Code § 19.2-243(4). The Court refused to find that the statement "We may run into speedy trial issues" constituted a proper objection.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1078152.pdf

Trial Issues

4th Circuit Court of Appeals

Bennett v. Stirling: November 21, 2016

U.S. D. Ct., South Carolina, Charleston: Defendant seeks *habeas* relief for the death penalty on Due Process grounds.

Facts: During closing argument at trial for capital murder, the prosecutor admonished the jury, "Meeting [Bennett] again will be like meeting King Kong on a bad day." He also called the defendant a "caveman," a "mountain man," a "monster," a "big old tiger," and a "beast of burden." The prosecutor also elicited testimony from one of the state's witnesses about a dream in which he was chased by murderous, black Indians. In addition, while cross-examining a defense witness in sentencing, the prosecutor alluded to a jail guard with whom the defendant had a sexual relationship as "the blonde-headed lady," and then again referred to her in closing argument.

The trial court denied the defendant's motion for a new trial and the South Carolina Supreme Court affirmed. However, a Federal District Court found that the "racially-charged" language used by the prosecutor violated Due Process and remanded the case for resentencing.

Held: Affirmed, *habeas* relief properly granted. The Court wrote that the prosecutor's remarks challenged here were "unmistakably calculated to inflame racial fears and apprehensions on the part of the jury" and "were poorly disguised appeals to racial prejudice." The Court found that the comments were a "dog whistle" that "plugged into potent symbols of racial prejudice, encouraging the jury to fear Bennett or regard him as less human on account of his race."

In this case, the jury was all white. The Court contrasted the prosecutor's comments in this trial to his comments during the first trial in this case, which resulted in a conviction that was also reversed on appeal. In that case, the jury was mixed-race and the prosecutor did not make these comments.

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/163.P.pdf

Rodriquez v. Bush: November 23, 2016

U.S.D.C. for South Carolina: Defendant appeals his conviction for Drug Distribution on Ineffective Assistance of Counsel regarding the trial court's refusal to accept his guilty plea.

Facts: Immediately before the defendant's state criminal trial for drug trafficking, the trial judge rejected a plea agreement. The judge did so off the record, and gave no reason for this rejection other than stating that he "was ready to try a case." The defendant's attorney did not object to the rejection of the plea on the record, nor did he ask the judge to place his reasons for rejecting the plea on the record.

Held: Conviction affirmed. The Court ruled that the defendant failed to demonstrate prejudice. The Court reaffirmed that a defendant has no constitutional right to a plea bargain, nor is there a constitutional right to have a plea bargain, once made, accepted by the court. Instead, the Court repeated that a trial court may accept or reject the plea at its discretion. The Court contrasted this case with *Lafler*, noting that the issue in *Lafler* was the defendant's attorney's advice, not the trial court's ruling.

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/147297.P.pdf

Virginia Supreme Court

Wilkins v. Commonwealth: June 2, 2016
Aff'd Published Ruling of Court of Appeals, May 12, 2015

Portsmouth: Defendant appeals his conviction for Petit Larceny, 3rd Offense, for being tried in his jail clothes.

Facts: At his jury trial for Petit Larceny, 3rd, the defendant did not have civilian clothes to wear. His attorney explained that the clothes they had brought the morning of trial were not acceptable under jail rules. The trial court observed that the clothes might not appear to a jury to be jail attire, but offered defense counsel the chance to get clothes from the public defender. After a long recess, the trial court found that this problem was likely another delaying tactic by the defendant, who had been through 3 continuances and 3 lawyers and wanted a continuance anyway. During trial, the defendant also threatened to kill his attorney in open court and tried to leave the courtroom.

The Court of Appeals affirmed the conviction, finding that the defendant's refusal to wear proper clothing was merely a delaying tactic and that the defendant had a reasonable opportunity to obtain proper clothes.

Held: Affirmed. The Court first held that, in an appeal, the defendant bears the burden of proving that the clothing he or she wore at trial was readily identifiable to the jury as "jail attire." In this case, the Court found that the record lacked enough evidence of the defendant's appearance in court for it to find that the defendant was wearing "indicia of incarceration."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151068.pdf

Virginia Court of Appeals –
Published

Dufresne v. Commonwealth: October 18, 2016
Reversed Court of Appeals ruling of February 9, 2016

Richmond: Defendant appeals her conviction for Grand Larceny on the grounds that it is not a lesser-included offense of Robbery.

Facts: The defendant stole a phone, money and medication from a quadriplegic man for whom she was caring. The defendant, who had been the victim's caregiver, and her confederate walked in and began by stealing the victim's phone, which was his sole way of communicating with the world. As the victim begged the defendant to return the phone, the defendant stated: "What would you like to do? Do you want to finish this?" The victim became terrified and the defendant then stole the money and medication that the victim kept behind his head. The defendant then stole a TV remote control, concerned it might have a mechanism for calling for help, and left.

During her robbery trial, the defendant argued that she was guilty of grand larceny, not robbery, and at her motion to strike argued "I'd ask for the charge to be dropped down to grand larceny." The trial court convicted the defendant of Grand Larceny, finding that it was a lesser-included offense of Robbery. Later, the defendant moved to set aside the verdict, arguing that Grand Larceny is not a lesser-included offense of Robbery. The trial court denied the motion on the grounds that the defendant could not approbate and reprobate. On appeal, a panel of the court of appeals reversed the conviction.

Held: Conviction Affirmed. In a 6-5 ruling, the full Court reversed the panel decision and ruled that the defendant invited error when she asked the trial court to enter a conviction order for grand larceny. While the Court agreed that the conviction for grand larceny under an un-amended indictment for robbery constitutes reversible error, the Court quoted *Rowe*, repeating that a "party may not approbate and reprobate by taking successive positions in the course of litigation that are either

inconsistent with each other or mutually contradictory. Nor may a party invite error and then attempt to take advantage of the situation created by his own wrong."

The Court rejected the panel's argument that the defendant preserved the argument by filing a motion to set aside the verdict after the trial. The Court also rejected the dissent's argument that the Commonwealth suffered no prejudice as a result of the defendant's tactics. The Court wrote: "Faced with the appropriate choice of either robbery or petit larceny, the trial court may well have convicted Dufresne of robbery."

The Court also found that the trial court could have lawfully convicted the defendant of robbery, observing that in robbery cases, threats of violence or bodily harm are not an indispensable ingredient of intimidation. The Court pointed out that it is only necessary that the victim actually be put in fear of bodily harm by the willful conduct or words of the accused and that, in this case, the facts supported a robbery conviction.

Lastly, the Court discussed how an attorney may correct an error that the attorney invited at trial. The Court indicated that a trial court may weigh several factors, including whether the error was intentional or accidental, the passage of time between the error and the motion to correct, and the prejudice suffered by the other side, in deciding whether to permit a party to correct an error that the party invited. However, in this case, the Court found that the defendant's argument came too late and had already caused too much prejudice.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0281152.pdf

Virginia Court of Appeals –
Unpublished

Dodd v. Commonwealth: July 5, 2016

Chesterfield: Defendant appeals his convictions for Child Sexual Assault on refusal to grant a mistrial.

Facts: Defendant sexually assaulted a child. At trial, a witness testified on direct examination, unsolicited, about her suspicions that the defendant was having an inappropriate relationship with a neighborhood boy. The witness continued to answer several of the prosecutor's questions, until finally the defendant objected to the testimony. Later, outside the presence of the jury, the defendant requested a mistrial.

Held: Affirmed. The Court ruled that, because the defendant did not immediately object to the witness' unsolicited statements regarding her suspicions, his objection was not timely and therefore he waived the objection. The Court explained that in a jury trial, precision in objecting is essential to avoid the need for either a curative instruction at a point when its effect may be diluted by the jury's focus on more recently elicited evidence, or a mistrial that requires the otherwise unnecessary expenditure of additional judicial resources.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1043152.pdf

Karika v. Commonwealth: November 1, 2016

Chesapeake: Defendant appeals his conviction for Assault and Battery on Subject Matter Jurisdiction and Admission of a 911 tape

Facts: Defendant spit in a man's face during a road-rage incident. The victim called 911. During the call, the victim handed the phone to the defendant. The defendant then spoke to the 911 operator as well. Prior to trial, the parties orally requested a bench trial, and the trial court entered an order that essentially stated "Upon motion of the Commonwealth's Attorney, defendant, attorney for the defendant, and the Court, this matter will be heard by the Court" and not a jury.

At trial, the defendant sought to introduce the 911 call, contending that it demonstrated that the victim's tone of voice was inconsistent with someone who had been assaulted. The trial court excluded the tape as hearsay evidence.

Held: Affirmed. The Court first rejected the defendant's argument that the trial court lacked subject matter jurisdiction because it failed to enter into the record that the defendant waived a jury trial with the consent of the Commonwealth and the trial court. The Court noted that the defendant never denied that he waived a right to trial by jury, nor did he contend that his waiver was not voluntary or not intelligently given. Instead, the Court found that the trial court's order demonstrated that the parties properly waived a jury trial as required by the Virginia Constitution, §19.2-258, and Rule 3A:13(b).

The Court then rejected the argument that the waiver must also appear in the conviction and sentencing orders. The Court also rejected the argument that the trial court's order must specifically include the word "waiver." Instead, the Court essentially inferred from the entry of the order setting the case for a bench trial that the trial court must have complied with the code and the rule.

The Court then found that the trial court improperly excluded the 911 tape. The Court noted, as in *Brown*, that this hearsay was not offered for the truth of the matter asserted, but instead for *how* the victim spoke. However, the Court found that the error was harmless, in light of the other evidence adduced at trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1512151.pdf

Carter v. Commonwealth: November 1, 2016

Lee: Defendant appeals his convictions for Murder and Use of a Firearm on numerous grounds, including Fourth Amendment, Prosecutorial Misconduct, Adverse Witness, and sufficiency grounds.

Facts: The defendant killed his wife by shooting her in the neck with a revolver. The defendant claimed that his wife killed herself and that he attempted to stop her. The defendant claimed that he suffered an injury to the webbing of his hand between his thumb and forefinger was due to him jamming it into the hammer area of the revolver, attempting to stop it from going off. However, the defendant also told witnesses that he got the injury from a lawn mower blade.

Police obtained a search warrant for the defendant's home. The affidavit noted that the defendant's explanation for his wife's death was not consistent with the facts and that witnesses had stated they were having drug and financial problems. In the affidavit, the officer wrote that the defendant's claims were inconsistent with the facts and therefore he was seeking to seize the phone or any devices that may contain electronic data, as well as records and documents. The defendant moved to suppress the search, but the trial court denied the motion.

At trial, one of the Commonwealth's witnesses claimed he did not recall the facts of a conversation he had with the defendant, where the defendant threatened the victim. The trial court permitted the Commonwealth to treat the witness as adverse, over the defendant's objection.

During a break in the trial, a juror approached the prosecutor's car while his secretary was getting out of the vehicle. She asked the secretary for a cigarette and the secretary provided the juror with the cigarette. No other discussion took place, other than an observation about the weather. After trial, the defendant moved for a new trial on the grounds of improper contact with the juror.

Held: Affirmed. After finding the evidence sufficient, the Court agreed that there was no actual prejudice nor an imputation of bias as a result of the juror receiving a cigarette from the secretary.

The Court then found that it was improper for the trial court to permit the Commonwealth to treat its witness as hostile. The Court repeated that, under *Ragland*, it is not sufficient merely that the witness gave a contradictory statement on a prior occasion. Rather, the "testimony offered must be injurious or damaging to the case of the party who called the witness," as well as being unexpected. In this case, the Court noted the witness did not make any substantive statements that were inconsistent with his prior statements to law enforcement. He simply claimed to not remember the facts. However, the Court then found this error to be harmless.

The Court then rejected the defendant's argument that the search was invalid. The Court rejected the argument that the officers demonstrated no basis to search the cellphone, writing that: "The question of what evidence may be relevant to a criminal prosecution is ultimately determined at trial and not by a magistrate at the time a search warrant is issued when it is often unknown what evidence the search will uncover." The Court ruled that the evidence of the drug use permitted a magistrate to conclude that the request to seize computers, cell phones, and other electronic devices was relevant.

The Court also ruled that the search was lawful under the "good faith" exception to the search warrant. The Court noted the lack of any knowing or reckless false statements in the affidavit. At the motion to suppress, the trial court had permitted the officer to testify about his own observations at the crime scene, even though that information was not in the affidavit. The Court also held that the trial court correctly permitted testimony at the hearing beyond the affidavit's "four corners", and held that in assessing the officer's good faith, the trial court could consider the information known to the officer as well.

The Court also rejected a number of other arguments as lacking any evidence or basis or due to the defendant's failure to make a timely objection at trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0048163.pdf

Armstrong v. Commonwealth: November 22, 2016

Newport News: Defendant appeals his conviction for Possession with Intent to Distribute on Denial of his Right to Testify

Facts: After presenting a motion to suppress, the parties incorporated the testimony they presented at the suppression hearing into the trial. The Commonwealth presented additional testimony before resting. Defense counsel then stated, "Judge, you've heard the defense evidence in this case." He moved to strike the evidence, and the trial court denied the motion. The trial court again asked defense

counsel if he had any further evidence, and defense counsel responded, "No further evidence, Your Honor."

The trial court found the defendant guilty and continued the case for sentencing. Five months later, new counsel filed a motion to vacate and to grant a new trial alleging the defendant was denied his right to testify. The defendant claimed that he wanted to testify and told his attorney that he wanted to testify, but that his attorney waived his testimony without asking him.

Held: Affirmed. The Court held that the trial court had no obligation to engage in an on-the-record examination of the defendant to determine whether he was waiving his right to testify. Instead, the Court pointed out that the trial court was entitled to rely upon defense counsel's representation that the defendant was presenting no evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1775151.pdf

Hawkins v. Commonwealth: December 20, 2016

Caroline: Defendant appeals his conviction for Dogfighting on refusal to grant a mistrial.

Facts: Defendant ran a dogfighting operation. At trial, two expert witnesses testified about the physical evidence seized from the defendant's property, including a breeding stand, spring pole, and flirt pole, which they described as items used in the breeding of fighting dogs. Additionally, the defendant had numerous dogfighting publications and journals at his property, some of which contained the defendant's own advertisement for puppies in which he used language relating to dogfighting.

During the trial, the defendant's wife testified on his behalf. The prosecutor asked her if she was testifying because she was afraid of him, pointing out previous protective orders and criminal charges she had taken out against him. She denied being afraid of him. The parties agreed to admit documents reflecting that a series of violent charges that the defendant had faced had all been dismissed.

In closing argument, the defendant argued that the jury could not convict him based on previously dismissed charges. In rebuttal closing, the prosecutor argued to the jury that the defendant "was asking you to find the defendant not guilty, just like he was found not guilty for assaulting his wife and destroying her property and brandishing a firearm at her and attempting to murder her and shooting at her vehicle and destroying her property and assaulting her and assaulting her and throwing a missile at her vehicle and assaulting her and getting four protective orders, one including her daughter."

The defendant objected and requested a mistrial, but the trial court denied the motion.

Held: Reversed. The Court found that the prosecutor's comments were so prejudicial that they required a mistrial. The Court explained that, while the reference to the dismissed charges during cross-examination involved an attempt to demonstrate the wife's bias, the statement in closing was "clearly an effort to persuade the jury that appellant was more likely to have committed this crime because of his prior interactions with the criminal justice system." The Court expressed concern that, in light of the comment, the jury could have disregarded any doubt concerning the defendant's guilt, out of concern that they not let him "get away with" another crime, and was "so impressive as to remain in the minds of the jurors and influence their verdict."

The Court remanded the case to the trial court, to determine whether the defendant could be re-tried under the Double Jeopardy clause, and directed the trial court to resolve the issue of whether

the Commonwealth's comment was intended to "goad" the defendant into moving for a mistrial through intentional prosecutorial misconduct.

The Court also noted that the evidence sufficiently demonstrated that the defendant was guilty of promoting or preparing for the fighting of a dog by breeding fighting dogs.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1863152.pdf

Withdrawal of Guilty Plea

Virginia Supreme Court

Small v. Commonwealth: July 19, 2016

Norfolk: Defendant appeals his conviction for Possession of a Firearm by Felon on refusal to allow him to withdraw his guilty plea.

Facts: Police located a firearm at the defendant's home in May, 2010. He pled guilty to possession of that firearm as a convicted felon in November, 2010. Thereafter, the parties continued the defendant's sentencing 9 times due to the defendant testifying in another trial. Then, in June 2013, the defendant moved to withdraw his guilty plea. He claimed that he possessed the firearm to protect himself from someone who had shot him and who had killed his friend just 4 days before his own arrest. He argued that, after the court convicted the person who shot him, he could now prove that he was in legitimate fear for his own safety. The trial court denied the motion.

Held: Affirmed. As in *Edmonds,* the companion case to this case (see below), the Court first reaffirmed the standard in *Parris* for a defendant to withdra.w a guilty plea prior to sentencing. The Court then found that there was too much prejudice to the Commonwealth to allow the defendant to withdraw his plea and that his purported defense was not legally sufficient.

Regarding prejudice, the Court specifically recognized prejudice to the Commonwealth as a relevant factor that should be considered when reviewing a motion to withdraw a guilty plea prior to sentencing. The Court agreed that the delay was too lengthy and that the delay to the Commonwealth was an appropriate reason to deny the motion.

Regarding the defense of duress or necessity, the Court first adopted the standard that the Court of Appeals articulated in *Buckley* and *Humphrey,* as it did in *Edmonds* (below), finding that, to use the defense of duress or necessity, a defendant must show:

(1) a reasonable belief that the action was necessary to avoid an imminent threatened harm;
(2) a lack of other adequate means to avoid the threatened harm; and
(3) a direct causal relationship that may be reasonably anticipated between the action taken and the avoidance of the harm.

In this case, the Court found that the defendant had failed to show an "imminent threatened harm" which led him to possess a firearm. The Court contrasted the *Humphrey* case, noting that, in this case, there was no evidence of a present threat of death or serious bodily injury. Other than someone shooting the defendant four days before, the Court found no evidence of an ongoing threat that would support the defense of justification.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1150965.pdf

Edmonds v. Commonwealth: July 19, 2016

Arlington: Defendant appeals his conviction for Possession of a Firearm by Felon on refusal to allow him to withdraw his guilty plea.

Facts: Police responded to a call for a man threatening a woman with a gun. Police found the defendant, a felon, near the apartment and found that he was carrying a firearm. The defendant claimed that he had just taken the gun from an apartment so that his uncle, who had been angry and drunk, could not get to it and hurt his girlfriend.

Initially the defendant pled guilty, but soon thereafter, the defendant moved to withdraw his guilty plea. He claimed that he took the gun under duress because of the threat of imminent harm to his uncle and girlfriend. The trial court denied the motion.

Held: Affirmed. As in *Small*, the companion case to this case (above), the Court first reaffirmed the standard in *Parris* for a defendant to withdraw a guilty plea prior to sentencing. The Court then found that the defendant's purported defense of duress was not legally sufficient to allow the defendant to withdraw his plea.

Regarding the defense of duress or necessity, the Court addressed this issue in this case as well in a separate opinion in the companion case, *Small v. Commonwealth.* The Court first adopted the standard that the Court of Appeals articulated in *Buckley* and *Humphrey,* finding that, to use the defense of duress or necessity, a defendant must show:

(1) a reasonable belief that the action was necessary to avoid an imminent threatened harm;
(2) a lack of other adequate means to avoid the threatened harm; and
(3) a direct causal relationship that may be reasonably anticipated between the action taken and the avoidance of the harm.

In this case, the Court found that the defendant had failed to show an "imminent threatened harm" which led him to possess a firearm. The Court examined the record and noted that the defendant never proffered the location of the apartment, where the firearm had been in the apartment, whether the uncle ever possessed the firearm, and whether the uncle knew the firearm's location. The Court concluded that taking the firearm and leaving with it did not appear to be the defendant's only choice.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151100.pdf

Velazquez v. Commonwealth: October 27, 2016

Staunton: Defendant appeals his conviction for Computer Solicitation of a Child on refusal to permit him to withdraw his guilty plea.

Facts: Defendant solicited a child online. Pursuant to a plea agreement, the defendant pled guilty to that offense and the Commonwealth entered a *nolle prosequi* regarding the offense of Indecent Liberties. The plea agreement included an agreed sentence of 15 years with 10 years suspended. Less

than a week later, the defendant filed a handwritten, *pro se* notice of appeal, seeking to withdraw his guilty plea on the grounds that his attorney had not adequately explained the plea and that he entered the plea out of fear.

A few weeks later, the Court appointed a new attorney and sentenced the defendant. The new attorney filed a formal appeal, but thereafter also presented and argued a motion to withdraw the guilty plea 18 days after the sentencing hearing. The trial court ruled that it had lost jurisdiction over the case due to the defendant's appeal. The Court of Appeals agreed and denied the appeal.

Held: Affirmed. The Supreme Court ruled that the trial court and Court of Appeals correctly denied the motion, but for the wrong reason. The Court ruled that the trial court still had jurisdiction to hear the motion to withdraw the guilty plea under §19.2-296, which explicitly provides "to correct manifest injustice, the court within twenty-one days after entry of a final order may set aside the judgment of conviction and permit the defendant to withdraw his plea." The Court pointed out that the defendant's motion to withdraw his guilty plea was filed within 21 days, and found that the trial court had jurisdiction to consider the merits of the motion and rule on it.

However, the Court held that the defendant failed to meet the standard required under §19.2-296 to withdraw his guilty plea. Since the defendant did not move to withdraw his plea until after sentencing, the defendant had to show "manifest injustice" in order to succeed on his motion. In defining "manifest", the Court described it as "being 'synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident. In evidence, that which is clear and requires no proof; that which is notorious." In this case, the Court observed that the defendant testified that his answers during the plea colloquy were truthful. The Court agreed that the defendant understood the charges and voluntarily entered into the plea agreement.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1150849.pdf

Virginia Court of Appeals
Published

Minor v. Commonwealth: November 8, 2016

Fauquier County: Defendant appeals his convictions for Child Sexual Assault on refusal to permit him to withdraw his guilty plea.

Facts: Defendant raped and sexually assaulted his five-year-old step-child. The defendant entered an *Alford* plea of guilty to several counts of rape and aggravated sexual battery in exchange for the Commonwealth's motion for *nolle prosequi* of the remaining charges. At sentencing, the trial court sentenced the defendant to 155 years with 85 years suspended. However, in the sentencing order, the trial court inadvertently failed to include one of the case numbers.

25 days later, the defendant filed a notice of appeal of all of his convictions, including the case number that had been omitted in the sentencing order. 36 days after sentencing, the defendant filed a motion to reconsider, asserting his innocence. The trial court denied that motion. However, a few days later, on January 6, 2016, the trial court entered an amended sentencing order that included the missing case number.

On January 20, 2016, the defendant filed several motions, including a motion to withdraw his guilty pleas.

Held: Affirmed. The Court of Appeals dismissed the appeal, finding that it lacked jurisdiction to consider the issue of whether the trial court properly refused to permit the defendant to withdraw his guilty plea. The Court of Appeals cited §17.1-406 and Rule 1:1 and noted that the trial court's sentencing order was a final order. The Court agreed that the trial court retained jurisdiction under §8.01-428(B) to correct clerical errors and omissions, and noted that a court has "inherent authority" to correct the record *nunc pro tunc* to speak the truth. However, the Court ruled that a court cannot extend its jurisdiction by entering an order to correct the record.

In this case, the Court found that the January 6 order was clearly a *nunc pro tunc* order, even though the order did not explicitly state that it was such an order. The Court then ruled that the January 6 order did not extend the trial court's jurisdiction to do anything else regarding the case, including to consider the motion to withdraw guilty plea. Thus, the Court of Appeals could not consider the issue on appeal.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2047154.pdf

Fernandez v. Commonwealth: December 6, 2016

Hampton: Defendant appeals his convictions for Robbery, Abduction, and related charges on refusal to permit him to withdraw his guilty plea.

Facts: Defendant violated probation within a week of his release from prison in May 2011. In that first week, he also committed a series of new offenses, including Robbery, Abduction, and other offenses. While in jail in July 2011, the defendant then assaulted a law enforcement officer. The defendant sought a sanity evaluation for his May 2011 substantive crimes. Dr. Earle Williams issued an opinion that the defendant was sane at the time of the new offenses. The defendant then sought a sanity evaluation for the probation violation. Dr. Williams then issued an opinion that the defendant was insane at the time of the probation violation. His report referenced the facts of the new, May 2011 offenses but did not reference his own earlier report, where he found the defendant to be sane.

The defendant pled guilty to the May 2011 offenses, but then obtained a new attorney and later withdrew his guilty plea, noting the inconsistencies between the two sanity reports, as well as other factors. The trial court appointed a new evaluator, Dr. Pappadake, who found the defendant to be sane at the time of all of the offenses. The defendant then entered a new set of guilty pleas, this time by *Alford* plea.

However, six months later, the defendant filed another motion to withdraw his new guilty plea. This time, the defendant's attorney explained that Dr. Williams' reports had contained errors that caused her to misunderstand his conclusions. In fact, Dr. Williams' first report -- finding the defendant was sane -- should have been for the probation violation and that the second report -- finding appellant was insane - should have been for the robbery-related charges. The attorney explained that the errors caused her to believe that the defendant could not present an insanity defense for the substantive charges; she believed she was "statutorily barred" from presenting the insanity defense because both doctors found that the defendant was sane for the May 2011 offenses.

The trial court held a hearing and heard from both doctors. Dr. Williams opined that the defendant was legally insane at the time of the May 2011 substantive offenses. The trial court found that Dr. Pappadake was the more credible witness and denied the defendant's motion to withdraw his guilty pleas.

Held: Reversed. The Court held that the trial court erred by denying the motion when the defendant's counsel misadvised the defendant concerning a valid insanity defense. The Court examined the facts and noted that the defendant's pleas were based solely on his counsel's faulty legal analysis of the efficacy of an insanity defense. The Court then observed that although the trial court found Dr. Pappadake to be a more credible witness than Dr. Williams, that determination was not for the trial court to make.

The Court reviewed the standard for permitting a defendant to withdraw his guilty plea prior to sentencing. In a motion to withdraw a guilty plea, the Court explained that it is not the trial court's role to evaluate credibility of witnesses, nor to determine whether the proffered defense will be successful. Instead, the role of the trial court is to determine whether the defendant has made a *prima facie* showing of a reasonable defense. If the trial court finds, as a matter of law, that the defendant has no reasonable defense, it may then deny the motion. However, the Court explained, if the defendant proffers sufficient facts to support the asserted defense, such that it is reasonable to present it to the judge or jury trying the case, the trial court should grant the motion.

Finally, the Court turned to the "prejudice" factor established by *Small*. However, although the Court agreed it could consider the potential prejudice to the Commonwealth, the Court examined the record and did not note any factual findings to suggest any prejudice to the Commonwealth, such as missing witnesses or charges that could not be pursued due to delay. Although the delay was roughly five years, the Court refused to find that the length of time, standing alone, was significant enough prejudice to the Commonwealth to deny the motion.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1544151.pdf

Virginia Court of Appeals –
Unpublished

Owens v. Commonwealth: November 1, 2016

Culpeper: Defendant appeals his convictions for Forgery, Escape, and related charges on refusal to permit him to withdraw his guilty plea.

Facts: Defendant plead guilty to various offenses, including Forgery and Escape. Thereafter, the trial court sentenced the defendant. Twenty days later, the defendant's attorney filed a motion to withdraw as counsel and moved to withdraw the guilty plea. The defendant's attorney stated that the defendant contended that he was manipulated to enter a guilty plea and believed that his attorney was ineffective.

The next day, the trial court held a hearing on the motions. At the hearing, the trial court released the defendant's attorney, finding that there was a conflict between the defendant and his attorney. The trial court then appointed a new attorney. However, before the new attorney entered his appearance, the trial court denied the motion to withdraw the guilty plea. The trial court noted that the new attorney would be permitted to re-file the motion to withdraw the guilty plea.

Held: Reversed. The Court ruled that the defendant was denied his Constitutional right to be represented by counsel at the hearing on his motion to withdraw his guilty plea. The Court found that the trial court improperly required the defendant to present his motion without the assistance of

counsel. The Court repeated that a defendant has the right to the assistance of counsel under the Sixth Amendment and §19.2-157 at any "critical stage" where the "substantial rights" of the accused may be affected. The Court then noted that a plea withdrawal hearing is considered a "critical stage" of the proceedings. Therefore, the defendant was entitled to be represented by counsel at the hearing.

The Court of Appeals also found that the trial court's offer to permit the new attorney to re-file the motion to withdraw the plea had no effect. The Court found that the sentencing order became final on the 21st day and that new counsel was unable to re-file the motion.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1793154.pdf

Smith v. Commonwealth: November 15, 2016

Stafford: Defendant appeals the revocation of his probation on refusal to permit to withdraw his guilty plea.

Facts: Defendant pled guilty to a probation violation and the trial court imposed a sentence. Three days after the trial court entered a final order, the defendant filed a notice of appeal. However, the next day the defendant's attorney moved to withdraw and a few days later the trial court entered an order suspending the 21-day limit under Rule 1:1. However, the trial court reversed itself and held *sua sponte* that it lost jurisdiction to hear the motions to withdraw the guilty plea and withdraw as counsel when the defendant noted his appeal.

Held: Reversed. The Court essentially repeated the analysis and finding from the Virginia Supreme Court's ruling in *Velazquez* from October 27, 2016. As in *Velazquez,* because the motion to withdraw the guilty plea was filed within the 21-day time period, the Court ruled that the trial court retained jurisdiction, regardless of the fact that the defendant had filed a notice of appeal.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1097154.pdf

CRIMES & OFFENSES

Abduction

Virginia Court of Appeals
Published

Lunceford v. Commonwealth: October 25, 2016

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

Facts: The defendant and the victim met to exchange custody of their child. During the exchange, the defendant entered the victim's car, where the child was in the back seat, and began to argue with the victim. Although the victim explained that she "was not scared of him" during their argument, the victim was concerned that the argument might have devolved into her initiation of a physical fight that would be embarrassing. She testified that she "chose to stay in that vehicle to try to keep it from not being a big ordeal or a big scene." She stayed in the vehicle for over an hour as the defendant tried to convince her to have sex with him.

Held: Reversed. The Court held that the record does not support a reasonable inference that the victim's fear of bodily harm overrode her ability to leave. The Court rejected the argument that the victim may have been concerned for her child, noting that the victim never testified about such a fear at trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1234151.pdf

Vay v. Commonwealth: January 31, 2017

Charlottesville: Defendant appeals his convictions for Abduction and Sexual Assault on voir dire, sufficiency of the evidence, and failure to inquire into his decision not to testify.

Facts: Defendant abducted, raped, and sodomized a woman while at a party. The defendant forced the victim through a crowd against her will into a kitchen, down a hallway, and into a bathroom. There, he locked the door and sexually assaulted her.

During jury selection, one of the jurors revealed that she worked at the nearby university, supervising students who conduct research on sexual assault. However, she indicated that she could be impartial and the trial court refused the defendant's request to strike her for cause.

Prior to trial, the defendant's counsel indicated that the defendant would not testify. During his case in chief, defense counsel asked for time to consult with his client about testifying. Thereafter, the defendant's attorney again indicated that the defendant would not testify. The trial court did not conduct any direct inquiry or examination with the defendant about the issue.

At trial, the trial court denied a motion to strike the abduction charge, stating that it was a "jury issue." The defendant later asked that the trial court give an instruction to the jury explaining the "incidental detention" doctrine, but the trial court refused.

After trial, the defendant terminated his attorney and obtained a new attorney. The defendant then claimed that he had wanted to testify at trial, but his attorney told him not to, and the defendant moved to set aside the verdict on the ground that the trial court failed to conduct adequate *voir dire* on his desire to testify on his own behalf.

Held: Affirmed. The Court first concluded that the victim's testimony made clear that the defendant's actions created a state of both shock and fear, and thereby supported a finding of the defendant seizing, taking, transporting or detaining by force or intimidation. The Court also concluded that the detention was not merely incidental to the rape and sodomy. The Court refused to find that, by stating at the issue was a "jury question", the trial court was abdicating its role.

The Court also agreed that the defendant's instruction on "incidental detention" was inappropriate. The Court repeated that, under *Hoyt,* whether the detention established by the evidence is the kind of restraint which is an intrinsic element of crimes such as rape, robbery, and assault is a question of law to be determined by a court, not the jury. In a footnote, the Court also rejected the argument that the *Hoyt* ruling violates *Apprendi* by substituting a judge's finding for a jury's determination.

Regarding the defendant's decision not to testify, the Court ruled that a trial court is not required to conduct a colloquy with a defendant to determine whether he has knowingly and intelligently waived his right to testify in his own behalf. The Court also concluded that, in this case, the defendant was fully aware of his right to testify and elected not to exercise that right.

Regarding the juror whose students were conducting research on sexual assault, the Court refused to find that a person affiliated with women and gender studies in a university setting can never fairly sit as a juror in a sexual assault case in which the defendant is a male.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0053162.pdf

Virginia Court of Appeals –
Unpublished

Whiting v. Commonwealth: November 1, 2016

Gloucester: Defendant appeals his conviction for Attempted Abduction on sufficiency of the evidence, and his Probation Revocation on failing to hold a revocation proceeding.

Facts: Defendant physically assaulted a woman who was visiting a lake. The defendant grabbed the woman as she was walking to a portable toilet and told her "I got something to show you." The defendant pushed the victim against the portable toilet. The victim then realized that the defendant had his penis out and was urinating on her. The victim grabbed the door of the portable toilet, hit the defendant with the door, and then locked herself inside. The defendant struggled to open it, but soon left the area. The trial court convicted the defendant of attempted abduction, assault, and public intoxication.

At the time, the defendant had been on probation for failure to register as a sex offender. The Commonwealth moved to revoke his suspended sentence. The parties agreed to set the revocation proceeding over until after the trial for the abduction and assault was complete. After several hearings and continuances, the parties finally held the sentencing hearing. At that hearing, the trial court erroneously noted that it had already found the defendant in violation of his probation and proceeded

to sentence the defendant for the violation. The trial court had, in fact, never conducted a hearing where it found the defendant in violation. The defendant did not object to that until filing his appeal.

Held: Affirmed regarding the Attempted Abduction conviction; reversed regarding the Probation Revocation. The Court first rejected the defendant's argument that the attempted abduction was not separate and apart from the assault and battery and that therefore the "incidental detention" doctrine did not permit his conviction. Instead, the Court pointed out that the abduction was merely attempted and remained incomplete. Since an attempted abduction is, by definition, an ineffectual abduction, the Court ruled that it cannot constitute an abduction by detention and thus does not implicate the "incidental detention" doctrine under *Brown*.

However, the Court agreed that the failure to hold a revocation hearing under §19.2-306 rendered his probation revocation improper. The Court agreed that Due Process requires the trial court to hold a hearing and find good cause to believe that the defendant has violated the terms of his suspended sentence. The Court also found that the defendant did not waive this argument by failing to object at the time of the hearing, ruling that the error was a miscarriage of justice that denied the defendant his essential due process rights.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1449151.pdf

Eason v. Commonwealth: November 8, 2016

Henrico: Defendant appeals his convictions for Attempted Murder, Abduction, and numerous other offenses on sufficiency of the evidence.

Facts: Defendant told a real estate agent he wanted to see a particular house. However, once inside, the defendant put a plastic bag over the agent's head and attempted to strangle her. During the attack, the defendant sexually assaulted her and attempted to put pills in her mouth. As he left, he told her she would be dead in a matter of minutes.

The defendant then walked to a nearby home, entered, and demanded a vehicle from the woman inside. She ran to the front door and attempted to open it, but the defendant stopped her and shut the door on her arm, preventing her from escaping. The defendant then told her he would not hurt her if she gave him the keys to her car. Stealing her purse and her car, he fled to his ex-girlfriend's residence. There, seeing police nearby, he fled inside and told her not tell them he was there or that she could get in touch with him.

Later, police found the defendant's fingerprints in the neighbor's stolen car, which was found parked where the defendant normally parked his delivery truck. Police also found the defendant's DNA was mixed with the agent's DNA on the back of her cellphone. Although neither victim could identify the defendant in photo arrays, both were able to narrow the possibilities to the defendant and other suspects. The carjacking victim also identified the defendant in court, stating she was certain he was her assailant.

Held: Affirmed. Regarding sufficiency of the evidence, the Court found that the facts demonstrated guilt. The Court specifically pointed out that the defendant's statements to his ex-girlfriend point to a consciousness of guilt suggesting actual guilt.

The Court specifically found that the facts demonstrated the Attempted Murder offense. The Court examined the facts when the defendant placed a plastic bag over the agent's head and attempted

to tie it off around her neck. The Court pointed out that the defendant used sufficient force such that, for a brief period, the victim could not breathe and she thought she was going to die. In addition, following the attempt to strangle and suffocate the victim, the defendant shoved hallucinogenic pills into her mouth and told her she would be dead soon.

Examining the Abduction conviction, the Court also specifically found that the evidence was sufficient to prove that the detention at the door exceeded the restraint necessary to accomplish the robbery of the purse and was not intrinsic to, or inherent in, the separate and distinct crime. The Court ruled that the defendant's actions at the door were separate, in place and time, from the actual robbery of the vehicle owner's purse. Further, the Court pointed out that the detention at the door prevented detection of what was occurring in the house.

The Court also ruled that taking a person's car to effect an escape constitutes "free transportation" which has a monetary value, and therefore the evidence was sufficient to prove beyond a reasonable doubt that the defendant had the intent to gain a pecuniary benefit from the Abduction.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1444152.pdf

Harper v. Commonwealth: December 6, 2016

Norfolk: Defendant appeals his convictions for Abduction, Robbery, and Use of a Firearm on sufficiency of the evidence.

Facts: The defendant planned a robbery of a restaurant with two other men. While he waited in a vehicle, the two other men intercepted an employee at gunpoint and ordered her to "Go to the back door." The men led the woman to the back door at gunpoint and entered the restaurant's office, where they then pointed guns at two assistant managers and a cook. One of the robbers "grabbed" the cook and moved him to an area just outside the office door. One assistant manager went to the safe and helped one of the robbers get the cash box. Once they had the cash box, the robbers escaped. The defendant counted and divided the money.

Held: Affirmed in part and reversed in part. The Court agreed that the movement of the managers within the office was incidental to the robbery and did not prove the separate offense of abduction with intent to extort money. However, the Court then found that the forced movement of the cook constituted abduction. The Court affirmed the convictions for abduction of the waitress and abduction of the cook and reversed the convictions for abduction of the two assistant managers.

The Court also rejected the argument that the defendant could not have robbed the waitress because the money did not belong to her. Instead, the Court explained that, as an employee of the restaurant, her "right to possession of company money was clearly superior to that of the robbers. The Court affirmed the robbery convictions, finding that the robbers subjected the two assistant managers and the waitress to violence and intimidation to accomplish the goal of obtaining the money from the safe and therefore were all guilty of robbery.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0319161.pdf

Conyers v. Commonwealth: December 20, 2016

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

Facts: Defendant and a confederate robbed a man at gunpoint in the stairwell to an apartment complex. The men pointed the gun at the victim and then dragged him away from the entrance and down a few steps to the bottom landing. There, in a darkened alcove, the defendant and his confederate stripped the victim of his property and fled the area.

The defendant argued that the abduction offense was merely incidental to the robbery and therefore the evidence was insufficient under the "incidental detention" doctrine.

Held: Affirmed. The Court ruled that the defendant exceeded the minimum restraint necessary to complete the robbery by dragging the victim beneath the stairs to the alcove. The Court emphasized that, to apply the "incidental detention doctrine," the only issue is whether any detention exceeded the minimum necessary to complete the required elements of the other offense.

The Court repeated that, in determining whether a detention was merely incidental to another crime, a trial court may consider several factors, including the detention's duration, whether it occurred during the commission of a separate offense, and whether its purpose was to avoid detection. The Court contrasted this case with *Hoyt*, finding that the evidence supported a reasonable inference that the defendant dragged the victim beneath the stairwell to avoid detection.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1635152.pdf

Abuse & Neglect of Adults

Virginia Court of Appeals
Unpublished

Valentine v. Commonwealth: March 21, 2017

Norfolk: Defendant appeals her conviction for Felony Murder and Abuse and Neglect of an Incapacitated Adult on sufficiency of the evidence.

Facts: The defendant was the live-in caregiver for an elderly woman. The defendant had extensive experience working in nursing homes and hospital settings, and was previously a licensed certified nursing assistant. The victim depended on the defendant for her daily needs, including food, water, and medical care.

The defendant took the victim to the emergency room because she had been experiencing confusion and insomnia. The doctor advised the defendant that the victim needed routine medical attention. However, for the next six months, the defendant did not take the victim to a doctor again. During that time, the victim's weight dropped from 105 to 45 pounds.

When the defendant left for the weekend, her sister entered the apartment and discovered that the victim was dead. At the time of her death, the victim was emaciated, her body collapsing in on itself. An autopsy revealed that the cause of death was "inanition and dehydration due to nutritional neglect with contributing causes medical neglect, combined antihistamine and dextromethorphan intoxication,

subacute blunt force head trauma, and degenerative brain disease." The coroner testified that the victim had the lowest body mass index she had ever seen.

Held: Affirmed. The Court held that the evidence was sufficient to show that the victim's death was the result of the defendant's neglect in violation of §18.2-369, abuse or neglect of an incapacitated adult.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1034161.pdf

Animal Offenses

Dogfighting

**Virginia Court of Appeals –
Unpublished**

Hawkins v. Commonwealth: December 20, 2016

Caroline: Defendant appeals his conviction for Dogfighting on refusal to grant a mistrial.

Facts: Defendant ran a dogfighting operation. At trial, two expert witnesses testified about the physical evidence seized from the defendant's property, including a breeding stand, spring pole, and flirt pole, which they described as items used in the breeding of fighting dogs. Additionally, the defendant had numerous dogfighting publications and journals at his property, some of which contained the defendant's own advertisement for puppies in which he used language relating to dogfighting.

During the trial, the defendant's wife testified on his behalf. The prosecutor asked her if she was testifying because she was afraid of him, pointing out previous protective orders and criminal charges she had taken out against him. She denied being afraid of him. The parties agreed to admit documents reflecting that a series of violent charges that the defendant had faced had all been dismissed.

In closing argument, the defendant argued that the jury could not convict him based on previously dismissed charges. In rebuttal closing, the prosecutor argued to the jury that the defendant "was asking you to find the defendant not guilty, just like he was found not guilty for assaulting his wife and destroying her property and brandishing a firearm at her and attempting to murder her and shooting at her vehicle and destroying her property and assaulting her and assaulting her and throwing a missile at her vehicle and assaulting her and getting four protective orders, one including her daughter."

The defendant objected and requested a mistrial, but the trial court denied the motion.

Held: Reversed. The Court found that the prosecutor's comments were so prejudicial that they required a mistrial. The Court explained that, while the reference to the dismissed charges during cross-examination involved an attempt to demonstrate the wife's bias, the statement in closing was "clearly an effort to persuade the jury that appellant was more likely to have committed this crime because of his prior interactions with the criminal justice system." The Court expressed concern that, in light of the

comment, the jury could have disregarded any doubt concerning the defendant's guilt, out of concern that they not let him "get away with" another crime, and was "so impressive as to remain in the minds of the jurors and influence their verdict."

The Court remanded the case to the trial court, to determine whether the defendant could be re-tried under the Double Jeopardy clause, and directed the trial court to resolve the issue of whether the Commonwealth's comment was intended to "goad" the defendant into moving for a mistrial through intentional prosecutorial misconduct.

The Court also noted that the evidence sufficiently demonstrated that the defendant was guilty of promoting or preparing for the fighting of a dog by breeding fighting dogs.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1863152.pdf

Arson

Virginia Court of Appeals –
Unpublished

Yergovich v. Commonwealth: September 20, 2016

Fairfax: Defendant appeals his conviction for Arson of a Dwelling on sufficiency of the evidence.

Facts: A father discovered that his son had taken money from him. He confronted his son but his son locked himself in his room. However, smelling smoke, the father kicked in the door and discovered that his son had started a fire in his own bedroom. The father watched the son throw items into the fire and tried to pull the defendant away, but the defendant pushed his father away and continued to feed the fire. Finally, the father and the son fled in different directions. Police captured the defendant, who was naked and intoxicated. The defendant claimed that had thrown various items, including his clothes, into the fire in order to erase memories of his ex-girlfriend, but that the fire got out of control.

The Commonwealth indicted the defendant for malicious burning of a dwelling under §18.2-77. At trial, the defendant claimed that he did not start the fire "maliciously"

Held: Affirmed. The Court repeated that, since neither Code § 18.2-77 nor Code § 18.2-81 specifically defines "maliciously," there is no difference between malice as an element of arson and malice as a necessary element of other common law crimes. Thus, the Court noted that "malice", in the case of arson, is not necessarily a feeling of ill will toward another person, but can simply be a purposeful intent to do a wrongful act.

In this case, the Court found that the evidence established malice through the defendant's conduct resulting in injury to his father and damage to the family home as well as destruction of personal property of others. The Court pointed out that the defendant purposely set the fire, took only minimal steps to contain it, and then fought his father when his father tried to stop the fire. The Court the Court explained that, while the defendant's explanation may have addressed his motive, his conduct established "malice."

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/2010154.pdf

Assaults

Assault on Law Enforcement

Virginia Supreme Court

Wright v. Commonwealth: August 18, 2016

Rockingham: Defendant appeals his convictions for Malicious Bodily Injury by Use of a Caustic Substance, Assault and Battery of a Law Enforcement Officer and Obstruction of Justice on sufficiency of the evidence.

Facts: Searching for a larceny suspect, police responded to the defendant's residence. After surrounding the house and requesting a search warrant, officers observed people leaving the residence who appeared to have been overcome by a caustic or noxious gas. An officer entered the residence and located the co-defendant in the basement. The officer saw the co-defendant and instructed him to raise his hands. The co-defendant complied, but then made one fluid motion to set down his beer. Suddenly a cloud of bear-repellant appeared from beside the co-defendant, while part of the co-defendant's arm was out of the officer's sight. The substance quickly overwhelmed the officer, who fled the residence. At that point, no one had seen the defendant inside the residence.

After a two-hour standoff, police captured the defendant and his co-defendant, having located the defendant in the basement. The first time officers saw the defendant at the residence was when they finally re-entered and captured both defendants. The two defendants were the only people inside the residence at that time.

Held: Reversed. After finding that the defendant had waived many of his arguments on appeal, the Court held that the evidence was insufficient to support the defendant's conviction as either a principal in the first or second degree. The Court examined the evidence and concluded that the evidence proved only that the defendant was present in the basement over two hours after the officer was exposed to the bear-repellant. The Court stated that the evidence did not demonstrate that the defendant was "present and shown to have procured, encouraged, countenanced or approved commission of the crime" or that he "shared the criminal intent of the actual perpetrator or was guilty of some overt act", thus also negating liability as a principal in the second degree.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1150181.pdf

Virginia Court of Appeals – Published

Doscoli v. Commonwealth: June 21, 2016

Staunton: Defendant appeals his conviction for Assault on Law Enforcement and Refusal to Aid an Officer on self-defense grounds.

Facts: When officers responded to a 911 hang-up in a potential domestic situation, the defendant exited the residence and cursed the officers, demanding that they leave. After the defendant slammed the door and locked it, officers could hear the defendant cursing another person inside. When the elderly resident finally opened the door, that man appeared to have a recent injury, but denied being attacked. The defendant continued to be belligerent. Finally, the officers told the defendant to "shut the door, lower his voice and maintain the peace," and left.

However, as the officers walked away, the defendant cursed them and displayed an offensive gesture towards them. They returned to the residence and the defendant began to angrily curse the officers while they stood in a common area. They arrested the defendant for breach of the peace. The defendant then struck the officers and smeared one of the officers with feces.

At trial, the defendant argued that the officers arrested him without probable cause and therefore he lawfully used force to resist the unlawful arrest.

Held: Affirmed. The Court re-affirmed that a citizen has the right to resist an unlawful arrest. However, the Court also cautioned that close questions as to whether an officer possesses probable cause "must be resolved in the courtroom and not fought out on the streets." In this case, the Court examined the objective facts available to a reasonable officer in this case, noting that when a law enforcement officer has probable cause to arrest a suspect for one crime, it is immaterial if the suspect is later charged with something else.

The Court found that the officers had probable cause that the defendant had refused or neglected to assist the officers in the preservation of the peace in violation of Va. Code § 18.2-463. The Court also found probable cause that the defendant unlawfully cursed and abused the officers in violation of §18.2-416 and probable cause that the defendant obstructed justice in violation of §18.2-460(A).

The Court also, in a footnote, favorably recited decisions from many other states that have eliminated or restricted the ability of citizens to violently resist unlawful arrests.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0517153.pdf

Jones v. Commonwealth: May 23, 2017

Virginia Beach: Defendant appeals his conviction for Assault and Battery of a Law Enforcement Officer on sufficiency of the evidence.

Facts: An officer noticed the defendant was sitting in a car with marijuana. The officer approached the defendant, who immediately became nervous. Suddenly, the defendant "bum-rushed" the officer, lowering his shoulder and head and attempting to push the officer out of the way and escape. The officer chased the defendant and captured him; he learned that the defendant had been wanted for several years. The defendant argued that he did not intentionally attack the officer, but was only trying to escape.

Held: Affirmed. The Court found that the evidence was sufficient to establish that the defendant intended to inflict bodily harm on the officer when the defendant pushed him in an offensive manner to

enable his escape. By shoving the officer in an effort to interfere with his duties and escape, the Court found that the defendant's contact with the officer was both offensive and insolent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1079161.pdf

Aggravated Malicious Wounding

Virginia Court of Appeals –
Unpublished

Stephens v. Commonwealth: October 25, 2016

Newport News: Defendant appeals his conviction for Aggravated Malicious Wounding on sufficiency of the evidence and refusal to permit expert testimony.

Facts: Defendant shook a child severely, resulting in abusive head trauma, other injuries, and permanent brain injury. The defendant had been alone with the child prior to the onset of the injuries. The defendant first denied responsibility, but later admitted that he had shaken the child. At trial, a medical expert testified that the injuries were severe enough to resemble a car accident, but that the injuries lacked any normal explanation. A defense expert disputed those findings.

Held: Affirmed. The Court found that the evidence was sufficient to show that the defendant caused the injuries through his own actions. Regarding malice, the Court noted that a person intends the natural and probable consequences of his actions, and in determining the probable consequences of an aggressor's actions and his or her intent to achieve those consequences, the trial court may consider the comparative weakness of the victim and the strength of the aggressor.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1432151.pdf

Jordan v. Commonwealth: November 22, 2016

Suffolk: Defendant appeals his conviction for Aggravated Malicious Wounding as a Principal in the Second Degree on sufficiency of the evidence.

Facts: Defendant, along with about 30 teenagers, confronted a woman and her family in their front yard. Members of the group spit on and pepper-sprayed several of the family. At that point, a neighbor, the victim in this case, stepped in between the crowd and the family and stated "You can fight me. If you came to fight, you can fight me." The victim did not possess any weapons and did not strike or hit anyone. The defendant struck the victim, who fell to the ground. The crowd then set upon the victim and beat him severely, causing permanent injuries.

At trial, several witnesses identified the defendant as the initial aggressor and stated that the defendant "high-fived" other members of the crowd after the attack.

Held: Affirmed. The Court repeated that, to convict the defendant as a principal in the second degree, the Commonwealth need only prove that the defendant was present at the scene of the crime and shared the criminal intent of the perpetrator or committed some act in furtherance of the offense. In this case, the Court found that the evidence was sufficient to prove that the defendant was present during the assault and performed an overt act of assistance or encouragement by striking the initial punch. The Court stated that, as in *Spradlin*, it was immaterial whether the defendant actually inflicted the specific injuries received by the victim, as he was "present and associated in this concerted action and participated in bringing it about."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1723151.pdf

Malicious Wounding

Virginia Court of Appeals –
Published

Synan v. Commonwealth: January 24, 2017

Spotsylvania: Defendant appeals his convictions for Malicious Wounding, DUI and Assault on admission of hearsay testimony and sufficiency of the evidence.

Facts: Defendant, drunk, grabbed hold of the steering wheel of his wife's van while she was driving, resulting in their van crashing into an embankment after crossing through oncoming traffic. The van was moving very fast and did not slow down as it turned sharply in front of the school bus. As a result, the bus driver had to swerve over the yellow line into oncoming traffic to prevent the bus from colliding with the van. The swerve she took caused the children on the bus to fall out of their seats.

The crash injured the wife. Within two minutes of the crash, a witness brought the defendant's wife out of the van. At trial, he testified that she was crying and shaking and that he asked her what happened. The witness testified the wife told him that the defendant "jerked the steering wheel" and "tried to kill them both by hitting the van, that he was yelling at her, [and] that they were fighting." The defendant objected to the statements being offered as hearsay testimony.

At trial, the defendant's wife testified that the defendant did not grab the wheel, as she had originally stated, but admitted to telling the investigating officer that the defendant had caused the crash by grabbing the wheel.

Held: Affirmed. The Court first found that it was proper to admit the wife's statements. The Court noted that the wife made her statements within minutes of the startling event, with no indication that there was any meaningful delay between the time of the accident and the time that the witness heard her statements. The Court also noted the lack of evidence that the witness questioned the wife or directed her to make her statements.

The Court then affirmed the conviction for DUI. The Court repeated the holding in *Dugger*, that a passenger who forcibly seizes control of the steering wheel of a moving vehicle exercises sufficient control to fall within the scope of DUI. In this case, the Court agreed that the defendant had control of the vehicle, even if only momentarily, by fighting for the wheel.

The Court then found that the evidence was sufficient to prove malicious wounding. The Court found that the trial court could have reasonably inferred that the defendant committed a "purposeful and cruel act without great provocation" by directing the van into oncoming traffic, off the road, and into an embankment.

The Court also ruled that the evidence was sufficient to prove that the defendant assaulted the school bus driver and the chaperone who was looking out the window at the time. The Court ruled that the evidence was sufficient for the trial court to conclude that the defendant acted overtly with the intent to inflict bodily harm and place the occupants of the bus in fear of bodily harm.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0795152.pdf

Virginia Court of Appeals –
Unpublished

Perkins v. Commonwealth: January 17, 2017

Newport News: Defendant appeals his convictions for Robbery, Malicious Wounding, Conspiracy, and Use of a Firearm on sufficiency of the evidence.

Facts: Defendant and a co-defendant robbed another man at gunpoint. The victim had been visiting an old friend at her apartment. However, during the visit, he accidentally revealed to her son, the defendant, that he was carrying a large amount of cash. After becoming aware that the victim had a great deal of cash, the defendant and his co-defendant began speaking and disappeared into another room together. When the victim left the apartment, the defendants approached the victim with a gun. The victim turned and walked away, but when he did, the defendant struck him on the head with the gun, and then his co-defendant struck the victim, at which point the victim fell to the ground, unconscious. The victim suffered a swollen eye, a cut ear, and swollen lips.

Police investigated the offense. During the investigation, they located photographs of the defendants with the stolen money taken after the offense.

Held: Affirmed regarding robbery, conspiracy, and use of a firearm; Reversed regarding Malicious Wounding. The Court first found that the evidence demonstrated that the defendant conspired with his co-defendant to rob the victim. The Court also agreed that, by striking the victim in the head with the gun, the defendant used a firearm in the commission of a felony.

However, the Court found that the evidence was insufficient to prove malicious wounding. The Court agreed that the defendant struck the victim on the head with a gun and agreed that the force of the defendant's blow was sufficient to injure the victim. However, the Court did not find sufficient evidence from which the trial court could have inferred an intent to cause permanent disability. The Court noted that the co-defendant also struck the victim, and when he did, the victim fell to the ground, unconscious. Therefore, the Court concluded that the trial court could not draw an inference of malice on the part of the defendant, despite the victim's injuries.

The Court did not address or mention the concepts of "concert of action", principal in the second degree, or accessory before the fact.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1040151.pdf

Edwards v. Commonwealth: April 11, 2017

Campbell: Defendant appeals his convictions for Malicious Wounding and Conspiracy to Murder.

Facts: The defendant forced two young girls in a house in which he lived to submit to tattooing. The two girls, 12 years old and 11 years old, resisted the defendant, but he forced several tattoos on them, despite having no experience tattooing and without changing the needle. While he was in jail awaiting trial on those charges as well as sexual assault charges, the defendant sent a note to a fellow inmate that read:

> "Dear Robbie, need these two people killed to keep them from testifying in my case . . . . I got $5,000.00 in payments for you to handle this. Without these two, the Commonwealth has no case on my sex charges."

However, the inmate was repulsed by the defendant's offenses against the girls and the inmate handed the note to the authorities the next day.

Held: Affirmed in part, Reversed in part. The Court affirmed the conviction for Malicious Wounding. The Court explained that, under 18.2-51, for the evidence to support a specific intent to disfigure, the evidence must be sufficient to find that the accused intended to "impair or injure" the appearance of the victim. Although the nature and extent of the bodily injury and how such injury was accomplished may reflect this intent, the Court emphasized that these factors are not exclusive; the critical issue is the intent with which the injuries were inflicted.

In this case, the Court noted that the children were unequivocal in their resistance to having the defendant tattoo their arms; the defendant was inexperienced in administering tattoos and did not change the needle between tattooing each girl; the girls were hurt by the tattooing; and, despite the children crying, the defendant forced them to receive three separate tattoos. The Court also agreed that the tattoos permanently disfigured the children.

However, the Court held that the evidence was not sufficient convict the defendant of conspiracy to commit murder. The Court reasoned that although the defendant sought another inmate's assistance in murdering the two witnesses, there is no evidence that the inmate agreed to assist the defendant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0939163.pdf

Unlawful Wounding

Ashworth v. Commonwealth: November 8, 2016

Mecklenburg: Defendant appeals his conviction for unlawful wounding on sufficiency of the evidence.

Facts: Defendant found the victim in bed with the defendant's wife. The defendant attacked the victim, and at one point placed the victim in a headlock and began to punch him repeatedly. While the defendant held the victim in the headlock, a witness observed that the victim appeared to be short of breath and that his skin tone turned "quite dark" from a lack of oxygen. The victim, who was not

fighting back, drifted in and out of consciousness, until the defendant slammed him face-first into the ground.

A deputy responded and noted that the victim was bleeding and had numerous injuries, but that the defendant lacked any notable injuries. At trial, the defendant testified that the victim attacked him first, but the trial court found him to be not credible.

Held: Affirmed. The Court found that the evidence demonstrated that the defendant acted with the intent to maim, disfigure, disable, or kill the victim. The Court based its ruling on all of the circumstances that precipitated the attack and the fact that the defendant placed the victim in a suffocating headlock, severely reduced his supply of oxygen, and punched him repeatedly while the victim was essentially defenseless.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1993152.pdf

Schools

Virginia Supreme Court

Lambert v. Commonwealth: December 15, 2016
Rev'd Ct. of Appeals Ruling of 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 apparently leave her backpack and coat at the bus stop. The defendant, who wasn't the child's teacher, 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, several school employees testified that the defendant's actions were improper under school policy and regular practice. The principal also testified that the defendant did not have the authority to use force in the manner that she did.

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. The Court of Appeals reversed the conviction, finding that the trial court improperly substituted the School Board's standards of conduct for the standards contained in the statute, and concluded that the defendant was acting as an employee in the scope of her duties at the time of the offense.

Held: Conviction Affirmed. Unlike the Court of Appeals, the Supreme Court refused to address whether the defendant was acting within the scope of her employment and whether the school could limit her authority by policy. Instead, the Court ruled that the defendant's conduct was not a reasonable use of force on the facts and therefore she exceeded the physical contact permitted by school personnel under Code § 18.2-57(G)(i). The Court noted that the trial court afforded "due deference", as required, to the defendant's version of the facts, yet still determined that the defendant's physical contact with the victim was "an unreasonable response."

Full Case At:

http://www.courts.state.va.us/opinions/opnscvwp/1160132.pdf

Virginia Court of Appeals –
Unpublished

Hart v. Commonwealth: May 2, 2017
Rev'd decision of December 6, 2016, on rehearing

Newport News: Defendant appeals his conviction for Assault and Battery on sufficiency of the evidence.

Facts: Defendant, a "student coordinator" at a school, restrained a student who had been yelling and causing a commotion in the elementary school cafeteria. The child testified that the defendant punched him three times. At trial, the defendant contended that he acted within the exceptions to assault and battery provided in Code § 18.2-57(G). The Court of Appeals reversed and remanded his conviction on an unrelated issue in early December of 2016. However, one week later the Virginia Supreme Court issued a ruling in *Lambert v. Commonwealth*, a similar case, reversing the Court of Appeals and affirming the conviction in that case. The Court of Appeals agreed to rehear the case in light of *Lambert*.

Held: Affirmed. In light of *Lambert*, the Court agreed that the defendant's actions were unreasonable and excessive – specifically, when the defendant punched the young child in the chest.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2074151.pdf

Assault Generally

Mayr v. Osborne: February 2, 2017

Henrico: Defendant, a doctor, appeals a finding of civil battery against his patient.

Facts: While performing back surgery on the plaintiff, the defendant, a doctor, accidentally performed the surgery on the wrong part of the plaintiff's spine. The doctor claimed that he had warned the plaintiff before the surgery that there was a risk of that happening, but the plaintiff denied that. Instead of suing the doctor for negligence, the plaintiff sued the doctor for battery. The trial court found for the plaintiff.

Held: Reversed. The Court agreed that a battery, in the medical context, is the unauthorized or unconsented to touching of the person of another. The Court explained that, in medical cases, a technical battery is present where (1) the patient placed terms or conditions on consent for a particular procedure, and the doctor ignored those terms or conditions; (2) the physician intentionally performed an additional procedure beyond the procedure the patient consented to; or (3) the physician intentionally performed a different procedure or one that differs significantly in scope from the procedure for which the patient provided consent.

The Court focused on the element of intent, explaining that intentional conduct is when "the actor engaged in volitional activity and that he intended to violate the legally protected interest of another in his person." The Court ruled that, to find battery by a physician, the facts must be sufficient to permit an inference that the physician intended to disregard the patient's consent regarding the procedure or the scope of the procedure. In this case, the Court found that the issue should have been addressed as a negligence issue, not a battery issue.

The Court also found that the physician's failure to adequately explain the risks that the procedure posed, including the risk that he would accidentally operate on the wrong body part, was a negligence issue, not a battery issue.

[Note: This case is civil, but may be germane to criminal battery as well – EJC]

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151985.pdf

Bad Check

Virginia Court of Appeals-
Unpublished

Watkins v. Commonwealth: July 26, 2016

Chesterfield: The defendant appeals her conviction for Bad Check on sufficiency of the evidence.

Facts: Defendant obtained a car from a car dealership, but wrote a worthless check for the deposit. The dealership, Gateway Hyundai, allowed the defendant to drive away with a 2014 Hyundai without a contract or payment, in February of 2014. At trial, the parties adduced a proposed contract for the sale of the car from February 26, 2014; however, it was not signed by the defendant nor a representative of the dealership.

At trial, the finance director at Gateway testified that because the February document in the record was not signed, he was not certain that it represented a final agreement. The defendant claimed that she signed an agreement on February 26, but she admitted that the unsigned February document admitted into evidence was different than the one she claimed to have signed on February 26, 2014.

Later, Gateway chose to renegotiate the arrangement with the defendant on March 21, 2014, lowering the amount to be financed. It was not until March 21, 2014 that both the defendant and a representative of Gateway signed a contract which contained a provision expressly requiring the defendant to pay a $2,500 deposit. In accordance with that provision, the defendant placed the check for $2,500 in the overnight drop box at the dealership later that day. The check bounced.

Gateway repeatedly tried to contact the defendant after the check was returned for insufficient funds. The defendant lied to an employee at the dealership, telling her that she had obtained a certified check to cover the cost of the deposit. Later, the defendant claimed to police that Gateway had not contacted her regarding the returned check. However, she admitted that she knew she did not have sufficient funds in her account to cover the check.

At trial, the defendant contended that her bad check was a mere payment on an existing debt, rather than a check given in exchange for present consideration.

Held: Affirmed. The Court found that it was proper to find that the $2,500 check the defendant wrote to Gateway contemporaneously with the execution of the March 21, 2014 contract was issued to satisfy her obligation under the newly formed contract, not to pay an existing debt.

The Court first analyzed when the contract in this case took place. The Court determined that the defendant was not the legal owner of the car when she took it in February; instead, the defendant was, at best, a bailee of the car. As for the February document, the Court pointed out that it did not comply with the statute of frauds, as it was a contract for the sale of goods valued at more than $500 that was not fully executed and in writing. The Court noted that the defendant failed to prove that a contract took place before March 21, 2014. The Court found that the binding contract for the sale of the car was actually formed on March 21, 2014.

The Court rejected the argument that the defendant's bad check was a mere payment for a past debt. The Court distinguished the *Sylvestre* case, noting that, in this case, the defendant clearly had fraudulent intent, knew that her account lacked sufficient funds, and issued the $2,500 check on March 21, 2014 to pay for the car pursuant to the signed contract with Gateway dated that same day.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1531152.pdf

Burglary

Virginia Court of Appeals –
Unpublished

Sumner v. Commonwealth: May 23, 2017

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

Facts: After the defendant visited his ex-girlfriend and the mother of his child at her home, a male houseguest ejected him from the home. The ex-girlfriend and another occupant tried to close the door behind him. However, once outside, the defendant fired several shots from the outside, striking another occupant. The defendant then forced his way inside and attacked the man. At trial, the defendant argued that his actions did not exceed his invitation to the home and that he did not enter with the intent to commit battery and therefore he was not guilty of Breaking and Entering.

Held: Affirmed. The Court found that the door was closed enough that the defendant had to fire shots through it, demonstrating that it was closed enough to constitute a breaking when he forced his way back into the home. The Court also found that during his second entry into the home, his intent to attack the man inside was clear from the evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0520162.pdf

Graves v. Commonwealth: May 23, 2017

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

Facts: After the defendant repeatedly threatened his wife, she obtained a protective order against him that granted her exclusive possession of their residence and ordered the defendant to leave and stay away from the residence. A few months later, the defendant's wife discovered him hiding inside the house. The defendant exited, claimed that he only returned to pick up his clothing, threw a cinder block through his wife's car window, and left.

At trial, the defendant argued that he had never voluntarily or involuntarily surrendered his residency and habitation at the address and that the Protective Order was insufficient to deprive him of the right of entry.

Held: Affirmed. The Court likened this case to the Turner case, finding that in this case, as a result of the protective order, the wife's house was no longer the defendant's residence and any interest that the defendant had in her home "was relegated to wife's superior possessory interest and right to exclusive habitation." Thus, the defendant's entry "offended wife's right of habitation" in violation of Code § 18.2-91.

The Court also concluded that the fact that appellant's clothing and identification were still in the house did not alter its conclusion. The Court pointed out that the defendant could have simply made arrangements to retrieve his personal effects rather than break into wife's home and, thereby, violate the protective order the court had put in place.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1341162.pdf

Capital Murder

United States Supreme Court

Moore v. Texas: March 28, 2017

Certiorari to the Court of Criminal Appeals of Texas: Defendant appeals his death sentence on Eighth Amendment grounds.

Facts: The defendant shot and killed a clerk while robbing a grocery store. The trial court sentenced the defendant to death in 1980. During a habeas proceeding, a Texas court determined that, under the Supreme Court's rulings in Atkins v. Virginia and Hall v. Florida, the defendant qualified as "intellectually disabled." However, the Texas appeals court reversed, finding that the habeas court employed intellectual-disability guides currently used in the medical community, rather than the guidelines adopted by the Texas appeals court.

Texas had adopted its own guidelines, based the definition of, and standards for assessing, intellectual disability contained in the 1992 edition of the American Association on Mental Retardation (AAMR) manual, which was a predecessor to the current manual. Those guidelines included a requirement that adaptive deficits be "related" to intellectual-functioning deficits. Applying those guidelines in this case, the Texas appeals court found that the defendant had failed to meet those guidelines.

Held: Reversed. In a 5-3 decision, the Court rejected the guidelines adopted by the Texas appeals court that restrict qualification of an individual as "intellectually disabled." While the Court agreed that Atkins had "left it to the States to develop appropriate ways to enforce the constitutional restriction" on the execution of the intellectually disabled, the Court repeated that, as in Hall, "adjudications of intellectual disability should be 'informed by the views of medical experts.'"

The Court explained that, under Hall, "being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards." The Court criticized the Texas guidelines, finding that they were outdated and informed by non-clinical and lay perceptions of intellectual disability. Instead, in this case, the Court examined the evidence in detail, applying current standards.

As in Hall, the Court explained that when an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits, it is necessary to move on to consider other evidence of intellectual disability. The Court noted that the defendant's IQ score was 74, which, adjusted for the standard error of measurement, yielded a range of 69 to 79. Because the lower end of the defendant's score range fell at or below 70, the Court noted that it was necessary to move on to consider the defendant's adaptive functioning. The Court also specifically criticized the Texas court decision to narrow the test-specific standard-error range based on sources of imprecision regarding the defendant's specific test.

The Court also rejected the Texas appeals court's interpretation of the defendant's intellectual functioning. The Court found that the Texas appeals court overemphasized the defendant's perceived adaptive strengths when it concluded that the defendant did not suffer significant adaptive deficits. The Court found that it was not appropriate to focus on his strengths at all, as the contemporary medical community focuses the adaptive-functioning inquiry on adaptive deficits.

The dissent agreed that the Texas guidelines were unconstitutional, but did not agree that the Texas court erred as to the defendant's intellectual functioning. The dissent also criticized the majority opinion for adopting an interpretation of the Eighth Amendment based on the opinions of clinicians and not "objective indicia of society's standards" as determined by judges.

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/15-797_n7io.pdf

Virginia Court of Appeals –
Published

Severance v. Commonwealth: May 23, 2017
(See same case above on different issue)

Fairfax (Alexandria): Defendant appeals his convictions for Capital Murder on refusal to sever the charges and for sentencing him to two sentences of Capital life.

Facts: The defendant murdered three people, first killing the wife of a Sheriff in 2003, next a local official in November 2014, and then the sister of a local judge in February 2014. The three murders occurred within a mile and a half of each other in a low-crime residential area, where murder was unusual. The defendant committed his murders during late weekday mornings and shot all three of his victims near their front doors. There was no evidence in any case of a robbery or break-in and although money and jewelry were easily accessible, nothing was taken.

[*Note*: The crimes took place in Alexandria but the trial took place in Fairfax County, due to a venue change – EJC].

Police investigated and discovered that the defendant's motive for the murders was revenge against the court system and the local government over perceived injustices, especially the loss of custody of his son. At trial, the Commonwealth introduced his writings where he expressed anger against Alexandria officials, including comments such as "[a]ssassinate . . . Family vendetta will settle the score after the kangaroo court . . . [k]ill all the local cops and murder all members of the enforcement class."

At trial, expert testimony established that the victims were all shot by an unusual .22 caliber handgun. The ammunition in each case was either cyclonic or subsonic Remington long-rifle plain lead hollow point bullets. At trial, three experienced firearm experts testified that they had only seen this particular ammunition three times in their long careers, and all three times were in these murders.

The defendant objected to the joinder of the three charges at trial, but the Court agreed to try the three crimes together. The jury convicted the defendant of all three murders, including two counts of Capital Murder and one count of First Degree Murder. The two counts of Capital Murder were charged under §18.2-31(8), as the killing of more than one person in a three-year period. The Court sentenced the defendant to two capital life terms over the defendant's objection.

Held: Affirmed. The Court agreed that it was proper under Rule 3A:10(c) to join the three charges, observing that the three offenses were sufficiently idiosyncratic and demonstrated a common scheme or plan. The Court noted that the three victims were prominent citizens of Alexandria; each murder was not committed in isolation, but part of a plan of retaliation against people appellant considered part of "the establishment class." The Court viewed the murders as separate expressions of the defendant's general plan.

The Court also pointed out that the circumstances of each murder, including the location, time of day, and murder weapon were idiosyncratic. In addition, the Court noted that even if the trials had been separate, the evidence of the other murders would have been admissible under Rule 2:404(b) to show a common scheme or plan.

The Court also agreed that the trial court properly sentenced the defendant to two sentences of Capital Life for the two murders the defendant committed in a three-year period. The Court rejected the argument that the Blockburger test applied in this case, noting that the Blockburger test only applies to "the same act or transaction," whereas in this case there were two separate murders.

The Court distinguished this case from the Andrews case, where the trial court had convicted the defendant of multiple capital murders under different subsections of §18.2-31. The Court pointed out that, in that case, it had prohibited sentencing a defendant repeatedly for the same murder. However, in this case, the murders were separate crimes and events. The Court explicitly rejected the defendant's argument that § 18.2-31(8) mandates that the first of the two murders is a predicate murder and only the second is a capital murder.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0308164.pdf

Carjacking

Virginia Supreme Court

Hilton v. Commonwealth: April 13, 2017

Henrico: Defendant appeals his convictions for Carjacking and Use of a Firearm on sufficiency of the evidence.

Facts: The defendant and an accomplice robbed two men who had thought they were meeting to purchase a car. The two victims gave the defendant keys to their truck, but before the defendant could leave the area, one of the victims produced a firearm and ordered the defendant to drop the keys. The defendant dropped the keys and fled.

Held: Affirmed. The Court rejected the argument that the evidence was insufficient the defendant only took possession of the victim's truck keys, and not that he took possession or control of the truck itself. The Court explained that under the explicit terms of Code § 18.2-58.1 a perpetrator can commit carjacking without taking possession of it, by seizing control of the victim's vehicle, i.e., "exercising power" over it. In this case, the Court pointed out that the defendant had taken the keys and made sure the victim was not free to get back into his truck, much less drive it.

The Court also approved of the model jury instruction for carjacking.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1160458.pdf

Child Abuse & Neglect

Virginia Court of Appeals – Published

Coomer v. Commonwealth: April 4, 2017

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

Facts: The defendant and her fiancé went out for the evening after arranging a babysitter for her 22-month-old daughter. While out, they drank alcohol, but suddenly learned that the babysitter had to unexpectedly terminate her supervision of the child. By that point, the defendant and her fiancé had consumed about a pitcher and a half of beer. The defendant drove to the babysitter's residence, placed her daughter in the car, and drove away. It was dark and rainy and the defendant drove under the speed limit until another vehicle in front of her suddenly slowed down; although the defendant tried to stop, she crashed into that car. The crash did not significantly damage either car. Police investigated and learned that the defendant had a BAC of .10 to .11 at the time of the crash, which took place on a wet and curvy road.

Held: Reversed. The Court repeated that, to support a conviction for the felony of child neglect, the Commonwealth's evidence must establish by the totality of the circumstances that the defendant's action(s) created the probability of a substantial risk of death or serious injury to her child, a risk that made it "not improbable that injury will be occasioned."

The Court first observed that neither voluntary intoxication nor DUI, standing alone, was sufficient to constitute criminal negligence for the purposes of felony child neglect. The Court

distinguished the facts in this case from the Rich and Wood cases. For example, the Court pointed out that the defendant's BAC was half of the BAC in the Rich case. The Court also argued that while the defendant's reaction time was not as fast as it should have been, she reacted quickly enough to avoid a serious accident. The Court stated that there was nothing in the defendant's conduct other than the consumption of alcohol that suggested any negligence on her part, such as excessive speed or following too closely.

The Court wrote: "Unquestionably, driving with a BAC over the legal limit with a child, particularly a very young child, in the car creates a potential danger to the child. Without additional evidence in the record of a substantial risk or probability of serious injury or death to the child arising from the accident, Coomer's actions do not rise to the level required for a felony conviction pursuant to Code § 18.2-371.1(B)(1)."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1017163.pdf

Virginia Court of Appeals –
Unpublished

Logan v. Commonwealth: November 1, 2016

Chesapeake: Defendant appeals his conviction for First-Degree Murder and Child Abuse on sufficiency of the evidence.

Facts: Defendant murdered a 16-month old child. The defendant and his family were home one day when his other children found the child dead in his bedroom. The child suffered three separate, acute fractures to her head and a number of fractured ribs. Some of the ribs had been broken weeks before her death. Blunt force trauma had split her liver in two and caused a significant fracture to her pancreas, leading to massive internal hemorrhaging.

The other children in the home were eight years old and younger. While witnesses stated that the defendant had been with the child all day, the defendant gave inconsistent statements about his own whereabouts and his interaction with the child. Expert witnesses at trial testified that the blows must have been inflicted using a high level of force, or an accident on par with an automobile crash or landing on concrete after falling several stories. The child had marks on her body that appeared to be from an adult's knuckles.

Held: Affirmed. The Court found sufficient evidence of premeditation, likening this case to the *Knight* case, where the murder was also especially brutal. The Court agreed that from the scope and degree of the injuries suffered by the toddler that the defendant intended to kill this child when he beat her. The Court also focused on the infliction of multiple blows and the size disparity between the defendant and his sixteen-month-old daughter.

The Court also pointed out that the defendant did nothing to help his child while she was alive, and only attempted to give CPR and call for help after his children found the child dead.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0867151.pdf

Mott v. Commonwealth: November 29, 2016

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

Facts: The defendant abandoned her four children, ages one, three, five, and seven years old, in a hotel room, alone, for over eight hours. The defendant had been in the room with the children and an adult man, but the defendant left "to go to the Dollar Store" and took the man's truck, knowing the man would be leaving for work in the morning. When the man awoke in the morning, he thought the defendant was still in the room and left for work before 6:00 a.m.. However, the defendant had already been gone for several hours and, once the man left, the children were left alone in the room.

When hotel employees discovered the children alone in the room around 2:00 p.m., they called the police. In the hotel room, the police found a BB gun that appeared to be a real firearm, a pocketknife, an open beer can, and a cup that appeared to contain an alcoholic beverage. There were unopened beer cans in the room's refrigerator but no edible food. The defendant finally returned around 3:00 p.m.

Held: Affirmed. The Court agreed that the defendant's conduct constituted "virtual abandonment" of her children. The Court found that the evidence demonstrated that the defendant knew her conduct was likely to expose her children to substantial risk or the probability of serious injury or death. The defendant was gone for several hours, knowing the children would be alone in a room with many dangerous items and nothing to eat.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1802151.pdf

Turner v. Commonwealth: January 10, 2017

Williamsburg/James City County: Defendant appeals his convictions for Involuntary Manslaughter and Felony Child Abuse on sufficiency of the evidence.

Facts: Defendant drove and crashed a van with 7 passengers, several of whom were young children. The defendant was speeding and his van began to weave off the road. When the defendant corrected, he flipped his van over and it crossed into oncoming traffic, where an oncoming dump truck struck it. The driver of that dump truck testified that the defendant was driving too fast to be able to negotiate the approaching curve.

The crash killed one of the children, ejected an infant onto the roadway, and severely injured several other children, some permanently. The defendant, who was high on marijuana, knew that the vehicle's steering was "loose" and was the only person wearing a seatbelt. The infant was not in a car seat at the time of the crash, but the defendant put the infant into the seat as the police arrived. A three-year-old child was also unsecured in the car. None of the car seats were properly installed or secured in the vehicle.

At trial, an expert testified that the defendant's THC level would have impaired his driving ability, although the expert could not quantify how much.

Held: Affirmed. The Court first found that the evidence was sufficient to prove involuntary manslaughter. The Court considered the defendant's failure to ensure that the children were properly restrained, coupled with his failure to control his vehicle, and ruled that those factors demonstrated recklessness disregard for human life. The Court also observed that impairment due to voluntary

intoxication is relevant to criminal negligence, even if it does not rise to the level of intoxication required for a driving under the influence conviction.

The Court also found the evidence sufficient to prove felony child abuse. The Court noted that the defendant drove recklessly after recently ingesting marijuana with the knowledge that his minor passengers were not properly restrained by seat belts or appropriate devices. In addition, the Court observed that due to the children's youth (3 years old and 3 months old), it was the defendant's responsibility to make sure that they were properly restrained by safety devices of the type appropriate for the children's size and age.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0067161.pdf

Child Pornography

Virginia Court of Appeals –
Unpublished

Kovach v. Commonwealth: December 6, 2016

Westmorland: Defendant appeals his convictions for Distribution of and Possession of Child Pornography on sufficiency of the evidence.

Facts: The defendant downloaded child pornography using "peer-to-peer" software, which simultaneously shared and distributed the material that the defendant downloaded. Police monitored the defendant's uploads and downloads for several months and then obtained a search warrant for the defendant's residence. Officers seized several digital devices, including a desktop computer, a laptop computer, and a memory storage card.

Among the images that the officers found on the defendant's desktop computer, officers discovered files that the officers had obtained from the defendant using the "peer-to-peer" software. Some of the child pornography on the desktop computer was in the computer's "unallocated space", a place that is generally inaccessible to users, where a computer stores "deleted" data. However, police also discovered child pornography on the defendant's desktop computer in a "zip" file that was accessible to the defendant without any special software. The folder was connected to the "peer-to-peer" software used to download and upload child pornography.

The defendant also had child pornography on his laptop in his "thumbnail cache", a place that the computer uses to organize the user's data so that the user can get quicker access to it. However, to view the "thumbnail cache" also requires special software. The defendant did not have the special software to view either his "unallocated space" or his "thumbnail cache."

Police also discovered child pornography in a memory storage card that was in a laundry hamper in the defendant's room. Police also found several of the videos that the police obtained while using peer-to-peer sharing software on the memory card

When police spoke to the defendant, the defendant admitted to downloading movies and adult pornography using the "peer-to-peer" software. The defendant also claimed that he had accidentally downloaded child pornography in the past. The defendant stated that only he and his sons lived in the house and that he monitored the computers very carefully, controlling what information his sons could

access. He also indicated that he downloaded peer-to-peer sharing software on his computer and admitted to downloading adult pornography. Lastly, the defendant also admitted that while he was downloading these files, he viewed child pornography on the "zip file" that was on his desktop computer.

At trial, an expert testified that he could not tell from examining the memory storage card whether it had been accessed by other computers. The expert also explained that he did not find any link file from the SD card on the laptop or the desktop, which would have appeared if a link had been opened on either device from the SD card. However, the expert that because the globally unique identifier ("GUID") number, which the officers had first found while downloading suspicious files using the peer-to-peer sharing program, matched the defendant's desktop, it followed that the child pornography they downloaded came from the defendant's computer.

Held: Affirmed in part, reversed in part. The Court held the evidence was insufficient to prove possession based on evidence from the unallocated space on the desktop and in the thumb cache on the laptop. However, the Court affirmed the possession conviction that relies on evidence found on the desktop in the "collection" zip file downloaded using the "peer-to-peer" software. The Court also affirmed the convictions for distribution of child pornography.

The Court agreed that the evidence demonstrated that the defendant possessed the child pornography in the "zip" file on his desktop computer. The Court noted that the defendant had control over the desktop, the images located in the zip file which were under the defendant's user name, and the zip file had recently been opened on the desktop. The Court concluded that the defendant knew the images were on the desktop and were under his dominion and control. The Court also found the evidence regarding the memory card was sufficient to prove possession.

However, the Court reversed the convictions for possession of child pornography regarding the evidence found in the parts of the computer that were not accessible to the defendant. The Court pointed out that, under *Kobman,* the defendant could not possess the contraband if he did not possess the forensic software that would allow him access to the material. Just as with the evidence in "unallocated space," the Court pointed out that special software is required to access the "thumb cache" and therefore found the evidence insufficiently demonstrated his possession of those images as well.

Lastly, the Court affirmed the conviction for distribution of child pornography. The Court agreed that it was reasonable for the trial court to conclude that the defendant should have known that the software he used to download child pornography had the ability to share files with other users. The Court wrote that the defendant's "assertion that he did not know that the sharing feature was operating is insignificant."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2013152.pdf

Coleman v. Commonwealth: December 29, 2016

Campbell: Defendant appeals his conviction for Distribution of Child Pornography on sufficiency of the evidence and a jury instruction issue.

Facts: The defendant uploaded child pornography to his publicly-viewable "Pinterest" page. [*Pinterest is a social media service, similar to Imgur or Instagram* – EJC]. One photo depicted a close shot of male and female genitalia, while the other depicted three nude young women lying on their stomachs on a bed, facing away from the camera with their legs spread.

After the photos generated an ICAC investigation, police visited the defendant at home. The defendant told police that he was the person for whom they were probably. He confessed that while looking for images of girls his own age, he had used the search term "kiddy porn" when other terms appeared to provide only adult pornography and that he refined his search terms to find images of women less than 16 years of age.

The defendant admitted to posting the first photo, but could not remember if he posted the other photo. The defendant stated that his account was password-protected and he was not aware of anyone else posting to that account.

At trial, the defendant argued that the photos were not "lewd," did not depict minors, and that he did not know they depicted minors. The defendant also objected to the following jury instruction, which derived from § 18.2-374.1:1:

> "It may be inferred by text, title or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age."

The defendant argued that this instruction shifted the burden to him, to disprove the age of the victim in the photograph.

Held: Affirmed. The Court first found the evidence sufficiently demonstrated that the girl in the first photograph was a child. The Court examined the image and noted the lack of public hair, lack of indication of pubic hair having been removed, the narrowness of her hips, the disparity between the size of her and the male's genitalia, and other factors that indicated that, at the time of the photo, she had not yet undergone puberty and was underage.

The Court then examined the "lewdness" or "sexual conduct" of the images. In the first image, the Court found that the male was visibly aroused in that image, which sufficiently demonstrated "physical contact in an act of apparent sexual stimulation" under § 18.2-390(3). The Court also found the second photo to be lewd, given the setting (a bed), the focus of the image (genitalia), and the girls' submissive posture.

The Court also found that, given the lack of evidence that someone else accessed the defendant's personal account, and his admission that he posted the first photo, the only reasonable inference was that the defendant was responsible for the presence of both images on the Pinterest page.

Lastly, the Court rejected the defendant's challenge to the jury instruction. The Court observed that, by its express language, the instruction presents a permissible, not mandatory, inference. The Court noted that a jury is competent to determine if images depict minors and rejected the argument that the instruction improperly invited the jury to speculate.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0096163.pdf

Child Solicitation

Virginia Court of Appeals –
Unpublised

Murgia v. Commonwealth: May 30, 2017

Chesapeake: Defendant appeals his conviction for Computer Solicitation of a Minor on sufficiency of the evidence.

Facts: Defendant worked as a track coach for the victim's school. The victim, a sixteen-year-old female high school student, asked the defendant to help her prepare for an upcoming event. In response, the defendant began sending the victim sexually suggestive messages, including one in which he described in lengthy detail a dream in which he engaged in various sexual acts with the child. The defendant referred to the victim in text messages as "yo sexy self and told her, "I'm gonna stretch your tight ass legs out and loosen them hips up too." The victim alerted a friend, who contacted law enforcement.

At trial, the trial court convicted the defendant of solicitation of a minor under 18.2-374.3(D).

Held: Reversed. The Court reaffirmed that the offense is complete at the time of the actual solicitation; there is no requirement that the accused "proceed to the point of some overt act in the commission of crime. The Court, however, likened this case to the Ford case, finding that the messages sent to the victim did not show the defendant intended to induce the victim to commit a criminal offense. The Court concluded that, although the messages contained graphic descriptions of sexual conduct with the victim, the defendant never expressed a desire to commit any of the enumerated sexual acts with the victim, much less expressed any desire to entice the victim to commit such acts.

The Court found that the defendant's conduct essentially constituted "words alone", and argued that the evidence showed the defendant took no step toward committing any illegal sexual activity with the victim, he never acted inappropriately toward her, he never asked her to meet him alone, he never touched her, and he did not contact her again after he sent the dream message.

Justice Beals filed a vigorous dissent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0788161.pdf

Conspiracy

Virginia Court of Appeals – Unpublished

Perkins v. Commonwealth: January 17, 2017

Newport News: Defendant appeals his convictions for Robbery, Malicious Wounding, Conspiracy, and Use of a Firearm on sufficiency of the evidence.

Facts: Defendant and a co-defendant robbed another man at gunpoint. The victim had been visiting an old friend at her apartment. However, during the visit, he accidentally revealed to her son, the defendant, that he was carrying a large amount of cash. After becoming aware that the victim had a great deal of cash, the defendant and his co-defendant began speaking and disappeared into another room together. When the victim left the apartment, the defendants approached the victim with a gun. The victim turned and walked away, but when he did, the defendant struck him on the head with the gun, and then his co-defendant struck the victim, at which point the victim fell to the ground, unconscious. The victim suffered a swollen eye, a cut ear, and swollen lips.

Police investigated the offense. During the investigation, they located photographs of the defendants with the stolen money taken after the offense.

Held: Affirmed regarding robbery, conspiracy, and use of a firearm; Reversed regarding Malicious Wounding. The Court first found that the evidence demonstrated that the defendant conspired with his co-defendant to rob the victim. The Court also agreed that, by striking the victim in the head with the gun, the defendant used a firearm in the commission of a felony.

However, the Court found that the evidence was insufficient to prove malicious wounding. The Court agreed that the defendant struck the victim on the head with a gun and agreed that the force of the defendant's blow was sufficient to injure the victim. However, the Court did not find sufficient evidence from which the trial court could have inferred an intent to cause permanent disability. The Court noted that the co-defendant also struck the victim, and when he did, the victim fell to the ground, unconscious. Therefore, the Court concluded that the trial court could not draw an inference of malice on the part of the defendant, despite the victim's injuries.

The Court did not address or mention the concepts of "concert of action", principal in the second degree, or accessory before the fact.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1040151.pdf

Contributing to the Delinquency of a Minor

Virginia Court of Appeals
Unpublished

Embrey v. Commonwealth: March 28, 2017

Staunton: Defendant appeals her conviction for Contributing to the Delinquency of a Minor on sufficiency of the evidence.

Facts: Police found a four-year-old child in the defendant's residence. The child had been there for at least four hours before the police arrived, running around barefoot in a residence where food and other "black stuff" was on the floor and "dug into" the carpeting, along with trash and dirty clothes strewn about the residence, dirty dishes surrounded by gnats piled up in the kitchen and in the bathroom, toilets that did not appear to be working, including one with human feces still in it, cat feces all over the floor, and pills, syringes, and needles near the bed in the only bedroom.

The defendant argued that the Commonwealth failed to establish the period of time the child was exposed to the unsanitary conditions.

Held: Affirmed. The Court held that intentionally exposing a child to any condition that poses a substantial risk to the child's health or safety constitutes a violation of the statute, regardless of how long or how many times the child was exposed to that condition. The Court refused to require the Commonwealth to prove, as an element of an offense pursuant to Code § 18.2-371, that a child was exposed to a potential hazard for any particular period of time or on repeated occasions. In this case, the Court agreed that the conditions presented a substantial risk of death, disfigurement, or impairment of bodily or mental function to the child.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0778163.pdf

Credit Card Offenses

Virginia Supreme Court

Scott v. Commonwealth: August 18, 2016

Richmond: Defendant appeals his conviction for Credit Card Theft on sufficiency of the evidence.

Facts: The defendant robbed the mother of his children at gunpoint and stole her purse. The purse contained cash, cigarettes, social security cards, and credit cards. The next day, the defendant returned the purse, but the cash and cigarettes were missing. The credit cards were in the purse when the defendant returned it, but the victim had already cancelled the cards. At trial, the trial court convicted the defendant of Credit Card Theft. The trial court rejected his argument that he lacked the specific intent to steal the credit cards.

Held: Affirmed. The Court held that credit card theft under the first prong of the statute is a general intent crime completed upon an unlawful taking. The Court relied on the plain language of 18.2-192(1)(a), which provides:

> "(1) A person is guilty of credit card or credit card number theft when:
> (a) He takes, obtains or withholds a credit card or credit card number from the person, possession, custody or control of another without the cardholder's consent or who, with knowledge that it has been so taken, obtained or withheld, receives the credit card or credit card number with intent to use it or sell it, or to transfer it to a person other than the issuer or the cardholder."

The Court ruled that this section does not require that the Commonwealth allege or prove the specific intent to use, sell or transfer a credit card that has been taken from a cardholder without consent. In doing so, the Court overruled the previous holdings by the Court of Appeals in *Scott* and *Darnell*, in which the Court of Appeals had found the crime to be a specific intent crime. The Court reasoned that, as it had in *Meeks*, the crime of credit card theft under the first prong of the statute is completed when the credit card or number is unlawfully taken from its rightful owner.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1150932.pdf

Boggs v. Commonwealth: January 24, 2017

Chesapeake: Defendant appeals his conviction for Credit Card Theft on sufficiency of the evidence.

Facts: Defendant and a co-defendant stole a credit card. The defendant and his coworker entered an apartment on a contract to remove a washer and dryer. They used a key to enter the apartment and locked the apartment when they left. Three to five hours after the men had been in the

apartment, the victim found someone had used a credit card she had left in the open in the apartment. Police located the user, whom the defendant's co-worker identified as the defendant's girlfriend.

Held: Affirmed. The Court found that the evidence amounted to more than mere possession of the stolen credit card, and there was sufficient evidence to support the trial court's finding that the defendant took the credit card.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1602151.pdf

Driving Suspended or Revoked

Virginia Court of Appeals
Published

Peters v. Commonwealth: November 8, 2016

Fauquier: Defendant appeals his conviction for Driving Revoked, 3rd or Subsequent, on sufficiency of the evidence regarding notice.

Facts: Defendant drove after having been revoked, DUI-related, after three previous convictions for that offense. When the deputy stopped the defendant, the defendant told the deputy that he did not have a driver's license. At trial, the Commonwealth introduced the three prior conviction orders from the previous offenses, each about three years before this offense, as well as the defendant's DMV transcript. The transcript noted that the defendant was "Revoked" and noted "Notice of Suspension/Revocation Received."

Regarding notice, the DMV transcript stated that the notices of revocation were delivered by first-class mail. The defendant's address was the same address he provided on his summons.

Held: Affirmed. The Court first found that under §46.2-203.1, the notice sent by DMV by first-class mail to the defendant's home was "deemed to have been accepted by the person at that address." The Court then pointed out that that, unlike in *Bishop*, in this case the DMV record was clear enough on its face to demonstrate that the defendant had notice, especially in combination with the defendant's statement to the officer that he did not have a license.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1577154.pdf

DUI

U.S. Supreme Court

U.S. Supreme Court

Birchfield v. North Dakota: June 23, 2016

This case consisted of 3 consolidated cases:

1. ***Birchfield v. North Dakota*:**

Certiorari to the Supreme Court of North Dakota:
Defendant appeals his conviction for criminal refusal of a blood test on Fourth Amendment grounds.

Facts: Defendant crashed his vehicle and an officer that responded arrested the defendant for DUI. The defendant refused a blood test, which is a criminal offense in North Dakota. The trial court overruled his argument that the Fourth Amendment prohibited criminalizing his refusal to submit to a blood test.

Held: Reversed. The Court held that the defendant was threatened with an unlawful warrantless search. (See Below for details)

2. ***Bernard v. Minnesota*:**

Certiorari to the Supreme Court of Minnesota:
Defendant appeals his conviction for criminal refusal of a breath test on Fourth Amendment grounds.

Facts: Police located and arrested the defendant, who had been driving his vehicle while intoxicated. The defendant refused a breath test, which is a criminal offense in Minnesota. The trial court overruled his argument that the Fourth Amendment prohibited criminalizing his refusal to submit to a breath test.

Held: Affirmed. The Court held that the breath test was a permissible search incident to the defendant's arrest. The Court explained that the Fourth Amendment did not require the officer to obtain a warrant prior to demanding the test and the defendant had no right to refuse the test. (See Below for details)

3. ***Beylund v. Levi*:**

Certiorari to the Supreme Court of North Dakota:
Defendant appeals his license suspension on Fourth Amendment grounds.

Facts: Defendant crashed his vehicle and an officer that responded arrested the defendant for DUI. When the officer brought the defendant to a hospital, he informed the defendant that refusal of a breath or blood test is a criminal offense in North Dakota. The defendant agreed to take the blood test. The defendant had a BAC of .25, and as a result of that BAC, the DMV administratively suspended his license for 2 years. At an administrative appeal, the court overruled his argument that the State unlawfully coerced him into taking a blood test by warning him that his refusal to submit to a blood test would be a crime.

The North Dakota Supreme Court held that Beylund's consent was voluntary under North Dakota's "implied consent" law.

Held: Reversed and Remanded. The Court decided that it was erroneous for the North Dakota Supreme Court to find that the defendant had *per se* consented to a blood test, because the State cannot compel both blood and breath tests with criminal consequences. The Court remanded the case to the North Dakota Supreme Court to re-evaluate the defendant's consent given the partial inaccuracy of the officer's advisory. (See Below for details)

***Court's Holding & Analysis**:* The Court held that the Fourth Amendment permits warrantless breath tests, but not blood tests, incident to arrests for drunk driving. The Court also held that states may criminalize refusal of a breath test, but may not criminalize refusal of a blood test, although the states are free to impose civil penalties for both.

In these cases, the Court addressed the question of whether "implied consent" laws that make it a *crime* for a motorist to refuse to be tested after being lawfully arrested for driving while impaired violate the Fourth Amendment's prohibition against unreasonable searches. The Court described an "implied consent" law as one that provides that cooperation with BAC testing is a condition of the privilege of driving on state roads, and further provides that the privilege will be rescinded if a suspected drunk driver refused to honor that condition.

The Court noted that each case was different – officers told Birchfield and Beylund that the law obligated them to submit to a blood test, whereas the officer told Bernard that the law required him to submit to a breath test. Birchfield and Bernard refused and the trial courts convicted them of criminal refusal. Beylund complied and lost his license due to his BAC.

The Court first examined breath tests in general. The Court agreed that a post-arrest breath test is a "search" under the Fourth Amendment. However, the Court found that such tests do not implicate significant privacy concerns, as they are not physically intrusive, only reveal alcohol content, and are unlikely to add to the embarrassment inherent in any arrest. The Court pointed out that humans have never been known to assert a possessory interest in or any emotional attachment to any of the air in their lungs.

The Court held that the Fourth Amendment permits warrantless breath tests as a search incident to arrest for drunk driving. The Court recited the history of the "search incident to arrest" exception in detail and found that a breath test is a reasonable search under the Fourth Amendment that does not require a search warrant. Thus, the Court did not address whether implied consent applied to breath tests because that question was moot.

The Court then examined blood tests. The Court observed that blood tests involve piercing of the skin, extract part of a person's body, and that blood carries information in addition to BAC, such as DNA. The Court also reviewed *Schmerber* and *McNeely* and repeated that the natural dissipation of alcohol in the bloodstream does not *always* constitute an exigent circumstance, although it may be an exigent circumstance in a particular case, depending on the totality of the circumstances in an individual case. The Court held that the Fourth Amendment does not *per se* permit warrantless blood tests as a search incident to arrest for drunk driving.

After addressing both warrantless breath tests and warrantless blood tests, the Court then turned to the criminal "unreasonable refusal" statutes in these cases. The Court ruled that motorists cannot be deemed to have consented to submit to a *blood* test on pain of committing a *criminal* offense. The Court noted that, in prior opinions, the Court had already approved of civil penalties and evidentiary consequences on motorists who fail to comply with implied-consent laws. However, the Court decided that, while a state may insist upon a blood test as part of "implied consent", a state may not impose *criminal* penalties for refusal of a blood test.

In particular, the Court wrote:

> "Our prior opinions have referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply…nothing we say here should be read to cast doubt on them. It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads."

Lastly, in *Beylund*'s case, the Court remanded the case to the lower court to consider two questions: First, whether *Beylund* gave actual consent to the blood test in his case , and second, whether suppression of the test is appropriate in light of *Heien v. North Carolina* and the officer's partially incorrect warning regarding implied consent.

Commentary: Regarding breath cases, the Court essentially approved of breath tests in any case where an officer lawfully arrests a defendant for DUI. The Court ignored implied consent because the Court ruled that a breath test is *always* permissible under the "search incident to arrest" exception to the search warrant requirement.

Regarding blood cases, there are several important caveats to this ruling.

First, the Court repeated that, under *Schmerber* and *McNeely*, there may still be a justification in an individual case to find exigent circumstances to take blood without a warrant.

Second, the unresolved question is: "What happens to an already-pending case where the defendant consented to a blood test under the mistaken belief that he could be criminally penalized under the implied consent law for refusing to cooperate." Regarding this second question, it is initially crucial to recognize that the Court did *not* strike down civil penalties for unreasonable refusal of a blood test. The Court only struck down criminal penalties for unreasonable refusal of a blood test.

Regarding this second question, it is also significant that the Court remanded *Beylund*'s case to the lower court to consider the application of *Heien v. North Carolina*. Under *Heien*, an "objectively reasonable" error by an officer does not result in suppression of the evidence. In citing *Heien*, the Court reminded us that just because police violate the Fourth Amendment, that doesn't necessarily result in the suppression of evidence. The Court left open whether the evidence should be suppressed in light of the fact that the officer *correctly* warned the defendant that he would face criminal consequences for refusal of a breath test but *incorrectly* warned the defendant that he would face criminal consequences for refusal of a blood test.

Virginia Court of Appeals –
Published

Synan v. Commonwealth: January 24, 2017

Spotsylvania: Defendant appeals his convictions for Malicious Wounding, DUI and Assault on admission of hearsay testimony and sufficiency of the evidence.

Facts: Defendant, drunk, grabbed hold of the steering wheel of his wife's van while she was driving, resulting in their van crashing into an embankment after crossing through oncoming traffic. The van was moving very fast and did not slow down as it turned sharply in front of the school bus. As a result, the bus driver had to swerve over the yellow line into oncoming traffic to prevent the bus from colliding with the van. The swerve she took caused the children on the bus to fall out of their seats.

The crash injured the wife. Within two minutes of the crash, a witness brought the defendant's wife out of the van. At trial, he testified that she was crying and shaking and that he asked her what happened. The witness testified the wife told him that the defendant "jerked the steering wheel" and "tried to kill them both by hitting the van, that he was yelling at her, [and] that they were fighting." The defendant objected to the statements being offered as hearsay testimony.

At trial, the defendant's wife testified that the defendant did not grab the wheel, as she had originally stated, but admitted to telling the investigating officer that the defendant had caused the crash by grabbing the wheel.

Held: Affirmed. The Court first found that it was proper to admit the wife's statements. The Court noted that the wife made her statements within minutes of the startling event, with no indication that there was any meaningful delay between the time of the accident and the time that the witness heard her statements. The Court also noted the lack of evidence that the witness questioned the wife or directed her to make her statements.

The Court then affirmed the conviction for DUI. The Court repeated the holding in *Dugger*, that a passenger who forcibly seizes control of the steering wheel of a moving vehicle exercises sufficient control to fall within the scope of DUI. In this case, the Court agreed that the defendant had control of the vehicle, even if only momentarily, by fighting for the wheel.

The Court then found that the evidence was sufficient to prove malicious wounding. The Court found that the trial court could have reasonably inferred that the defendant committed a "purposeful and cruel act without great provocation" by directing the van into oncoming traffic, off the road, and into an embankment.

The Court also ruled that the evidence was sufficient to prove that the defendant assaulted the school bus driver and the chaperone who was looking out the window at the time. The Court ruled that the evidence was sufficient for the trial court to conclude that the defendant acted overtly with the intent to inflict bodily harm and place the occupants of the bus in fear of bodily harm.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0795152.pdf

Beckham v. Commonwealth: May 30, 2017

Spotsylvania: Defendant appeals his conviction for DUI 3rd offense on admission of his out-of-state prior convictions.

Facts: Defendant drove while intoxicated. He had two previous convictions for DUI in Florida in the previous 10 years. The trial court convicted the defendant of DUI 3rd or subsequent offense, rejecting the defendant's argument that the Florida DUI statute was not a "substantially similar offense."

Held: Affirmed. The Court held that the Virginia and Florida DUI statutory schemes are substantially similar, finding that the conduct that was sufficient to sustain two Florida DUI convictions would have supported convictions under Virginia's DUI laws, regardless of whether the prosecution used an impairment or per se theory.

Regarding the "impairment" form of DUI, the Court examined both states' impairment provisions and observed that a defendant would be subject to the same presumption of intoxication if chemical testing indicated a certain blood-alcohol level, and he or she would also be entitled to present other evidence rebutting that presumption.

Regarding the "per se" form of intoxication, the Virginia and Florida per se provisions are operationally identical; both set forth an offense requiring the prosecution to prove the same elements: that the defendant was driving, operating, or controlling a vehicle and at that time had an unlawful blood-alcohol content.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1146162.pdf

Virginia Court of Appeals -
Unpublished

Staiger v. Commonwealth: January 10, 2017

Mecklenburg: Defendant appeals her convictions for DUI second offense and DUI third offense because both took place at the same proceeding.

Facts: Defendant, who already had one DUI conviction, drove drunk to her AA meeting. However, along the way, she drove her car off the road and crashed. The defendant then left that car, returned home, and retrieved another car. The defendant then drove back to the AA meeting in that car. However, along the way, she drove that car off the road and crashed again, a couple of miles away from the first crash. Police responded and arrested the defendant.

The Commonwealth charged the defendant for DUI 2nd and DUI 3rd for those two incidents and tried both cases at the same time. The trial court convicted the defendant of both offenses,

Held: Affirmed. The Court observed that nothing prevents the simultaneous trial of a second DUI and a third DUI. Just as in *Williams*, the Court ruled that the Commonwealth does not need to convict the defendant of a DUI 2nd first before pursuing the 3rd offense DUI.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0652152.pdf

DUI Maiming

Rich v. Commonwealth: December 15, 2016
Affirmed by Court of Appeals Ruling of November 10, 2015

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

Facts: Defendant, intoxicated, crashed into a man who was crossing the street in a medical scooter. A witness testified that she saw slowed down and let him the man by when she saw him crossing the street erratically, 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. Her BAC was a .13.

Held: Affirmed. The Court first found that the evidence sufficiently demonstrated that the defendant "caused" the crash within the meaning of §18.2-51.4. The Court applied the same interpretation of "proximate cause" as it had for the causation element contained in § 18.2-36.13 (involuntary manslaughter), since the two statutes contain the same causation language. The Court then reiterated that a crash can have more than one proximate cause and therefore criminal liability can attach to each actor whose conduct is a proximate cause, unless the causal chain is broken by a superseding act that becomes the sole cause of the crash.

The Court then rejected the defendant's argument that the trial court merely speculated as to the cause of the crash, by analogy to *Hoffner.* The Court found that the defendant's admitted inattentiveness while driving, voluntary consumption of alcohol up to and well beyond the point of intoxication, and voluntary decision to drive while having had very little sleep, formed a natural and continuous sequence that caused the accident.

The Court also found that the defendant's actions were criminally negligent for purpose of the statute.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151841.pdf

Refusal

Kim v. Commonwealth: April 13, 2017

Fairfax: Defendant appeals his conviction for Unreasonable Refusal on Sufficiency of the Evidence.

Facts: The defendant, under arrest for DUI, refused to submit to a breath sample. The officer arrested the defendant on a roadway located in the dead center of an apartment complex. The roadway intersects with a public highway, at one end and a private road in the apartment complex at the other end. The apartment complex was accessible by public roads, but the roads within the complex were privately maintained. There were no physical barricades or security guards preventing entry by the public, but there were signs located at every entrance and throughout the complex indicating that apartment complex was "Private Property." The signs also stated "No Soliciting," "No Loitering," "No Trespassing" and "Violators Will Be Prosecuted."

Held: Reversed. The Court repeated that, to meet the statutory definition of highway under Code § 46.2-100, a "way or place" must be "open to the use of the public for purposes of vehicular travel." The Court explained that, in this case, the Commonwealth met its the initial burden of presenting evidence establishing that the public had unrestricted access to the roads of the apartment complex. The Court agreed that a sufficient showing of unrestricted access gave rise to the presumption that the way was a "highway."

The Court noted that, in order to meet its burden, the Commonwealth was required to do more than simply show that entry into the apartment complex was not controlled by physical barriers or security guards. The Court further explained that, although it had never explicitly stated what further evidence of unrestricted access is necessary to give rise to the presumption, the lack of a physical barrier

in conjunction with evidence that the roads at issue are named, feature traffic signs, curbs, and sidewalks, would amount to a sufficient showing of unrestricted access to give rise to the presumption that the road is a highway.

However, the Court then found that the defendant sufficiently rebutted that presumption. In this case, the Court found that the presence of several conspicuously posted "No Trespassing" signs established that the apartment complex's roadways were not "open to the use of the public" for any reason. The Court concluded that such a restriction, unlike the "no soliciting" sign in Furman, negates any consent to access the roads within the apartment complex that may be implied by the lack of physical barriers or the fact that the roads are named, paved, curbed, bordered by sidewalks and have posted traffic signs.

Therefore, the Court concluded that the apartment complex's roadways did not meet the statutory definition of highway under Code § 46.2-100. As a result, the implied consent statute had no applicability and the defendant was not required to submit a breath sample.

Justices Kelsey, Lemons, and McClanahan wrote an extensive dissent in which they included photographs of the apartment complex. They disagreed with the Court's factual conclusions regarding the roadway.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1160665.pdf

Display of a Noose

Turner v. Commonwealth: November 22, 2016

Franklin: Defendant appeals his conviction for Displaying a Noose with Intent to Intimidate on First Amendment and sufficiency grounds.

Facts: Within hours of the 2015 Charleston church massacre, the defendant put an all-black, life-size dummy hanging by a noose from a tree in his yard, clearly visible to anyone. His African-American next-door neighbors called the police. When an officer asked the defendant what it was, he claimed it was a "scarecrow" but then explained that he was a "raciest" and that he "did like blacks but not [*racial slur redacted –EJC.*]."

The trial court denied his motion to dismiss on First Amendment grounds and convicted him of the offense in violation of Code § 18.2-423.2.

Held: Affirmed. The Court first rejected the argument that the defendant's actions were protected speech under the First Amendment. The Court quoted extensively from the U.S. Supreme Court's opinion in *Virginia v. Black*, which upheld Virginia's "cross-burning" statute, § 18.2-423. The Court repeated *Black*'s admonition that intimidation in the "constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."

As in *Black*, the Court looked to whether the public display of a noose evokes a "long and pernicious history as a signal of impending violence." The Court reviewed the image of the noose in the context of the history of lynching. The Court concluded that, because the Commonwealth is required to prove that the noose was displayed "in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury," the scope of Code § 18.2-423.2 only

encompasses the exhibition of a noose that represents a "true threat" and therefore the code section is Constitutional.

The Court also rejected the argument that the defendant's act was protected by the fact that he placed the noose on his own property. The Court wrote: "Justice Holmes famously observed in *Schenk v. United States*, 249 U.S. 47 (1919), that falsely shouting "fire" in a crowded theater is not protected speech under the First Amendment and we can think of no principled constitutional reason why that should change if you happen to own the theater."

Lastly, the Court found that the evidence sufficiently demonstrated that the defendant's front yard was a "public place" under the statute. The Court adopted the same definition of "public place" as that used in the *Hackney* case and held that the use of offensive language by use of a symbol on one's own premises constitutes a violation of the law when that symbol is used to communicate it to the public, and thus disturbs persons who are within the viewpoint of the communication, display, or message.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2039153.pdf

Destruction of Property

Virginia Court of Appeals –
Unpublished

Ruffin v. Commonwealth: December 6, 2016

Prince George County: Defendant appeals his conviction for Felony Destruction of Property on sufficiency of the evidence.

Facts: The defendant destroyed a rental car in a crash. The defendant and the mother of his child had traveled to a residence. After getting into a physical and heated argument with the woman, the defendant "yelled something," jumped into the car, and turned out of the driveway into oncoming traffic in a traffic circle. The defendant then drove around another vehicle, at sixty to sixty-five miles per hour, while other vehicles were on the road. The defendant drove through an intersection to cross over the median of a traffic circle, went airborne, hit an ambulance, and flipped several times.

At trial, the defendant testified that the crash was an accident, the result of confusion due to being an area with which he was unfamiliar.

Held: Affirmed. The Court examined the facts and agreed that the defendant's actions were willful, based on his behavior and statements, in that they were both "volitional and intentional." The Court reaffirmed that, under *Scott*, it is not sufficient to prove mere negligence to convict a defendant of felony destruction of property. However, in this case, the Court found that the evidence sufficiently demonstrated that the defendant intended the "immediate, direct, and necessary consequences" of his actions.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1815152.pdf

Drugs

Distribution

Virginia Court of Appeals
Published

Sandidge v. Commonwealth: December 20, 2016

Lynchburg: Defendant appeals his sentencing for Distribution of Cocaine, 3rd offense, on imposition of the mandatory minimum sentences.

Facts: The trial court convicted the defendant of two counts of Distribution of Cocaine, 3rd offense. At the beginning of the sentencing hearing, the defendant's attorney announced that the defendant would testify, with the intent of "truthfully providing to the Commonwealth all information and evidence the defendant had concerning the offenses," pursuant to Va. Code §18.2-248(C)(e), and thereby take advantage of the "safety valve" contained in the statute to earn a waiver of the mandatory minimum sentence.

The defendant testified that he sold drugs to support his family and had no other information to share. The Court found that the defendant had not complied with the terms of the statute and imposed the mandatory minimum sentences.

Held: Affirmed. The Court held that a defendant who wishes to take advantage of the "safety valve" in Va. Code §18.2-248(C)(e) must have "truthfully provided to the Commonwealth all information and evidence the person has concerning the offense or offenses" *prior* to sentencing, rather than during sentencing. The Court observed that the "truthfulness" requirement is meaningless unless the Commonwealth has an opportunity to assess and validate the defendant's information through investigation.

The Court wrote: "Without the ability to test a statement for veracity and completeness, courts would be required to assume the truth, and the full disclosure, of statements given by a felon at sentencing for the purpose of avoiding a decade-long mandatory prison term. Given the strong incentive any defendant has to avoid such a lengthy sentence, the General Assembly quite reasonably drafted a statute that permits the courts and the Commonwealth to guard against the provision of false and/or incomplete information."

The Court further explained that "truthful compliance with subpart 'e' is more than an esoteric exercise in catharsis." Instead, the purpose of the defendant providing information is to assist law enforcement. However, the Court declined to address the issue of what would happen if a defendant simply had no information to share.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1851153.pdf

Virginia Court of Appeals –
Unpublished

Shelly v. Commonwealth: December 6, 2016

Amherst: Defendant appeals her conviction for Distribution of Drugs in a School Zone on sufficiency of the evidence.

Facts: The defendant sold drugs to a confidential informant at a picnic table sitting on the exterior corner of a motel and approximately 100 yards away from a school. The picnic table appeared to be on private property, in a grassy area between a motel and a nearby business. There was a "No Trespassing" sign in the area, but it was only posted at the night check-in window. At trial, an investigator testified that he had never seen anyone turned away from using motel property unless they had been previously barred from it. Police had seen various people using the picnic table on other occasions.

The defendant argued that the location where the drug sale took place was not "open to public use" as required by Code § 18.2-255.2(A)(2).

Held: Affirmed. The Court construed § 18.2-255.2(A)(2), which states: "It shall be unlawful for any person to . . . sell . . . any controlled substance . . . while . . . [u]pon public property or any property open to public use within 1,000 feet of [school property]." The Court reviewed cases like *Fullwood* and *Small*, where it had previously held that property "open to public use" can include private property. The Court ruled that, because the picnic table was readily accessible to the public and the public would not reasonably anticipate being challenged regarding their use of the picnic table, and because the picnic table was not blocked, closed or in any way inaccessible to the public, the picnic table in this case was "open to public use" pursuant to Code § 18.2-255.2(A)(2).

The Court also pointed out that an "area open to public use" is not limited to areas where children actually congregate because the statute prohibits drug sales in any area within 1,000 feet of school property, regardless of its actual use by children.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2019153.pdf

Possession with Intent to Distribute

Virginia Court of Appeals – Unpublished

Carter v. Commonwealth: July 12, 2016

Prince George: Defendant appeals his conviction for Conspiracy to Possess Cocaine with Intent to Distribute on sufficiency of the evidence.

Facts: An officer stopped a vehicle in which the defendant was the front-seat passenger. The vehicle was a rental belonging to the mother of the driver's child. Searching the defendant, the officer found nothing. However, searching the back-seat passenger, the officer found $3,792 in cash, divided into two separate pockets, folded over by denomination. That passenger gave inconsistent statements

about the nature and origin of the cash. In the glove compartment, which was in front of the defendant, the officer found a handgun and a bag of cocaine.

Held: Reversed. While the Court agreed that the Commonwealth may prove a conspiracy by circumstantial evidence, in this case, the Court found that the evidence showed merely that the defendant was the front seat passenger. The Court noted that the defendant committed no acts that proved that he pursued the same object as the other individuals in the vehicle. The Court distinguished other cases where other factors helped to demonstrate a conspiracy, such as:

- Co-Conspirator Testimony
- Defendant's statements at the scene
- Defendant's testimony at trial
- Owe-sheets or documents indicating an agreement

The Court found that the defendant's mere proximity to the weapon and drugs, alone, was not enough to demonstrate a shared criminal intent. The Court observed that his mere proximity failed to demonstrate possession as well. The Court also found that the presence of cash on the passenger failed to demonstrate the defendant's intent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1445152.pdf

Kincaid v. Commonwealth: July 27, 2016

Bath: Defendant appeals his conviction for Possession with Intent to Distribute Methamphetamine on sufficiency of the evidence.

Facts: Police stopped the defendant in a vehicle. When asked by an officer if there was "anything illegal" in the vehicle, the defendant responded that there "may be an old pipe in a green bag in the passenger's side front seat." An officer located the green duffel bag and retrieved a black case which contained a glass pipe. The defendant never denied ownership of the pipe. At trial, the trial court admitted a certificate of analysis was admitted at trial, without objection, which established that the substance recovered from the pipe was methamphetamine residue.

Held: Reversed. The Court held that possession of the mere residue of methamphetamine was insufficient to prove that the defendant had a contemporaneous intent to distribute the controlled substance. The Court relied on the *Stanley* case, in which it had also reversed a conviction for Possession with Intent to Distribute a residual amount of a controlled drug. In *Stanley*, the Court had held that for a defendant to be convicted of possession of a controlled substance with the intent to distribute, the Commonwealth must prove that the defendant possessed the controlled substance contemporaneously with his intention to distribute that substance.

However, the Court also held that, given that the defendant specifically identified the glass pipe as an illegal item and never disclaimed ownership, the evidence was sufficient to support a conviction for possession of methamphetamine.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1623153.pdf

Lewis v. Commonwealth: October 4, 2016

Colonial Heights: Defendant appeals his conviction for Possession of Marijuana with Intent to Distribute on sufficiency of the evidence.

Facts: An officer stopped a vehicle driven by a man in which the defendant was a passenger. Soon after, the vehicle fled and the officer pursed. During the pursuit, the officer saw a bag of marijuana fly out of the passenger window. The officer recaptured the defendant and the driver. The bag contained almost three ounces of marijuana packed in three smaller bags which each held about an ounce of marijuana, valued at up to $350 per ounce. The officer searched the vehicle and found no indicia of personal use, such as smoking devices.

The officer searched the defendant and found over $2000 in cash, mostly in $20 bills. The defendant claimed that his mother gave him the money in order to pay his rent, which was $1400, but the defendant's mother did not corroborate that. At trial, an expert testified that the quantity of the marijuana and the manner in which it was packaged was inconsistent with personal use.

Held: Affirmed. The Court reviewed the facts of the case, including the quantity, packaging, possession of cash, and lack of evidence of personal use, and found that it was sufficient to prove the case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0912152.pdf

Riddle v. Commonwealth: November 15, 2016

Campbell: Defendant appeals his conviction for Possession with Intent to Distribute an Imitation Substance on sufficiency of the evidence.

Facts: Police searched the defendant's fellow passenger during a traffic stop and found several bags of crystal-like substances on the passenger's person. At trial, the officer testified that based on his training and experience he originally thought the substance was MDMA. The defendant referred to the substance as "Himalayan salts." The defendant admitted that he and his compatriot bought the Himalayan salts together and packaged them and that "if someone else knew where to get it I would have sold it to them." Additionally, he admitted to the police that it was "funny" how similar the Himalayan salts looked like molly.

Held: Affirmed. The Court held that the evidence was sufficient to find beyond a reasonable doubt that the substance, by appearance and packaging, would likely be mistaken for MDMA. Rejecting the defendant's argument that his statement about selling the substance was merely "hypothetical," the Court held that the trial court was entitled to credit the defendant's statement to the officers that he did, in fact, plan to sell the repackaged "Himalayan salts" as MDMA. Lastly, the Court found that, even though he did not physically possess the substance, the defendant consented to the felonious purpose of possessing with the intent to distribute the imitation controlled substance because the defendant and his compatriot, together, procured and packaged the Himalayan salts to look like MDMA.

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/1953153.pdf

Williams v. Commonwealth: December 20, 2016

Prince George: Defendant appeals his convictions for Possession with Intent to Distribute and Conspiracy to Possess with Intent to Distribute on sufficiency of the evidence.

Facts: Officers stopped a rented car in which the defendant was a rear-seat passenger. After arresting the driver for DUI and Driving Suspended, police obtained consent to search the defendant and found almost $4,000 in cash, folded in dealer-denominations. The defendant claimed he "found" the money in the car, but then later claimed that his girlfriend gave him the money. Police opened the glove compartment and found a handgun and a bag that contained four smaller bags of cocaine.

Held: Affirmed as to Possession with Intent to Distribute; Reversed as to Conspiracy to Possess with Intent to Distribute. The Court ruled that the defendant's inconsistent statements, coupled with his proximity to the cocaine and his possession of a large amount of currency folded by denominations, sufficiently proved his "knowledge of the presence, nature, and character" of the cocaine.

Regarding the conspiracy conviction, however, the Court found that the facts were insufficient to prove a conspiracy between the defendant and any of the other occupants of the car. The Court pointed out a lack of evidence of conversations, furtive movements, length of time in the vehicle, scent, residue, or evidence of the cocaine on any of the occupants of the vehicle. The Court found that the fact that one of the occupants was sitting in front of the glove compartment was not an overt act that demonstrated that he was acting in concert with the defendant. The Court also found that the fact that the driver was driving the vehicle was also not an overt act tending to show that he was acting in concert with the defendant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0080162.pdf

Garnett v. Commonwealth: December 20, 2016

Henrico: Defendant appeals his conviction for Possession with Intent to Distribute on admission of text messages and sufficiency of the evidence.

Facts: Police stopped the defendant and located a significant amount of marijuana in the car he was driving. The defendant claimed that he had borrowed the car from his sister. An officer also located a mobile phone in the car, but at trial, she could not recall whether she found it in the center console or on the defendant's person.

Police obtained a search warrant for the contents of the phone. The Commonwealth introduced text messages contained in the phone that discussed the sale and distribution of marijuana at trial. The defendant objected that the Commonwealth did not establish a sufficient foundation that the phone belonged to the defendant. The Commonwealth argued that the defendant was the only person in the car and therefore, the mobile phone had to belong to him. The trial court admitted the text messages.

Held: Reversed. The Court ruled that the trial court erred in admitting the text messages because the Commonwealth did not provide an adequate foundation for their admission. The Court

agreed that the Commonwealth can authenticate text messages and prove the ownership of a mobile phone with either direct or circumstantial evidence, citing numerous cases where Virginia and other courts had found a sufficient foundation for digital evidence. The Court ruled that mere proximity to the phone was insufficient to prove that the defendant owned the phone and authored the text messages.

However, the Court found that the evidence at trial would have otherwise been sufficient to prove that the defendant possessed marijuana with the intent to distribute. The Court found that the text messages, coupled with the strong and obvious odor of marijuana in the vehicle, sufficiently demonstrated the defendant's guilt. Therefore, the Court remanded the case for re-trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1573152.pdf

Roy v. Commonwealth: March 7, 2017

Prince George: Defendant appeals his convictions for Possession of Cocaine with Intent to Distribute and Conspiracy on Sufficiency of the Evidence.

Facts: Police stopped a rental car the defendant was driving and arrested him for DUI and for driving on a suspended license. The defendant's girlfriend, who was not present, had rented the car, but the defendant was not an authorized driver. Searching the passengers, police found thousands of dollars in cash in one of the passenger's pockets, folded by denomination. That passenger gave inconsistent statements about the source of the cash. Searching the vehicle, officers found a handgun and a bag of cocaine in the glove compartment, packaged into four separate baggies.

Held: Reversed. The Court found that the evidence failed to establish either that the defendant possessed the cocaine or that he agreed to conspire with one or more individuals to distribute it. The Court distinguished other cases where statements or other evidence provided circumstantial evidence of possession or a conspiracy.
(Note: This case is similar to *Carter v. C/w*, an unpublished case from July of 2016 – *EJC*
http://www.courts.state.va.us/opinions/opncavwp/1445152.pdf)

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1403152.pdf

Possession

Virginia Court of Appeals –
Published

Broadous v. Commonwealth: February 7, 2017

Chesapeake: Defendant appeals her conviction for Drug Possession on denial of her affirmative defense that she was seeking treatment

Facts: Defendant injected herself with Fentanyl. When the defendant became unconscious and non-responsive, her boyfriend called 911 for assistance from their motel room. When rescue arrived, the defendant identified herself to the emergency personnel and remained at the scene until she was transported to the hospital. She made several incriminating statements about the drug and her usage of it to the police and also consented to a search of her hotel room.

However, prior to trial, the defendant made a motion to made a motion to apply the affirmative defense under § 18.2-251.03 for those who "seek or obtain" emergency medical treatment for a drug overdose. The trial court denied the motion and convicted the defendant.

Held: Affirmed. The Court held that the affirmative defense only applies to the individual making the emergency report. The Court addressed the meaning of § 18.2-251.03, finding that it provides an affirmative defense to prosecution of an individual for the unlawful possession of a controlled substance only if that individual satisfies each of six requirements, the first of which is that the person "seeks or obtains emergency medical attention for himself, if he is experiencing an overdose, or for another individual, if such other individual is experiencing an overdose."

The Court rejected the argument that simply by "receiving" medical treatment, the defendant "obtained" treatment as required by that first element. Instead, the Court ruled that that the plain meaning of the phrase "obtains emergency medical attention for himself" requires a defendant to have actively planned and taken steps to gain medical treatment. The Court held that § 18.2-251.03 does not provide an affirmative defense to prosecution to an individual who passively receives emergency medical attention.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0169161.pdf

Embezzlement

Virginia Court of Appeals
Unpublished

Tomlin v. Commonwealth: March 14, 2017
(*See elsewhere for this case on other issues*)

Sussex: Defendant appeals her convictions for Embezzlement and False Pretenses on amendment of the indictment, denial of a bill of particulars, and sufficiency of the evidence.

Facts: The defendant worked as a social worker at a home for elderly and disabled patients. On multiple occasions, the defendant asked for and received advance payments from the patient's funds to shop for the patients. She was authorized to make such requests as part of her job. However, she then used those funds to purchase expensive items. She then turned in receipts to her employer, who reimbursed her. The patients did not receive any of the items. Using photocopies of the receipts, the defendant returned many of the items, keeping the refunds for herself.

The defendant also obtained a cash advance for patient clothes which she then spent on clothes for herself, although she turned in the receipt and claimed it was for a patient. Prior to trial, the Commonwealth moved to amend four indictments from "obtaining signatures by false pretenses" to "obtaining money by false pretenses". The trial court granted the motion over the defendant's objection.

Prior to trial, the defendant also moved to compel the Commonwealth to elect between Embezzlement and Larceny by False Pretense, alleging that the charges were duplicative and convicting her of both would violate double jeopardy. The trial court denied the motion. The defendant also requested a bill of particulars, but the trial court denied the motion.

The trial court convicted the defendant of Larceny by False Pretense and Embezzlement regarding the patient funds and the false returns. The trial court convicted the defendant of Grand Larceny regarding the clothes.

Held: Affirmed. The Court first ruled that the trial court did not err when it granted the Commonwealth's motion to amend four indictments from obtaining signatures by false pretenses to obtaining money by false pretenses because those amendments did not change the nature or character of the offenses.

The Court also found the evidence sufficient to convict for obtaining money by false pretenses, embezzlement, and grand larceny. The Court rejected the argument that she could not embezzle patient funds because the patients were not her employers. The Court pointed out that she obtained the money by virtue of her employment, which was sufficient. The Court also found that the evidence also demonstrated larceny by false pretense. The Court explained that the defendant's use of photocopied receipts was a false representation to her employer that those transactions were final, when the defendant had, in fact, kept the original receipts to obtain and keep the proceeds from the returns. Third, the Court found that the trial court did not err in denying the defendant's pretrial motion to elect between Embezzlement and Larceny by False Pretense. The Court examined the offenses and found that, under *Blockburger*, the offenses were distinct and therefore the trial court properly denied the motion to force election.

Lastly, the Court agreed that the trial court properly denied the defendant's pretrial motion for a bill of particulars. The Court examined each of the indictments and noted that they named the defendant, identified the County where the offense took place, recited the date of the offense, named the victim, and set forth the elements of the offenses. The Court agreed that these allegations were sufficient to give appellant notice of the nature and character of each charge.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1946152.pdf

Phillips v. Commonwealth: March 28, 2017

Norfolk: Defendant appeals her conviction for Embezzlement on Sufficiency of the Evidence and an Award of Restitution

Facts: The defendant worked as a clerk in a store that sold money orders. One day, the defendant sold 9 money orders worth $3,500 to a customer without taking any payment. Soon after, both the defendant and the customer left the store. When the store discovered the theft, the store put a "stop" on the embezzled money orders and fired the defendant. There was no evidence that anyone ever negotiated the stolen money orders.

At trial, the defendant argued that there is no statutory presumption that the value of a money order is the amount printed on its face, and therefore the common-law value of a money order was simply the value of the paper upon which it is printed. The trial court convicted the defendant and ordered her to pay restitution for the value of the money orders.

Held: Affirmed in part, reversed in part. The Court affirmed her conviction, but vacated her restitution obligation.

Regarding the value of the money orders, the Court agreed that the Commonwealth might only have been able to prove the value of the paper in a prosecution for simple Grand Larceny. However, in this case the Court pointed out that the Commonwealth charged Embezzlement. The Court noted that the Embezzlement statute specifies that the object of embezzlement may be "any money, bill, note, check, order, draft, bond, receipt, bill of lading or any other personal property, tangible or intangible." The Court further reasoned that the law does not require that a thief be permitted to enjoy the fruits of his crime before he may be charged with the theft. Instead, the Court ruled that the embezzlement was complete when the defendant gave away the money orders without taking the commensurate cash as payment

The Court also noted that the Commonwealth could have charged the defendant using §18.2-98, which states, in part, that "the money due on or secured by the writing, paper or book, and remaining unsatisfied, or which in any event might be collected thereon, or the value of the property or money affected thereby, shall be deemed to be the value of the article stolen."
However, the Court reversed the award of restitution. The Court pointed out that just because the defendant stole property worth a specific dollar amount does not automatically justify a restitution award of that amount, since in this case, the theft caused no financial loss to the owner. The Court noted that there was no evidence that the money orders were negotiated prior to the stop-payment order.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0237161.pdf

Failure to Appear

Virginia Supreme Court

Johnson v. Commonwealth: July 7, 2015
Affirmed by the Court of Appeals ruling of July 7, 2015

Fredericksburg: Defendant appeals his convictions for Felony Failure to Appear on Double Jeopardy grounds.

Facts: Defendant failed to appear for his preliminary hearing, where he was facing three charges. The Grand Jury indicted the defendant for three counts of felony failure to appear, one for each felony, and the trial court convicted him of those offenses. At trial, the defendant argued that convicting him of more than one count was a violation of Double Jeopardy.

Held: Affirmed. The Court examined the language of 19.2-128(B)(i) and noted that it refers to a person who fails to appear for "a" felony offense. Like the Court of Appeals, the Supreme Court found that the General Assembly made the unit of prosecution the failure to appear for a single charge. The Court pointed out that, if it had held otherwise, if the charges were a felony and a misdemeanor, a trial court could convict a defendant of felony and misdemeanor failure to appear, but could not convict a defendant two felonies if the charges were both felonies.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151200.pdf

False Pretense & Fraud

Virginia Court of Appeals
Published

Wood v. Commonwealth: December 13, 2016

Suffolk: Defendant appeals his conviction for Construction Fraud on admission of prior bad acts and sufficiency of the evidence.

Facts: The Contractor's Board revoked the defendant's contractor's license, but the defendant continued to do business anyway. The defendant contracted to repair the victims' roof, charging them a deposit up-front. [*Do not ever pay a Contractor up-front – EJC*]. The contract contained the defendant's revoked license number. The defendant deposited the victims' check, but did not begin work on the roof or deliver any materials to the job site. Thereafter, the defendant made various false representations to the victims about the status of the deposit check months after he deposited it.

After repeatedly telling the victims that he was waiting for materials to "come in," the defendant stopped communicating entirely, until they sent him a demand letter. However, the defendant still failed to return the deposit money or deliver any construction materials as he claimed he would do.

At the time of trial, the defendant already had two recent prior convictions for construction fraud. Both convictions were for offenses that happened the same month as the fraud in this case. Over the defendant's objection, the trial court admitted the prior convictions to show the defendant's fraudulent intent.

Held: Affirmed. The Court first ruled that evidence that the defendant was convicted of construction fraud for offenses that took place within weeks of this offense was highly probative of the defendant's intent at the time of this offense. The Court construed the *Kirkpatrick* rule and quoted *Mughrabi*: "The evidence that appellant perpetrated more than one fraud about the same time is relevant to show his fraudulent intent."

Regarding sufficiency, the Court concluded that the trial court could reasonably infer from the facts that the defendant accepted the victims' deposit funds with the intent to defraud them.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0060161.pdf

Virginia Court of Appeals –
Unpublished

Tomlin v. Commonwealth: March 14, 2017
(*See elsewhere for this case on other issues*)

Sussex: Defendant appeals her convictions for Embezzlement and False Pretenses on amendment of the indictment, denial of a bill of particulars, and sufficiency of the evidence.

Facts: The defendant worked as a social worker at a home for elderly and disabled patients. On multiple occasions, the defendant asked for and received advance payments from the patient's funds to shop for the patients. She was authorized to make such requests as part of her job. However, she then used those funds to purchase expensive items. She then turned in receipts to her employer, who reimbursed her. The patients did not receive any of the items. Using photocopies of the receipts, the defendant returned many of the items, keeping the refunds for herself.

The defendant also obtained a cash advance for patient clothes which she then spent on clothes for herself, although she turned in the receipt and claimed it was for a patient. Prior to trial, the Commonwealth moved to amend four indictments from "obtaining signatures by false pretenses" to "obtaining money by false pretenses". The trial court granted the motion over the defendant's objection. Prior to trial, the defendant also moved to compel the Commonwealth to elect between Embezzlement and Larceny by False Pretense, alleging that the charges were duplicative and convicting her of both would violate double jeopardy. The trial court denied the motion. The defendant also requested a bill of particulars, but the trial court denied the motion.

The trial court convicted the defendant of Larceny by False Pretense and Embezzlement regarding the patient funds and the false returns. The trial court convicted the defendant of Grand Larceny regarding the clothes.

Held: Affirmed. The Court first ruled that the trial court did not err when it granted the Commonwealth's motion to amend four indictments from obtaining signatures by false pretenses to obtaining money by false pretenses because those amendments did not change the nature or character of the offenses.

The Court also found the evidence sufficient to convict for obtaining money by false pretenses, embezzlement, and grand larceny. The Court rejected the argument that she could not embezzle patient funds because the patients were not her employers. The Court pointed out that she obtained the money by virtue of her employment, which was sufficient. The Court also found that the evidence also demonstrated larceny by false pretense. The Court explained that the defendant's use of photocopied receipts was a false representation to her employer that those transactions were final, when the defendant had, in fact, kept the original receipts to obtain and keep the proceeds from the returns. Third, the Court found that the trial court did not err in denying the defendant's pretrial motion to elect between Embezzlement and Larceny by False Pretense. The Court examined the offenses and found that, under *Blockburger*, the offenses were distinct and therefore the trial court properly denied the motion to force election.

Lastly, the Court agreed that the trial court properly denied the defendant's pretrial motion for a bill of particulars. The Court examined each of the indictments and noted that they named the defendant, identified the County where the offense took place, recited the date of the offense, named the victim, and set forth the elements of the offenses. The Court agreed that these allegations were sufficient to give appellant notice of the nature and character of each charge.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1946152.pdf

Johnson v. Commonwealth: May 23, 2017

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

Facts: Defendant defrauded a homeowner, pocketing an advance for construction work that he never performed. The homeowner sent a letter demanding the return of the funds. The homeowner sent the letter by certified mail, but did not request a return receipt.

Held: Reversed. The Court held that, under the explicit terms of §18.2-200.1, the Commonwealth failed to prove a material element of the offense by failing to prove beyond a reasonable doubt that the letter was sent with a return receipt request.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0751162.pdf

Pugh v. Commonwealth: May 23, 2017
(See below for same case on different issue)

Suffolk: Defendant appeals his convictions for Fraud, Forgery, and related offenses on sufficiency of the evidence and admission of a copy of a check.

Facts: The defendant cashed a forged check at a Walmart store, drawn on a non-existent business. After police located him, the defendant claimed that the received the check as payment for the sale of a vehicle on Craigslist. He could not provide the name of the buyer, nor did he provide any contact information for the buyer. He stated that the buyer told him that the check was from his employer and that they entered the Walmart together to cash the check. The defendant had numerous prior felony convictions.

At trial, the defendant provided no corroboration for his story. The Commonwealth introduced a copy of the check at trial. The copy read: "This is an image of a check, substitute check or deposit ticket. Refer to your posted transactions to verify the status of the item. For more information about image delivery. . . " The defendant objected on Best Evidence grounds that the check did not contain the exact phrase in Rule 2:1003 "This is a legal copy of your check. You can use it the same way you would use the original check", but the trial court overruled his objection.

Held: Affirmed. Regarding sufficiency of the evidence, the Court first reaffirmed that possession of a forged check by an accused, which he claims as a payee, is prima facie evidence that he either forged the instrument or procured it to be forged. The Court then found that the jury was entitled to disbelieve the defendant, who had a dozen prior felony convictions, including for forgery, and to conclude that his hypothesis of innocence was not reasonable. The Court agreed that the defendant failed to rebut the presumption that he knew the check was forged when he cashed it.

Regarding admission of the copy of the check, the Court rejected the argument that the check admitted in this case should have been excluded because it did not contain the exact language set forth in quotation marks in Rule 2:1003(b). The Court did not agree that the copy was a "substitute check" under 2:1003, but also observed that even if the exhibit was a "substitute check," the omission of the exact language from Rule 2:1003(b) should not require its exclusion — it simply would not receive the presumption of admissibility as an original. Instead, the Court pointed out that proper circumstances existed here to treat a photocopy as a duplicate original, since the accuracy of the photocopy was not disputed

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1299161.pdf

Firearms and Weapons Offenses

Virginia Court of Appeals –
Unpublished

Dagner v. Commonwealth: October 25, 2016

Virginia Beach: Defendant appeals his conviction for Possession of a Firearm by Felon on sufficiency of the evidence.

Facts: The defendant, a felon and the rear passenger in a vehicle, had a firearm underneath the seat in front of him. After stopping the vehicle, an officer noticed the defendant moving his feet around and looking at the floorboard. The officer asked the defendant to exit the vehicle. The officer noticed the firearm handle was facing toward the defendant with the barrel pointing toward the front of the vehicle. The defendant told the officer that the gun belonged to the front passenger and that he heard the weapon drop under the seat. However, at trial, the officer testified that "anybody who handles guns knows not to touch them by the barrel."

Held: Affirmed. The Court found there was substantially more evidence than mere proximity. The Court agreed that the defendant knew the nature and character of the firearm, based on his own statement. The Court also agreed that the evidence demonstrated that the defendant placed the weapon under the seat.

The Court also rejected the argument that the Commonwealth must show that the defendant possessed the firearm for a particular period of time. The Court held that whether the defendant had knowledge and exercised dominion and control of the gun before or after the stop was completely irrelevant. The only requirement the Court recognized is that, at some moment in time, the defendant was aware of the presence and character of the firearm and it was subject to his dominion and control.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1228151.pdf

Gordon v. Commonwealth: January 24, 2017

Virginia Beach: Defendant appeals his conviction for Possession of a Firearm by Felon on sufficiency of the evidence.

Facts: Police saw the defendant, a felon, inside the rear passenger seat of a vehicle. Smelling marijuana, they turned around and approached. When they did, they saw that the defendant had moved next to the driver's side door and was leaning into the vehicle. Officers searched the car and when they located a loaded handgun underneath the driver's seat, they arrested the defendant. The

defendant spontaneously stated: "How am I in the back seat getting charged with having a gun?" At the time, police had not said anything about where they had found the gun and had not moved it.

Officers later obtained a GSR test from the defendant that DFS found was positive for gunshot residue. At trial, the defendant admitted to being in and around the vehicle, but denied possessing the firearm.

Held: Affirmed. The Court found that the evidence of the defendant's proximity to the firearm, his movements towards the location of the firearm as the police officers approached, the GSR test results showing gun primer residue on both of the defendant's hands, the defendant's statements to police regarding his position in the car relative to the location of the firearm, the reasonable inference from those spontaneous utterances that he knew about the gun concealed under the floor mat, all were sufficient to demonstrate his guilt.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1329151.pdf

Smalls v. Commonwealth: January 31, 2017

Hampton: Defendant appeals his conviction for Possession of a Firearm while in Possession of Drugs on sufficiency of the evidence.

Facts: Police stopped the defendant and found drugs in his possession. The defendant told the officers: ""I don't have anything . . . but a gun in a drawer in my bedroom." The officers obtained a search warrant for the defendant's residence. Inside, police located the firearm, as well as drug paraphernalia. At trial, an officer testified that based on his twenty years of law enforcement experience and his knowledge of firearms, he concluded that the gun was a "real gun," not a replica.

Held: Affirmed. The Court again refused to require the Commonwealth to prove that a firearm is "operable" under §18.2-308.4. Instead, the Court ruled that the defendant's own statement that he had a gun in his bedroom, as well as the officer's testimony that the gun was real, were competent evidence to establish that the item found in the drawer was a firearm.

The Court also reaffirmed that the Commonwealth is not required to prove that the firearm is in some way being used in conjunction with the unlawful drug activity or to further such activity.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0392161.pdf

Holsinger v. Commonwealth: March 14, 2017

Mecklenburg: Defendant appeals his conviction for Unlawfully Discharging a Firearm within an Occupied Dwelling on sufficiency of the evidence.

Facts: The defendant, angry and drunk, fired a handgun in his kitchen out the back door and into the backyard, shattering the glass in his back door. At the time, the woman with whom he resided was in the kitchen, kneeling behind the defendant and an arm's length from the door. At trial, the defendant argued that he did not put the woman in peril.

Held: Affirmed. The Court found that the defendant's firing of the handgun through the kitchen door may have placed the woman's life in peril, in light of his irrational, angry, and intoxicated state, combined with his extremely close proximity to her at the time that he discharged the gun. The Court pointed out that the Commonwealth need not show that the victim was actually put in peril, harmed, or even that the defendant fired a bullet in an occupant's direction.

In a footnote, the Court also rejected the argument that, because the defendant was inside, and not outside shooting at the building, he was not guilty. The Court repeated that § 18.2-279 does not specify where the shooter must be in relation to the occupied dwelling.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0743162.pdf

Habitual Offender

Virginia Court of Appeals –
Unpublished

Bunn v. Commonwealth: May 16, 2017
See below for same case on different issue

Portsmouth: Defendant appeals his convictions for Hit & Run and for Habitual offender on sufficiency of the evidence.

Facts: The defendant crashed into a parked car, sending it many feet down the road. A child had been sitting in the vehicle, and after the crash, the victim exited the car, crying, holding her head, and saying "my head hurt, my head hurt." The child's family and their friends came outside to the crash, but the defendant exhorted them: "don't call the police, she will be all right." The defendant, however, never asked if this child was injured. Before the police arrived, the defendant fled to his sister's house, which was nearby and down the road about 500 feet.

When an officer arrived and located the defendant, the defendant denied that he was the driver. The officer collected the defendant's information, and ultimately the defendant admitted he was the driver in the crash. The defendant carried a Virginia ID card, but no driver's license.

At trial, in order to prove the defendant's status as a habitual offender, the Commonwealth introduced five previous conviction orders for habitual offender. The most recent was more than five years before the offense date in this case. The Commonwealth did not introduce the original order that declared the defendant to be a habitual offender or the evidence of the length of time the court had ordered that the habitual offender status would remain in effect, or whether its term was indefinite. The Court also did not admit a DMV transcript that showed his status at the time of the crash.

At trial, the defendant claimed that he did not flee, that he did not think that the victim had been injured, and that he provided the information required. The defendant also complained that there was not sufficient evidence that he remained a habitual offender on the offense date and that he had notice thereof.

Held: Affirmed in part, reversed in part. The Court agreed that the evidence sufficiently proved the defendant committed the Hit & Run offense, but found that the evidence was insufficient as to the Habitual Offender offense.

The Court found that, by denying he was the driver of the vehicle, the defendant failed to provide the information required by the statute. The Court also rejected the defendant's argument that he thought the victim was not injured. The Court pointed out that it was not enough that the defendant's believed that the victim was uninjured; his belief must have been reasonable. The Court observed that the defendant was more concerned with avoiding responsibility for the accident than with confirming the well-being of a child affected by that accident. The Court found that the presence of others who might render aid did not relieve the defendant of his legal obligation to do so.

However, the Court found that the Commonwealth failed to adequately prove that the defendant was a habitual offender on the offense date. The Court ruled that, without knowing the terms of the defendant's habitual offender revocation, without any evidence of his status with the DMV on the offense date, and without any admission from the defendant as to his status on that date, the evidence of his prior convictions, numerous though they were, was insufficient to prove that he was a habitual offender the offense date. The Court agreed that the evidence demonstrated that the defendant did not have a license, but found it was an impermissible logical leap to presume that he was unlicensed because he had been revoked as a habitual offender.

The Court declined to address whether the defendant had adequate notice, but did point out, in a footnote, that the statute does not require that a driver receive notice of his current status, but rather that he receive notice that he has been declared a habitual offender.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0633161.pdf

Hit & Run

Virginia Court of Appeals –
Unpublished

Medwid v. Commonwealth: December 6, 2016

Prince George: Defendant appeals her conviction for Hit and Run on sufficiency of the evidence.

Facts: Defendant confronted the victim, her estranged husband, at his residence and told him that she was going to kill him. When he tried to flee in his vehicle, the defendant struck the victim's vehicle with her vehicle. Unable to escape, the victim tried to flee on foot, but the defendant struck him again, knocking him down. Finally, the victim escaped to a nearby house. Police located the defendant later and noted damage to her vehicle. The defendant claimed that she had struck a tree.

Held: Affirmed. The Court reaffirmed that §46.2-894 places an unqualified duty on a driver who hits another car to provide specific information to certain individuals or entities listed in the statute. The Court quoted the 1946 *Herchenbach* case: ""The duty imposed upon the driver of a vehicle involved in an accident is not passive. It requires positive, affirmative action; that is, to stop and give the aid and information specified." In this case, the Court found that the defendant failed to provide her information to either law enforcement or the victim, as required by the statute.

The Court also rejected the argument that, because the person injured in the accident was the defendant's husband, and therefore the identity of the driver was not in question, the defendant did not need to comply with §46.2-894. Instead, the Court repeated that the requirement to provide the driver's identity "addresses more than the relationship between a driver and the victim of an accident. The identification requirement is intended to facilitate accident investigation and to preserve public order."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1382152.pdf

Whitfield v. Commonwealth: March 21, 2017

Norfolk: Defendant appeals his conviction for Felony Hit & Run on sufficiency of the evidence regarding value.

Facts: Defendant crashed into another vehicle and fled the scene. At trial, the evidence of the damage caused by the crash consisted of the testimony of one independent witness, two officers, and photographs of the defendant's car. No occupant of the victim vehicle testified. There was no evidence of the two cars' year of manufacture or mileage or whether the cars had valid inspection stickers. The Commonwealth offered no written documentation of the damage to the cars, the repairs that might be necessary, the cost of repairs, whether any repairs were performed, or the prevailing repair rates in the area. There was no evidence as to whether either or both cars had sufficient damage caused by the crash to deem one or both a total loss and if so, the value of the cars, nor was evidence of the condition or value of the cars prior to the crash.

The trial court found that the evidence, circumstantially, demonstrated that the damage was more than $1,000.

Held: Reversed. The Court found that the trial court's conclusion was speculative and not based on evidence in the record. The Court mentioned that the officers could have testified as expert witnesses, but there was no evidence of the condition of the vehicles before the crash.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0333161.pdf

Bunn v. Commonwealth: May 16, 2017
See above for same case on different issue

Portsmouth: Defendant appeals his convictions for Hit & Run and for Habitual offender on sufficiency of the evidence.

Facts: The defendant crashed into a parked car, sending it many feet down the road. A child had been sitting in the vehicle, and after the crash, the victim exited the car, crying, holding her head, and saying "my head hurt, my head hurt." The child's family and their friends came outside to the crash, but the defendant exhorted them: "don't call the police, she will be all right." The defendant, however, never asked if this child was injured. Before the police arrived, the defendant fled to his sister's house, which was nearby and down the road about 500 feet.

When an officer arrived and located the defendant, the defendant denied that he was the driver. The officer collected the defendant's information, and ultimately the defendant admitted he was the driver in the crash. The defendant carried a Virginia ID card, but no driver's license.

At trial, in order to prove the defendant's status as a habitual offender, the Commonwealth introduced five previous conviction orders for habitual offender. The most recent was more than five years before the offense date in this case. The Commonwealth did not introduce the original order that declared the defendant to be a habitual offender or the evidence of the length of time the court had ordered that the habitual offender status would remain in effect, or whether its term was indefinite. The Court also did not admit a DMV transcript that showed his status at the time of the crash.

At trial, the defendant claimed that he did not flee, that he did not think that the victim had been injured, and that he provided the information required. The defendant also complained that there was not sufficient evidence that he remained a habitual offender on the offense date and that he had notice thereof.

Held: Affirmed in part, reversed in part. The Court agreed that the evidence sufficiently proved the defendant committed the Hit & Run offense, but found that the evidence was insufficient as to the Habitual Offender offense.

The Court found that, by denying he was the driver of the vehicle, the defendant failed to provide the information required by the statute. The Court also rejected the defendant's argument that he thought the victim was not injured. The Court pointed out that it was not enough that the defendant's believed that the victim was uninjured; his belief must have been reasonable. The Court observed that the defendant was more concerned with avoiding responsibility for the accident than with confirming the well-being of a child affected by that accident. The Court found that the presence of others who might render aid did not relieve the defendant of his legal obligation to do so.

However, the Court found that the Commonwealth failed to adequately prove that the defendant was a habitual offender on the offense date. The Court ruled that, without knowing the terms of the defendant's habitual offender revocation, without any evidence of his status with the DMV on the offense date, and without any admission from the defendant as to his status on that date, the evidence of his prior convictions, numerous though they were, was insufficient to prove that he was a habitual offender the offense date. The Court agreed that the evidence demonstrated that the defendant did not have a license, but found it was an impermissible logical leap to presume that he was unlicensed because he had been revoked as a habitual offender.

The Court declined to address whether the defendant had adequate notice, but did point out, in a footnote, that the statute does not require that a driver receive notice of his current status, but rather that he receive notice that he has been declared a habitual offender.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0633161.pdf

Homicide

Virginia Court of Appeals –

Published

Suter v. Commonwealth: February 21, 2017

Virginia Beach: Defendant appeals her conviction for Accessory After the Fact to Murder on sufficiency of the evidence.

Facts: The defendant observed an altercation between the victim and her friend. After she witnessed her companion produce a gun and shoot at the victim, she immediately drove her friend away from the scene. The victim died two days later.

Held: Reversed. The Court explained that, under the common-law, there are three basic requirements that must be met to constitute one as an accessory after the fact to a felony. The first is that a completed felony must have been committed. The second requirement is that the person giving aid must have known of the perpetration of the felony by the one he aids. Finally, the aid must have been given to the felon personally for the purpose of hindering the felon's apprehension, conviction, or punishment.

In this case, the Court found that the murder had not occurred when the defendant rendered aid to the murderer. The Court ruled that that a person cannot be convicted as an accessory after the fact to a murder because of aid given before the victim's death. The Court remanded the case to permit the Commonwealth to retry the defendant on misdemeanor accessory after the fact pursuant to Code § 18.2-19(ii), reasoning that the defendant may still have been guilty of accessory to Malicious Wounding.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1937151.pdf

Gregg v. Commonwealth: February 28, 2017

Fauquier: Defendant appeals his convictions for Involuntary Manslaughter on Double Jeopardy grounds.

Facts: The defendant shot at a tow truck that was repossessing his vehicle as it drove away, killing the driver. The trial court convicted the defendant of both common law involuntary manslaughter and involuntary manslaughter in violation of Code § 18.2-154, "unlawfully shooting at an occupied vehicle wherein death resulted."

Held: Reversed. The Court concluded that the Commonwealth was free to instruct the jury on both common law involuntary manslaughter and involuntary manslaughter by shooting into an occupied vehicle causing death under Code § 18.2-154. However, the Court held that the Commonwealth could not seek sentences for both convictions.

The Court repeated that, where the issue is whether the Legislative Branch has provided that two offenses may be punished cumulatively, a court must look to legislative intent. The Court examined the code sections and concluded that § 18.2-154 simply created a mechanism that permits the Commonwealth to substitute proof of distinct facts in place of criminal negligence.

The Court also subjected the charges to a *Blockburger* analysis and found that the charges in this case do not qualify as separate offenses within the meaning of *Blockburger*. Instead, the Court reasoned that the element of shooting at an occupied vehicle in Code § 18.2-154 is simply the criminally negligent act which renders the accused guilty of involuntary manslaughter.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0047164.pdf

Virginia Court of Appeals –
Unpublished

Logan v. Commonwealth: November 1, 2016

Chesapeake: Defendant appeals his conviction for First-Degree Murder and Child Abuse on sufficiency of the evidence.

Facts: Defendant murdered a 16-month old child. The defendant and his family were home one day when his other children found the child dead in his bedroom. The child suffered three separate, acute fractures to her head and a number of fractured ribs. Some of the ribs had been broken weeks before her death. Blunt force trauma had split her liver in two and caused a significant fracture to her pancreas, leading to massive internal hemorrhaging.

The other children in the home were eight years old and younger. While witnesses stated that the defendant had been with the child all day, the defendant gave inconsistent statements about his own whereabouts and his interaction with the child. Expert witnesses at trial testified that the blows must have been inflicted using a high level of force, or an accident on par with an automobile crash or landing on concrete after falling several stories. The child had marks on her body that appeared to be from an adult's knuckles.

Held: Affirmed. The Court found sufficient evidence of premeditation, likening this case to the *Knight* case, where the murder was also especially brutal. The Court agreed that from the scope and degree of the injuries suffered by the toddler that the defendant intended to kill this child when he beat her. The Court also focused on the infliction of multiple blows and the size disparity between the defendant and his sixteen-month-old daughter.

The Court also pointed out that the defendant did nothing to help his child while she was alive, and only attempted to give CPR and call for help after his children found the child dead.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0867151.pdf

Turner v. Commonwealth: January 10, 2017

Williamsburg/James City County: Defendant appeals his convictions for Involuntary Manslaughter and Felony Child Abuse on sufficiency of the evidence.

Facts: Defendant drove and crashed a van with 7 passengers, several of whom were young children. The defendant was speeding and his van began to weave off the road. When the defendant corrected, he flipped his van over and it crossed into oncoming traffic, where an oncoming dump truck struck it. The driver of that dump truck testified that the defendant was driving too fast to be able to negotiate the approaching curve.

The crash killed one of the children, ejected an infant onto the roadway, and severely injured several other children, some permanently. The defendant, who was high on marijuana, knew that the vehicle's steering was "loose" and was the only person wearing a seatbelt. The infant was not in a car seat at the time of the crash, but the defendant put the infant into the seat as the police arrived. A three-year-old child was also unsecured in the car. None of the car seats were properly installed or secured in the vehicle.

At trial, an expert testified that the defendant's THC level would have impaired his driving ability, although the expert could not quantify how much.

Held: Affirmed. The Court first found that the evidence was sufficient to prove involuntary manslaughter. The Court considered the defendant's failure to ensure that the children were properly restrained, coupled with his failure to control his vehicle, and ruled that those factors demonstrated recklessness disregard for human life. The Court also observed that impairment due to voluntary intoxication is relevant to criminal negligence, even if it does not rise to the level of intoxication required for a driving under the influence conviction.

The Court also found the evidence sufficient to prove felony child abuse. The Court noted that the defendant drove recklessly after recently ingesting marijuana with the knowledge that his minor passengers were not properly restrained by seat belts or appropriate devices. In addition, the Court observed that due to the children's youth (3 years old and 3 months old), it was the defendant's responsibility to make sure that they were properly restrained by safety devices of the type appropriate for the children's size and age.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0067161.pdf

Secret v. Commonwealth: February 14, 2017

Louisa: Defendant appeals his convictions for Arson and Attempted Murder on sufficiency of the evidence, Fifth Amendment, and Jury Instruction grounds.

Facts: The defendant set a rooming house on fire. The defendant poured fuel around a building in the early morning hours when people were still sleeping, outside of bedrooms, offices, and the main living area throughout the first floor.

A deputy responded and located the defendant, surrounded by residents of the building. The deputy detained the defendant and placed him in handcuffs. The deputy asked the defendant if he would be willing to come to the Sheriff's Department to talk to a State Police Investigator. The defendant agreed. The deputy told the defendant he would have to transport him handcuffed, per policy, but that he was not under arrest. The deputy removed the handcuffs when the defendant arrived at the Department.

The investigator spoke with the defendant in a closed room for almost an hour. After the defendant admitted to setting the fire, the investigator read the defendant his *Miranda* rights. Thereafter, the defendant explained that he set the fire to eliminate the "holograms" who lived inside the building. During his interview, the defendant denied being under the influence of either drugs or alcohol. During a motion to suppress, the trial court found no evidence of impairment.

At trial, the trial court refused the defendant's jury instruction, quoting *Thacker,* which stated: "To do an act with intent to commit one crime cannot be an attempt to commit another crime, though it might result in such other crime." The defendant argued that the Commonwealth failed to prove the

specific intent to kill each individual victim. The trial court disagreed and convicted the defendant of arson and nine counts of attempted murder.

After the defendant filed his notice of appeal, he discovered that the record transmitted to the Court of Appeals was missing a key transcript. The trial court agreed to amend the record and add that transcript.

Held: Affirmed. First, regarding the addition of the transcript, the Court ruled that it was proper to add the transcript. As no petition for appeal had yet been filed in the Court of Appeals at the time the circuit court conducted its hearing to determine whether the transcripts had been omitted due to a "clerical mistake," the Court ruled that the trial court retained jurisdiction to make its decision on that matter.

The Court then rejected the defendant's argument that, because the investigator first obtained a confession, and then administered *Miranda* warnings, the statement violated *Elstad* and *Seibert*. The Court stated that the key inquiry is whether the investigator purposefully utilized a "two-step interrogation technique" as proscribed by *Seibert.* The Court agreed that the investigator did not deliberately employ a two-step interrogation technique, nor did he use any deliberately coercive or improper tactics in obtaining the initial statement.

The Court found that the evidence proved the defendant's specific intent to kill each victim. The Court noted that the Commonwealth was not required to prove that the defendant intended to kill specific victims by name. Instead, the Commonwealth needed only show he intended to kill the people he knew were in the building, whether he knew their identities or not, at the time he set it on fire.

Regarding the defendant's jury instruction, the Court agreed that the instruction improperly misled the because it suggested that a person could not hold two intents at the same time.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0853152.pdf

Identity Theft

Virginia Court of Appeals
Published

Salazar v. Commonwealth: August 23, 2016

Loudoun: Defendant appeals his conviction for Identity Fraud on sufficiency of the evidence.

Facts: Defendant used the victim's social security number to obtain a mortgage on a home in Maryland. The victim, suspicious of strange mail that he received, decided to subscribe to a credit monitoring service at a cost of $29/month. When he learned that the defendant had a loan under his social security number, the victim notified the bank and the police. The defendant confessed that he used the social security number, which he stated that he "made up" because he did not have one of his own.

At trial, the defendant argued that the evidence failed to demonstrate that the bank "relied" on the social security number, or that anyone suffered a financial loss of more than $200 through fraud.

Held: Affirmed. The Court relied on the plain language of the statute. Under § 18.2-186.3(A)(2), the Court noted that the Commonwealth had to establish that the defendant, with "the intent to defraud," used the social security number of another "person," without that person's "authorization or permission," in order to "obtain money, credit, loans, goods, or services." The Court rejected the argument that the Commonwealth must also prove that the defendant knew that he was using the victim's social security number, as opposed to simply having made up the number at random.

The Court then found that the defendant's use of a false social security number, alone, demonstrated his intent to defraud. The Court rejected the argument that the Commonwealth must prove that the bank actually relied on the social security number; the Court noted that the use must simply lead to the issuance of the loan.

Regarding the financial loss, the Court first rejected the argument that, by loaning the defendant money, the bank suffered a "loss." The Court ruled that if a person fraudulently obtains a mortgage through the use of another person's identifying information but makes all of the mortgage payments on time consistent with his contractual obligations, a mortgage lender has not suffered a financial loss, absent evidence regarding the terms of the loan agreement, the ultimate resolution of the loan after it went into default, and the results of a foreclosure sale, if any.

However, the Court agreed that the victim's monthly payments, which totaled more than $200, did constitute a "loss" under the statute. The Court distinguished *Howell* and noted that, in this case, the victim contracted for credit monitoring services as a direct result of the defendant's yet-to-be discovered criminal use of the victim's social security number and not merely to prevent or ameliorate a second criminal event that was yet to occur.

Note: The Court also noted that this § 18.2-186.3 is technically "identity theft," rather than "identity fraud."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0879154.pdf

Interdiction

U.S. District Court –
W.D. Va.

Hendrick v. Caldwell: February 8, 2017

U.S. District Court, W.D.Va (Roanoke): Plaintiffs seek declaratory and injunctive relief to stop prosecutions against them as "Interdicted" habitual drunkards.

Facts: Plaintiffs, all homeless alcoholics, are "interdicted" persons in Richmond and Roanoke. A Circuit Court declared them all to be "habitual drunkards" and entered orders pursuant to § 4.1-333 prohibiting their possession or consumption of alcohol in their respective jurisdictions. In each case, the circuit court entered the order either *in absentia* or against the plaintiffs without counsel.

The plaintiffs filed a Federal Lawsuit seeking injunctions against two Commonwealth Attorneys from further prosecutions for violation of the Interdiction statute. In particular, they argue:

1. Enforcement of the Interdiction Statute results in cruel and unusual punishment because it punishes the status of being a homeless alcoholic.

2. Enforcement of the Interdiction Statute deprives them of due process because they lack counsel when interdicted, and because the interdiction proceedings do not require evidence beyond a reasonable doubt.
3. The Interdiction Statute is unconstitutionally vague.
4. Enforcement of the Interdiction Statute deprives them of equal protection.

Held: Dismissed. The District Court dismissed the lawsuit on a 12(b)(6) motion for failure to adequately state a claim.

Regarding the Eighth Amendment claim, the Court found that the Virginia statute was akin to the "public drunkenness" statute upheld in *Powell v. Texas*, as it imposes "a criminal sanction for public behavior which may create substantial health and safety hazards . . . and which offends the moral and esthetic sensibilities of a large segment of the community." Just like the U.S. Supreme Court in *Powell*, the Court distinguished the *Robinson* case, where the U.S. Supreme Court found unconstitutional a law that made it a crime "to be addicted to the use of narcotics." The Court expressed concern that the plaintiffs' theory would open the door to similar challenges, such as claims by narcotics addicts for being punished for the status of "being" in possession of drugs, or arguments by sex offenders that their conduct was symptomatic of their disease.

Regarding the Due Process claim, the Court found that the plaintiffs failed to demonstrate that the civil interdiction hearings themselves deprived them of physical liberty. Thus, the Court found that they had no right to counsel at those hearings. Given that plaintiffs are appointed counsel at subsequent criminal proceedings, that they are afforded notice and an opportunity to be heard prior to interdiction, and that there is an available means of challenging the underlying interdiction, the Court rejected the Due Process argument.

Regarding the vagueness argument, the Court ruled that the plaintiffs lack standing to make this argument, as the Court found it apparent that the statutory term "habitual drunkard" applies to homeless alcoholics compelled to possess and consume alcohol with no choice but to do so in public spaces.

Regarding the Equal Protection argument, the Court pointed out that, as alcoholics, the plaintiffs are not a suspect class. The Court refused to find that the plaintiffs and non-interdicted individuals, or alcoholics and non-alcoholics, to be similarly situated and therefore necessitating equal treatment. The Court also refused to find that the consumption of alcohol was a "fundamental right" that called for "strict scrutiny." Instead, applying "rational basis scrutiny", the Court wrote that "it cannot be said that preventing the possession or consumption of alcohol by individuals who, like plaintiffs, admittedly cannot mitigate their alcohol consumption, or who have been adjudged to be at risk of abusing alcohol through interdiction proceedings, is not rationally related to this legitimate interest."

Full Case At:
https://docs.justia.com/cases/federal/district-courts/virginia/vawdce/7:2016cv00095/102075/37

Larceny

Virginia Supreme Court

Moseley v. Commonwealth: June 7, 2016

Hampton: Defendant appeals his convictions for Burglary and Grand Larceny on Sufficiency of the Evidence.

Facts: On June 3, after a burglary, a police officer saw the defendant leaving the cul-de-sac where the burglary took place, which she thought was unusual since it was a neighborhood that people seldom visited. She did not note what vehicle the defendant was driving. On June 17, police responded to an attempted burglary nearby and found the defendant, who matched the description of someone leaving the scene. The defendant had freezer-gloves in his pocket. Police learned that someone had also burglarized another nearby residence.

Meanwhile, somewhere else (the record does not say), a tow truck driver towed an abandoned vehicle and summoned police. The windows of the vehicle were down and the keys were inside. Police searched the vehicle and found property from the burglaries, as well as documents such as the defendant's ID and an electric bill from March. At trial, a witness testified that for a time, the defendant drove this vehicle on an almost-daily basis, although she could not say exactly when that was. The vehicle was registered to someone else.

Held: Reversed. The Court agreed that the evidence and reasonable inferences flowing from it created a suspicion that the defendant was the thief of the stolen items. The Commonwealth had conceded, on appeal, that the larceny inference did not apply because the evidence does not prove that the appellant had exclusive dominion and control over the stolen property. The Court then reviewed the contents of the vehicle in detailed and considered whether the evidence was sufficient.

The Court stated that the presence of the ID and stolen items together in the same place, although suspicious, did not prove that the defendant stole the items, participated in their theft, saw the items, or was aware that they were stolen. The Court noted the lack of evidence as to who drove the car there and when it arrived. Further, the Court weighed the fact that the car was left unlocked with the windows down and the keys inside, providing ample time for someone to have tampered with its contents before it was towed and searched.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0881151.pdf

Lindsey v. Commonwealth: January 19, 2017

Arlington: Defendant appeals his conviction for Concealment on a jury instruction concerning the presumption.

Facts: Defendant concealed two hats under his jacket while in a store. The staff confronted him, but he denied having the items. The staff summoned police and after an altercation, they recovered the items. At trial, the defendant objected to the model jury instruction that "Willful concealment of goods or merchandise while still on the premises of a store is evidence of an intent to convert and defraud the owner of the value of the goods or merchandise, unless there is believable evidence to the contrary." The defendant argued that the instruction should give a "permissive" inference instead by instructing the jury that it "*may* infer" the defendant's intent. The trial court overruled the objection and gave the instruction.

Held: Affirmed. The Court found that the language of the model instruction was a permissive inference, as in *Dobson*, in that it merely instructed the jury that it could consider the concealment of

merchandise as evidence of criminal intent, along with any other evidence that was presented to it. The Court pointed out that the instruction did not state that willful concealment, standing alone, satisfies the Commonwealth's burden of proof as to the element of intent. Thus, the Court rejected the argument that the instruction provided the sort of "mandatory" presumption that violates Due Process.

The Court also approved of the general "finding instruction" that the Commonwealth gave for Concealment. Justices Goodwyn and Kootz wrote a lengthy dissent.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151111.pdf

Virginia Court of Appeals
Published

Jones v. Commonwealth: February 14, 2017

Norfolk: Defendant appeals his conviction for Receiving Stolen Property on sufficiency of the evidence.

Facts: Police stopped the defendant while he was driving a stolen vehicle. Police located the stolen vehicle in an area known by the police as a "dumping ground for stolen cars" a few hours after it was stolen. The defendant tried to flee, but police captured him. The passenger successfully escaped. When questioned, the defendant admitted that he knew that the passenger did not own the car.

At trial, the defendant claimed that he did not know the vehicle was stolen at the time he began driving it. He claimed that the passenger had "rented" the vehicle and wanted the defendant to drive it because the other man did not have a valid driver's license. The passenger had died by the time of trial, but had failed to appear at a previous hearing.

Held: Affirmed. The Court found the evidence sufficient to prove the defendant's guilty knowledge that the vehicle he was driving was stolen. The Court rejected the defendant's hypothesis that he could have known that he was receiving stolen property, but could have instead wished to use this opportunity to return the vehicle to its owner

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0351161.pdf

Virginia Court of Appeals
Unpublished

Moody v. Commonwealth: February 21, 2017

Greensville: Defendant appeals his convictions for Grand Larceny on the "Single Larceny Doctrine"

Facts: The defendant and his confederates broke into a home and stole several items. At trial, one of the co-conspirators explained that they had conspired to break into the home to steal items that could be readily pawned or otherwise sold. However, as they were leaving, they saw the defendant, contrary to the initial plan, loading items into the victim's vehicle. He stole the victim's car and attempted to sell that too. The trial court convicted the defendant of separate counts of larceny, for the

stolen items and for the stolen vehicle. The defendant objected that both larcenies should have been treated as one offense under the "Single Larceny Doctrine."

Held: Affirmed. Applying the "Single Larceny Doctrine," the Court reaffirmed that "[t]he primary factor to be considered is the intent of the thief and the question to be asked is whether the thefts, although occurring successively within a brief time frame, were part of one impulse." The Court agreed that the theft of the vehicle and the theft of the items from within the home did not appear to be part of one impulse, and thus that the single larceny doctrine did not apply.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1637152.pdf

Vaughan v. Commonwealth: March 14, 2017

Danville: Defendant appeals his conviction for Felony Concealment on sufficiency of the evidence.

Facts: The purchased a large storage tub and walked back to a television inside the store. He removed the security device on the television and then placed the television in his shopping cart. He then placed the storage tub on top of the television, partially concealing it from view. Only a small portion of the white television box was visible under the tub. The defendant then walked past all points of sale.

A loss prevention officer stopped the defendant, who claimed that he intended to purchase the television. However, when the officer asked the defendant to accompany him to the loss prevention office, the defendant fled, leaving the television and other merchandise behind. At trial, the trial court rejected the defendant's argument that he was not guilty because he did not "fully conceal" the television from view.

Held: Affirmed. The Court observed that, while the willful total concealment of merchandise is prima facie evidence of an "intent to convert and defraud" the owner of the value of the merchandise, under certain circumstances, partial concealment can permit a similar inference as it can also obscure from notice the merchandise in question. In this case, the Court held that the defendant's partial concealment, in conjunction with the totality of his conduct, supported that an inference

In a footnote, the Court also pointed out that the Commonwealth could have proceeded under the alternative prong under § 18.2-103, which makes it unlawful to take possession of a store owner's merchandise with the intention of permanently depriving the owner of his property.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0393163.pdf

Sims v. Commonwealth: May 16, 2017

Henrico: Defendant appeals his convictions for Burglary of a Building, Petit Larceny, and Possession of Burglary Tools on sufficiency of the evidence.

Facts: The defendant broke into an auto repair shop, smashing the glass in a rear entry, and stole Virginia state inspection stickers by prying open a cabinet. Within a few hours of the break-in,

police found the defendant in his work van about two miles away. The defendant fled on foot when police first approached the van. Police could see inspection stickers in the console area in plain view and inspection stickers scattered throughout the van. In the van, police found a heavily dented aluminum baseball bat, an oversized screwdriver, and inspection stickers stolen from the repair shop within arm's reach.

The defendant later returned to the scene and admitted that, although the van belonged to his employer, he drove it "all the time" and that the items in the van belonged to him.

Held: Affirmed. The Court reaffirmed that the exclusive unexplained possession of the stolen property shortly after the theft gave rise to an inference that the possessor was guilty of the breaking and entering. The Court found that the defendant's proximity to the stolen items, coupled with his flight from the scene and the proximity in location and time to the offense, was sufficient to prove the offenses.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0638162.pdf

Obstruction of Justice

Virginia Court of Appeals –
Unpublished

Fripp-Hayes v. Commonwealth: October 4, 2016

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

Facts: An officer detained the defendant's son, who matched the description of a larceny suspect. The son had no identification so the officer sought to photograph him for the investigation. Soon thereafter, the defendant arrived and demanded to know why the police were trying to photograph her son. The officer repeatedly explained to the defendant that he needed a photograph because he was investigating the crime of grand larceny.

Despite the officer's explanation for his request, the defendant refused to present any identifying information, refused to allow him to photograph her son, and instead attempted to drive away with her son in a car. The officer directed the defendant not to leave, but she tried to drive away anyway repeatedly, at one point driving over one of the officer's foot. Finally, officers were able to stop the vehicle and get a photograph of the son.

Held: Affirmed. The Court first reviewed the elements for Obstruction of Justice. The Court repeated that obstruction does not occur when the person's conduct merely frustrates the officer's investigation. Instead, the Court reiterated that the test is: first, whether the defendant's actions did, in fact, prevent a law-enforcement officer from performing his duties, and second, whether the defendant acted with an intent to obstruct the law-enforcement officer.

In this case, the Court first found that the officer had reasonable suspicion to lawfully detain the defendant's son. In view of the fact that an officer who suspects that criminal activity has occurred has "full authority" to question a suspect about his identity, the Court found that the defendant unlawfully interfered with the officer's attempt to photograph the son.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1500154.pdf

Epps v. Commonwealth: December 13, 2016

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

Facts: Defendant masturbated in public, in view of a few of his neighbors. The neighbors called the police, who responded and located the defendant. Upon seeing the police, the defendant began to flee. However, during the chase, the defendant turned around and squared his body up to the officer in a fighting stance. When the officer pulled out his Taser and gave the defendant repeated verbal warnings to stand down, the defendant finally relented and went to the ground.

Held: Affirmed. The Court likened this case to *Thorne* and *Molinet* and ruled that the defendant obstructed the officer's performance of his official duties as a law enforcement officer. The Court noted out that, to apprehend the defendant, the officer had to threaten him with the use of force.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1301151.pdf

Perjury

**Virginia Court of Appeals –
Unpublished**

Saunders v. Commonwealth: November 8, 2016

Pittsylvania: Defendant appeals his conviction for Perjury on sufficiency of the evidence.

Facts: Defendant testified at his trial for Eluding and Driving Suspended. During his testimony, he admitted that he had been convicted on numerous occasions under a false name, "Antonio Saunders", rather than his real name, "Adrian Sanders." After that trial, the Commonwealth indicted the defendant for Perjury at the trial, introducing his own statements, the prior convictions, and a deputy's testimony that he's only knows the defendant as "Antonio Saunders." At that second trial, the defendant contended that his previous statements weren't material and that the evidence lacked sufficient corroboration.

Held: Affirmed. Regarding materiality, the Court observed that "materiality is the functional equivalent of relevancy." The Court then pointed out that identity is the unspoken element of every crime and also that witness credibility was a central issue at the first trial. Regarding corroboration, the Court repeated that, although the exact nature of the corroborating evidence has never been specifically delineated, it need not be equal in weight to the testimony of a second witness. Instead, the corroborating evidence must confirm the single witness' testimony in a manner strong enough "to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence."

In this case, the Court found that the deputy's testimony, the first trial's transcript, and various court documents were sufficient evidence to convict the defendant of perjury.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1639153.pdf

Tarsha Gerald v. Commonwealth: December 27, 2016
Patricia Gerald v. Commonwealth: December 27, 2016

Albemarle: Defendants appeal their convictions for Perjury and Driving Suspended on sufficiency of the evidence and venue grounds.

Facts: Defendants, a mother and daughter, were driving in a car that struck another car at a stoplight. The victim could see that the mother was driving the vehicle, but the daughter exited the passenger's side, identified herself as the driver, and gave the victim her contact information. The daughter did not give him a driver's license. When the victim asked to see the mother's driver's license, the daughter got into the driver's seat and both women fled the scene.

A police officer located the mother and daughter, who both confessed their licenses were suspended. The mother confessed to driving the car before the crash. Another officer telephoned both women, who identified themselves on the phone. The mother confessed she had been driving, but claimed that she had a driver's license.

However, at trial in General District Court, both defendants testified under oath that they had not been driving and denied speaking to the police and confessing to the offenses. A police officer took copious notes regarding their testimony at that trial. The General District Court convicted both defendants of driving on suspended and appealed their convictions. The Commonwealth also indicted the defendants for perjury.

At trial in Circuit Court for the perjury offenses and the original offenses of driving suspended, the defendants objected to venue for perjury on the basis that the Albemarle County General District Court is located in the City of Charlottesville, not Albemarle County, and thus Albemarle County was an improper venue for the perjury trial. The City of Charlottesville charter, enacted by the General Assembly, provides "[t]he property now belonging to the county of Albemarle within the limits of the city of Charlottesville, shall be within and subject to the joint jurisdiction of the county and city authorities and officers," and expressly included the courthouse in that description. The defendants argued that this provision meant that the City and County had to "jointly" prosecute the defendants.

Held: Affirmed. The Court first found that the evidence sufficiently demonstrated Perjury. The Court rejected the argument that the Commonwealth did not prove the exact questions asked of the defendant during the general district court trial because the officer conceded that he could not recall, "word for word," what the questions were. Instead, the Court observed that the officer testified that his notes were careful and thorough and that the officer's testimony was equally careful and thorough.

Regarding the venue issue, the Court ruled that, because the General Assembly's broad grant of "joint jurisdiction" in the City of Charlottesville charter encompasses the authority exercised by the trial court, Albemarle County Circuit Court was a proper venue for the defendants' perjury trials. The Court examined the City charter, first enacted in 1888 by the General Assembly, and subsequently re-enacted on a number of occasions as the City grew into the County. The Court ruled that the phrase "joint jurisdiction" in the charter essentially means "concurrent jurisdiction," in that it grants either the city or the county authority to prosecute offenses taking place within the Albemarle County Courthouse. The

Court rejected the argument that "joint jurisdiction" requires a simultaneous, joint prosecution of the defendants.

The Court distinguished this case from *Fitch*, where a defendant perjured herself in the City of Staunton while inside the Augusta County Courthouse, noting that although the facts are analogous, in *Fitch* there was no statutory authority or other legal provision granting Augusta County shared jurisdiction over crimes committed on county property located within Staunton city limits.

Full Cases At:
http://www.courts.state.va.us/opinions/opncavwp/1967152.pdf
http://www.courts.state.va.us/opinions/opncavwp/1931152.pdf

Possession of Cellphone by Prisoner

Virginia Court of Appeals
Published

Ragland v. Commonwealth: March 28, 2017

Augusta: Defendant appeals his conviction for possession of a cellular phone by a prisoner on sufficiency of the evidence.

Facts: While the defendant, who was serving a sentence on work release, was returning to jail, guards discovered that he was carrying an Apple iPhone. When the guard caught him, the defendant stated that he "got" him, but then contended that he had permission to possess the phone, per the Work Release rules. However, there was no evidence that the defendant had permission from his employer or the jail to have the phone under the jail's rules.

The Commonwealth indicted the defendant for possession of a cellular telephone by a prisoner, in violation of Code § 18.2-431.1. At the time of this offense, the statute only criminalized the possession of a "cellular telephone" by an incarcerated prisoner. [*Note*: In 2015, the General Assembly amended § 18.2-431.1(B) to state, "It is unlawful for an incarcerated prisoner . . . without authorization to possess a cellular telephone or other wireless telecommunications device during the period of his incarceration." – *EJC*].

At trial, the jail witnesses described the device as a "cellular telephone," although the defendant argued that that, because there might be a difference in the communication technology utilized, his iPhone was not a "cellular telephone" as contemplated under the statute. To support this argument, the defendant attempted to introduce printed documents, purportedly from FCC's website, the "FCC Encyclopedia," in support of his argument demonstrating the existence of multiple forms of communications technology that operate similarly to cellular telephone service. The Commonwealth objected and the trial court refused to admit the documents.

The defendant also argued that because the guards intercepted him before he to reached the inmate locker room, he did not possess of the device "while incarcerated."

Held: Affirmed. The Court found that the evidence was sufficient to prove that the defendant possessed a "cellular telephone", as opposed to an "other wireless telecommunications device." The Court noted that the statute lacks a definition of "cellular telephone," and therefore the Court referred to the Oxford Online Dictionary for the following definition: "a telephone with access to a cellular radio

system so it can be used over a wide area, without a physical connection to a network. Also called mobile phone."

The Court agreed that expert testimony was not necessary to establish that the device was a cellular telephone, writing: "The four Commonwealth photographic exhibits depict a device that is in common use bearing the Apple corporate logo and easily recognizable by virtually anyone who has not been in a coma or on a deserted island for the last decade as an Apple iPhone which has been turned on and shows a live connection to the Verizon cellular network."

The Court also agreed that the defendant possessed a cellular telephone in the jail without permission while he was "incarcerated." The Court noted that the rules of the jail forbade possession of any device anywhere inside the facility. The Court also pointed out that his statement that the guard "got" him and his subsequent lie demonstrated a consciousness of guilt.

Lastly, the Court held that it was not error for the trial court to refuse to take judicial notice of the proffered FCC documents. The Court observed that the defendant's proffered evidence would have simply provided the trial court with information that other technology existed and would not have proven or disproven anything with respect to the nature of the device in question.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0294163.pdf

Probation Violation

Virginia Court of Appeals
Published

Wilson v. Commonwealth: November 29, 2016

Danville: Defendant appeals his Probation Revocation on jurisdictional grounds

Facts: On October 26, 2005, the trial court convicted the defendant of involuntary manslaughter and possession of a firearm by felon and sentenced the defendant to four years and six months of imprisonment, followed by five years and six months of suspended time. The trial court ordered that the defendant "shall pay restitution in the amount to be determined by the Probation Officer". The sentencing order did not contain a requirement to make specific monthly payments or a date certain by which the defendant must have fulfilled his restitution obligation. Lastly, the order placed the defendant on supervised probation beginning upon release from incarceration for twelve months.

The defendant began supervision on May 1, 2009 and his completion date was April 23, 2010. On July 7, 2010, the defendant signed a "voluntary extension of probation" agreement, where the defendant waived a probation violation hearing in exchange for an extension of his supervision until he paid all his court costs, fines, and restitution. On February 8, 2011, the trial court followed up the agreement by entering an order placing the defendant on indefinite supervision until he paid his court costs, fines, and restitution in full.

However, in 2015 the trial court issued a bench warrant for the defendant for three reasons: First, the defendant failed to report a Georgia DUI arrest on February 15, 2015; Second, the defendant lied to the probation office on March 26, 2015 about the February 15, 2015 DUI arrest, (3) the defendant tested positive for a controlled substance on March 26, 2015, and (4) that he left the

Commonwealth of Virginia without permission to go to Georgia. The trial court found the defendant in violation on these grounds and imposed a portion of his suspended time.

Held: Reversed. The Court first held that the circuit court improperly delegated the determination of the defendant's restitution amount to the probation officer in its original sentencing order. The Court found that, under the terms of §19.2-305, the amount of restitution to be paid by the defendant is within the sole province of the trial court to determine and that determination may not be delegated to another department of government, including the probation office. However, the Court then ruled that the restitution order was merely voidable, rather than void, and that the defendant waived his objection by failing to object and could not collaterally attack the order now.

However, the Court then ruled that the trial court erred in revoking the defendant's suspended sentence because it no longer had "active" jurisdiction to do so. The Court found that, pursuant to the sentencing order, the trial court had twenty-one days from April 23, 2010 to extend its "active" jurisdiction for the defendant to remain on supervised probation. The probation officer's "extension" took place, however, ten weeks later, and the trial court's order another nine months later. The Court examined the trial court's order extending the defendant's probation and found that, by the time it entered its order doing so, the trial court no longer had active jurisdiction to extend the defendant's probation and the defendant's signature on an agreement to extend jurisdiction was ineffective.

The Court agreed that § 19.2-306(A) extends jurisdiction to a circuit court to revoke a previously suspended sentence "for any cause the court deems sufficient that occurred at any time within the probation period, or within the period of suspension fixed by the court." The Court found that, pursuant to the Code, the trial court had "active" jurisdiction to find the defendant in violation of the conditions for his suspended sentence during the period of five years and six months from May 1, 2009. Thus, the Court determined that the "active" jurisdiction of the trial court to revoke the defendant's suspended sentence terminated, by operation of the statute, for any action by the defendant that occurred after November 1, 2014, but that none of the violations cited by the trial court occurred prior to November 1, 2014.

In a footnote, the Court pointed out that the defendant was still on a term of uniform good behavior at the time of his violations, but that the trial court did not make a finding that the defendant violated the terms of good behavior in its order.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1658153.pdf

Virginia Court of Appeals -
Unpublished

Whiting v. Commonwealth: November 1, 2016

Gloucester: Defendant appeals his conviction for Attempted Abduction on sufficiency of the evidence, and his Probation Revocation on failing to hold a revocation proceeding.

Facts: Defendant physically assaulted a woman who was visiting a lake. The defendant grabbed the woman as she was walking to a portable toilet and told her "I got something to show you." The defendant pushed the victim against the portable toilet. The victim then realized that the defendant had his penis out and was urinating on her. The victim grabbed the door of the portable toilet, hit the defendant with the door, and then locked herself inside. The defendant struggled to open it, but soon

left the area. The trial court convicted the defendant of attempted abduction, assault, and public intoxication.

At the time, the defendant had been on probation for failure to register as a sex offender. The Commonwealth moved to revoke his suspended sentence. The parties agreed to set the revocation proceeding over until after the trial for the abduction and assault was complete. After several hearings and continuances, the parties finally held the sentencing hearing. At that hearing, the trial court erroneously noted that it had already found the defendant in violation of his probation and proceeded to sentence the defendant for the violation. The trial court had, in fact, never conducted a hearing where it found the defendant in violation. The defendant did not object to that until filing his appeal.

Held: Affirmed regarding the Attempted Abduction conviction; reversed regarding the Probation Revocation. The Court first rejected the defendant's argument that the attempted abduction was not separate and apart from the assault and battery and that therefore the "incidental detention" doctrine did not permit his conviction. Instead, the Court pointed out that the abduction was merely attempted and remained incomplete. Since an attempted abduction is, by definition, an ineffectual abduction, the Court ruled that it cannot constitute an abduction by detention and thus does not implicate the "incidental detention" doctrine under *Brown*.

However, the Court agreed that the failure to hold a revocation hearing under §19.2-306 rendered his probation revocation improper. The Court agreed that Due Process requires the trial court to hold a hearing and find good cause to believe that the defendant has violated the terms of his suspended sentence. The Court also found that the defendant did not waive this argument by failing to object at the time of the hearing, ruling that the error was a miscarriage of justice that denied the defendant his essential due process rights.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1449151.pdf

Cilwa v. Commonwealth: November 29, 2016

Fairfax: Defendant appeals her Probation Revocation on jurisdictional grounds

Facts: On January 28, 2010, the trial court convicted the defendant of Grand Larceny and imposed two years of incarceration, with one year and one month suspended for a period of three years, including two years of supervised probation upon her release from incarceration. The trial court later found the defendant in violation of probation and on February 13, 2012, entered an order extending the defendant's probation for two years. However, the order did not specifically impose and re-suspend the remaining ten-month sentence for each charge and did not extend the three-year time period for which the sentences were suspended.

In 2014, the Court issued a bench warrant for probation violation. The defendant moved to dismiss the allegation but the trial court overruled the motion and found her in violation.

Held: Reversed. The Court agreed that, when she appeared before the court in February 2015, the defendant was not subject to the court's jurisdiction because her sentence expired on January 28, 2013, three years from the date of the court's original sentencing order. The Court agreed that the trial court implicitly imposed and re-suspended the previously un-served portion of the sentences in its February 13, 2012 order.

However, the Court found that when the court extended the defendant's probation, it did not explicitly or implicitly extend the three-year period for which the sentence was suspended; any period of probation that was no longer concurrent with the three-year time-period that began on January 28, 2010 was ineffective. Thus, the Court ruled that, because the trial court suspended the defendant's sentence for a three-year period, which expired on January 28, 2013, the trial court lacked jurisdiction when it found the defendant in violation of probation in February 2015.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0481154.pdf

Kennedy v. Commonwealth: March 7, 2016

Chesapeake: Defendant appeals his Probation Revocation on Admission of Hearsay evidence.

Facts: The defendant, while on probation, corresponded with known gang members in violation of the terms of his probation. At the violation hearing, the probation officer testified she had received correspondence from a prison gang intelligence officer who had intercepted correspondence from the defendant. Three of the defendant's letters were attached to the e-mail. Although the probation officer had the letters with her in court, the Commonwealth did not introduce them into evidence. The defendant objected to the e-mail on hearsay grounds but did not contest that he authored the letters. The trial court overruled the objection and found the defendant in violation.

Held: Affirmed. Although the Court repeated that the standard prohibition on hearsay does not apply to probation revocation hearings, the Court ruled that any correspondence from appellant to his cousin or to inmates in the New York penal system was admissible as a party admission under Va. R. Evid. 2:803(0). The Court also noted that the defendant had not raised a Due Process argument, as the defendant had in *Henderson*, and therefore any error would have been non-Constitutional error.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0510161.pdf

Douglas v. Commonwealth: March 28, 2017

Salem: Defendant appeals the revocation of his probation on the terms of his probation

Facts: The defendant, while on probation for felony larceny, was convicted of Indecent Liberties with a minor in a nearby jurisdiction. The trial court revoked his probation for the larceny offense and placed him back on probation for that offense. That sentence, as well as his Indecent Liberties sentence in the nearby jurisdiction, included a condition that the defendant obey "all the rules and requirements set by his probation officer."

When the defendant met with his probation officer, the officer indicated that the new conviction would result in additional probation conditions applicable to registered sex offenders, including a condition that prohibited the defendant from possessing and viewing sexually explicit or pornographic materials. The defendant signed and agreed to those new conditions.

However, later the defendant violated that new condition by looking at pornography on the internet. The trial court proceeded to revoke the defendant's suspended sentence from the larceny

offense. At the hearing, for the first time the defendant objected to the special probation condition prohibiting him from possessing or viewing sexually explicit materials, arguing that it was unrelated to his larceny convictions.

Held: Affirmed. The Court held that the defendant could not collaterally attack the probation condition at issue. The Court explained that under Rule 1:1, any challenge to an order of the circuit court must be made within twenty-one days of the entry of the order in question, unless the order is void ab initio. In this case, the Court observed that the defendant signed the probation conditions and therefore chose to accept "the benefit of the court's suspension of sentence."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1886153.pdf

Langen v. Commonwealth: April 11, 2017

Newport News: Defendant appeals her Probation Revocation on sufficiency of the evidence.

Facts: The defendant received a sentence that included four years and ten months suspended on grand larceny and five years suspended on larceny with intent to sell or distribute. The trial court ordered the defendant to pay $47,000 in restitution. Both suspensions were conditioned upon an indefinite period of good behavior or until the defendant paid her restitution was paid in full. The court also placed the defendant on supervised probation for two years. The sentencing orders noted that the probation officer would monitor the defendant's restitution payments. Thereafter, the defendant agreed to pay a minimum of $100 per month towards her restitution, but the probation office lowered those amounts to $80 and then to $40 per month.

When the two-year period ended, the probation office issued a major violation report, explaining that the defendant had only paid $930 in restitution. The report did not state when the payments were first due, how many payments the defendant had made, or what payments (if any) the defendant had failed to make. The trial court found the defendant in violation and revoked a portion of her suspended sentence.

Held: Reversed. The Court found insufficient evidence to find that the defendant violated the terms of her suspended sentences by failing to timely pay restitution. The Court noted that, under §19.2-305.1(E), only an "unreasonable" failure to pay restitution can result in the revocation of probation or imposition of a suspended sentence. The Court pointed out that the trial court never admitted into evidence defendant's probation agreement, which apparently included a required schedule of restitution payments, when they were to begin and what amounts were due by what dates. The Court also noted that there was no specific testimony about what payments the defendant failed to pay by a specific date. The Court noted that the defendant was not expected to pay the entire $47,000 restitution by March 2016.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0745161.pdf

Rape & Sexual Assault

Virginia Court of Appeals –
Published

Hutton v. Commonwealth: November 8, 2016

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

Facts: Defendant, thirty-nine years-old, sexually assaulted a fifteen-year-old neighbor. The child would visit the defendant at his home at various times of the day. The child's mother had told the child not to go to the defendant's home and had told the defendant not to permit her child in his home. On several occasions, the defendant and the child had sex. When the victim became pregnant, her family learned of the offenses.

Held: Reversed. The Court held that the evidence presented at trial was insufficient to establish that he maintained the statutorily required custodial or supervisory relationship over the victim. The Court focused on the meaning of the term "supervisory" in §18.2-370.1. The Court repeated that the purpose of the statute is to protect minors from adults who might exploit certain types of relationships, and contrasted numerous cases, such as *Krampen*, where the victim's mother had given the defendant permission to take her to church, *Guda*, where the defendant was a security officer at the victim's high school, and *Sadler*, where the defendant was the victim's coach.

In this case, the Court expressed concern that finding the defendant's relationship over the victim to be supervisory would vastly expand the reach of Code § 18.2-370.1. The Court found that the defendant did not engage in supervisory or caretaking behavior, did not take responsibility for the safety or well-being of the victim, or establish a supervisory relationship between himself and the victim. The Court stated that simply being in the presence of a child does not trigger a supervisory obligation. The Court also stated that the sexual proposals, serving food, and passing phone messages did not prove a supervisory relationship

The Court also noted that the child abuse statute, §18.2-371.1, has a less-stringent requirement than §18.2-370.1, in that it requires only that the Commonwealth prove a defendant was "responsible for the care of a child," in contrast to the "custodial or supervisory relationship" that Code § 18.2-370.1(A) requires

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0191163.pdf

Virginia Court of Appeals -
Unpublished

Bailey v. Commonwealth: January 17, 2017

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

Facts: The defendant told a ten-year-old boy that he would buy him an expensive ice cream if the boy would let the defendant smack the child's bare bottom. A witness saw the defendant touch the

boy's clothing near his genitals. At trial, the defendant argued that a proposal to "smack" a child on the buttocks did not constitute indecent liberties.

Held: Affirmed. The Court ruled that the defendant's proposal to "smack" the child was a proposal to "feel or fondle the sexual or genital parts" of the minor, in violation of Code § 18.2-370. While the Court agreed that the Commonwealth must prove that the defendant, with lascivious intent, proposed that he either "feel" or "fondle" the sexual or genital parts of the victim, the Court found that the plain meaning of Code § 18.2-370(A)(3) prohibits an adult from proposing that he "feel" the sexual parts of a minor, regardless of the degree of force applied or the duration of the contact.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0370161.pdf

Borras v. Commonwealth: May 30, 2017

Spotsylvania: Defendant appeals his conviction for Aggravated Sexual Battery on sufficiency of the evidence.

Facts: Defendant sexually assaulted a woman at her home after a party, while she was severely intoxicated. At trial, the victim testified that she has had multiple nightmares and flashbacks. She attended weekly sexual assault counseling sessions for over a year, and was continuing to attend them as of the trial date. She testified that she would hyperventilate if she drove by her former workplace, forcing her to pull over, and that she has had "panic attacks in the middle of the night where I choke on my tongue and I wake up screaming."

At trial, the defendant contended that the defendant did not cause the victim serious mental injury for purposes of the Aggravated Sexual Battery statute.

Held: Affirmed. The Court pointed out that §18.2-67.3(A)(4)(b) prohibits sexual battery "accomplished against the will of the complaining witness by force, threat or intimidation" where "the accused causes serious bodily or mental injury to the complaining witness." The Court reaffirmed that, under Gozin, to prove the requisite element of 'serious mental injury' to sustain a felony conviction for aggravated sexual battery, the record must reflect evidence proving a greater injury to the victim's mental health by way of the frequency, degree, duration or after-effects than that which would attend any sexual battery.

In this case, the Court affirmed the trial court's conclusion that the victim was sufficiently troubled psychologically that she has been injured in a manner necessary to meet the serious mental injury element.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2007152.pdf

Receiving Stolen Property

**Virginia Court of Appeals –
Unpublished**

Marshall v. Commonwealth: January 24, 2017

Norfolk: Defendant appeals his conviction for Receiving Stolen Property on sufficiency of the evidence.

Facts: Police found the defendant driving a vehicle that the victim had reported as stolen. When officers approached him, the defendant fled in the vehicle. However, soon thereafter officers captured him, recovered the vehicle, and learned that the defendant was driving on a suspended license. At trial, the victim testified, referring to a third party: "I gave this guy my car for drugs basically; and he never brought the car back." The victim had never reached out to the third party to get his car back and never set a deadline for the car's return. The victim did not know the defendant and did not give him permission to drive the car.

Held: Reversed and Dismissed. The Court ruled that the evidence was insufficient to support a conviction for receiving stolen property. While the Court agreed that the defendant possessed the vehicle without permission from the owner, the Court ruled that the Commonwealth was required to prove beyond a reasonable doubt that someone took the car with the intent to permanently deprive the victim of the vehicle. However, the Court found that the evidence did not establish that the vehicle had been stolen, given that the owner testified that "I gave this guy my car for drugs."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1706151.pdf

Resisting Arrest

Virginia Court of Appeals –
Unpublished

Battaglia v. Commonwealth: March 7, 2017
See same case elsewhere on other issues

Prince William: Defendant appeals his convictions for Assault on Law Enforcement and Resisting Arrest on Admission of a Witness' statement, Refusal to Grant a Mistrial, and Sufficiency of the Evidence.

Facts: Police responded after the staff at a bar ejected the defendant for threatening people. An officer located the defendant, drew his weapon and told the defendant that he was under arrest and to turn around and put his hands behind his back. However, the defendant began running away. After the defendant tripped, the officer captured him. The defendant kicked the officer, but ultimately police restrained him.

At trial, the defendant's attorney cross-examined a witness regarding a report he wrote about the incident. Specifically, the attorney asked him about details to which he testified that were not contained in his report. On re-direct, the trial court allowed the witness to read his entire written statement over the defendant's objection.

At trial, the defendant's ex-wife testified for the Commonwealth. On cross-examination, she testified that she had to meet the defendant "at a police station because he caused so much – ". As soon as she started to make that statement, however, the defendant's attorney stopped the witness,

objected, and approached the bench. The defendant moved for a mistrial, arguing that the witness' statement implied to the jury that he committed a violent offense in the past. The trial court denied the motion.

Held: Affirmed. Regarding the admission of the witness' prior written statement, the Court concluded that the trial court had the discretion under Virginia Rule of Evidence 2:106(a) to allow the witness to read his statement to the jury because the defendant's counsel tried to impeach him with it on cross-examination. The Court reasoned that the Commonwealth could present the statement to the jury so that the jury could determine what parts to believe rather than hearing select pieces of it from the defendant's counsel on cross-examination.

Regarding the motion for mistrial, since the defendant's ex-wife was responding to a question when she gave her answer, she stopped talking as soon as the defendant's counsel objected, and the trial court immediately gave the jury a curative instruction to disregard her statement about meeting the defendant at a police station, the Court ruled that the trial court did not err by denying the motion for a mistrial.

Regarding sufficiency, the Court rejected the argument that, under the facts, the evidence was not sufficient to establish that the officer had the immediate physical ability to place the defendant under arrest during the few seconds that the defendant ran away from the officer.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0719154.pdf

Robbery

Virginia Court of Appeals –
Unpublished

Small v. Commonwealth: December 13, 2016

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

Facts: The defendant and his confederates visited an elderly man's home and offered to repair his driveway for a couple hundred dollars. However, after dumping some gravel on the victim's driveway and doing almost no work, the defendant and his confederates demanded over eight thousand dollars. When the victim balked, one of the men began tapping his shovel on the ground and told the victim that his "kids would find [him] behind the house that night if [he] didn't pay him." They demanded cash from the victim. The victim agreed and drove with them to the bank, where he withdrew the money and paid them.

At trial, the victim testified that he paid the men because he was afraid of what they would do to him, given their previous threat.

Held: Affirmed. Though robbery is a taking that results from violence or intimidation, the Court reasoned that there is no requirement that the intimidation immediately precede the taking. The Court found that the elderly victim reasonably feared for his safety and that his fear overbore his will.

Full Case At:

http://www.courts.state.va.us/opinions/opncavwp/1722151.pdf

Stalking

Banks v. Commonwealth: February 14, 2017

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

Facts: The defendant met the victim, a doctor, in 1990 and, even though they had no relationship at all and the victim had not shared her contact information, the defendant soon telephoned her and wrote her letters stating that he wanted to marry her. The defendant continued to send the victim letters asking for a romantic relationship. After the defendant approached the victim in her workplace aggressively, she notified law enforcement, who ordered him to stop. The defendant stopped for a few years, but then confronted her in her workplace parking lot, where he grabbed her car door and yelled, "Why won't you talk to me?" Again, a law enforcement officer contacted the defendant, who agreed that he would stop contacting the victim.

However, 15 years later, on April 14, 2014, the defendant approached the victim in her workplace parking lot. This time, he repeatedly asked her if she could be his doctor, even after she said no and told him to leave. The victim summoned a security guard and the defendant left. At trial, the victim testified that she "felt intimidated" and "scared that this . . . was getting more and more aggressive." The guard also testified about the victim's apparent fear. The defendant never actually touched the victim or made specific verbal threats of harm.

The arrest warrant charged the defendant with violating §18.2-60.3 "on or about 04/14/2014 to 04/16/2014." The defendant complained that the Commonwealth proved its case using evidence outside that specified period. The defendant asked for a jury instruction that only permitted the jury to consider his prior contacts with the victim as evidence of intent, rather than as substantive violations, arguing that consideration of the evidence of his prior contacts with the victim that occurred earlier than the preceding year violated the one-year statute of limitations for the stalking charge.

Held: Affirmed. Regarding the dates alleged in the warrant, the Court ruled that the Commonwealth was permitted to prove that the offense occurred on a date different than the dates referenced in the warrant. The Court ruled that the statute of limitations began to run in April 2014 when the offense was complete. The Court reasoned that to hold otherwise would insulate from prosecution a defendant who engages in prohibited contact every year for a series of years as long as each subsequent contact occurs more than 365 days after the previous contact.

The Court agreed that it was appropriate for the jury to consider evidence of the defendant's contacts with the victim that occurred before the specified period alleged in the warrant as relevant to the "on more than one occasion" element of the offense. The Court found that the nature and duration of the defendant's contacts with the victim and her testimony regarding her fear supported the jury's finding that his conduct instilled a reasonable fear of death, criminal sexual assault, or bodily injury. The Court also agreed that it was entirely logical for the victim to view the defendant's fixation on her as more threatening due to its long duration and unpredictability. The Court noted that it was reasonable for the victim to fear the defendant due to his persistence and ability to locate her.

Full case at:
http://www.courts.state.va.us/opinions/opncavwp/2055152.pdf

Violation of a Protective Order

Virginia Court of Appeals –
Unpublished

Peters v. Commonwealth: November 15, 2016

Hampton: The defendant appeals his convictions for Violation of a Protective Order on sufficiency of the evidence.

Facts: The defendant harassed the victim with over a thousand emails, texts, and phone calls, followed her and damaged her home. The victim obtained a protective order against the defendant, which he promptly violated and the trial court convicted him of 19 violations of that order.

Later, the victim again saw the defendant following her on three more occasions. On two occasions, after visiting a 7-11, she saw the defendant pull alongside her at a stoplight. On another occasion, the defendant pulled into the 7-11 parking lot where she was parking. He slowly pulled in, made eye contact with her, and then sped away.

Held: Affirmed. The Court noted that the trial court's protective order was issued pursuant to Code § 19.2-152.10 to prevent "acts of violence, force, or threat." The Court then recited that Code § 19.2-152.7:1 defines "acts of violence, force, or threat," to include stalking. The Court found that the defendant's actions constituted stalking.

The Court pointed out that the victim had already had obtained a protective order and that the defendant knew that the victim was afraid of him and did not want him to have contact with her. The Court quoted the Virginia Supreme Court's ruling in *Stephens v. Rose*, where it stated "Evidence that the defendant received notice that his contacts were unwelcome may be sufficient to support a trial court's finding that the defendant should have known his continued contacts would cause fear."

The Court found the evidence sufficient to prove that the defendant initiated contact which was in violation of the protective order and that he did so with the intent to continue and reinitiate harassment and prohibit contact with the victim. The Court also noted that *Stephens* had ruled that a victim need not specify what particular type of harm she fears to prove the offense of stalking.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1888151.pdf

Defenses

Self-Defense

Virginia Supreme Court

Small v. Commonwealth: July 19, 2016

Norfolk: Defendant appeals his conviction for Possession of a Firearm by Felon on refusal to allow him to withdraw his guilty plea.

Facts: Police located a firearm at the defendant's home in May, 2010. He pled guilty to possession of that firearm as a convicted felon in November, 2010. Thereafter, the parties continued the defendant's sentencing 9 times due to the defendant testifying in another trial. Then, in June 2013, the defendant moved to withdraw his guilty plea. He claimed that he possessed the firearm to protect himself from someone who had shot him and who had killed his friend just 4 days before his own arrest. He argued that, after the court convicted the person who shot him, he could now prove that he was in legitimate fear for his own safety. The trial court denied the motion.

Held: Affirmed. As in *Edmonds,* the companion case to this case (see below), the Court first reaffirmed the standard in *Parris* for a defendant to withdraw a guilty plea prior to sentencing. The Court then found that there was too much prejudice to the Commonwealth to allow the defendant to withdraw his plea and that his purported defense was not legally sufficient.

Regarding prejudice, the Court specifically recognized prejudice to the Commonwealth as a relevant factor that should be considered when reviewing a motion to withdraw a guilty plea prior to sentencing. The Court agreed that the delay was too lengthy and that the delay to the Commonwealth was an appropriate reason to deny the motion.

Regarding the defense of duress or necessity, the Court first adopted the standard that the Court of Appeals articulated in *Buckley* and *Humphrey,* as it did in *Edmonds* (below), finding that, to use the defense of duress or necessity, a defendant must show:

(1) a reasonable belief that the action was necessary to avoid an imminent threatened harm;
(2) a lack of other adequate means to avoid the threatened harm; and
(3) a direct causal relationship that may be reasonably anticipated between the action taken and the avoidance of the harm.

In this case, the Court found that the defendant had failed to show an "imminent threatened harm" which led him to possess a firearm. The Court contrasted the *Humphrey* case, noting that, in this case, there was no evidence of a present threat of death or serious bodily injury. Other than someone shooting the defendant four days before, the Court found no evidence of an ongoing threat that would support the defense of justification.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1150965.pdf

Edmonds v. Commonwealth: July 19, 2016

Arlington: Defendant appeals his conviction for Possession of a Firearm by Felon on refusal to allow him to withdraw his guilty plea.

Facts: Police responded to a call for a man threatening a woman with a gun. Police found the defendant, a felon, near the apartment and found that he was carrying a firearm. The defendant claimed that he had just taken the gun from an apartment so that his uncle, who had been angry and drunk, could not get to it and hurt his girlfriend.

Initially the defendant pled guilty, but soon thereafter, the defendant moved to withdraw his guilty plea. He claimed that he took the gun under duress because of the threat of imminent harm to his uncle and girlfriend. The trial court denied the motion.

Held: Affirmed. As in *Small*, the companion case to this case (above), the Court first reaffirmed the standard in *Parris* for a defendant to withdraw a guilty plea prior to sentencing. The Court then found that the defendant's purported defense of duress was not legally sufficient to allow the defendant to withdraw his plea.

Regarding the defense of duress or necessity, the Court addressed this issue in this case as well in a separate opinion in the companion case, *Small v. Commonwealth.* The Court first adopted the standard that the Court of Appeals articulated in *Buckley* and *Humphrey,* finding that, to use the defense of duress or necessity, a defendant must show:

(1) a reasonable belief that the action was necessary to avoid an imminent threatened harm;

(2) a lack of other adequate means to avoid the threatened harm; and

(3) a direct causal relationship that may be reasonably anticipated between the action taken and the avoidance of the harm.

In this case, the Court found that the defendant had failed to show an "imminent threatened harm" which led him to possess a firearm. The Court examined the record and noted that the defendant never proffered the location of the apartment, where the firearm had been in the apartment, whether the uncle ever possessed the firearm, and whether the uncle knew the firearm's location. The Court concluded that taking the firearm and leaving with it did not appear to be the defendant's only choice.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151100.pdf

Hines v. Commonwealth: October 27, 2016

Norfolk: Defendant appeals his convictions for Manslaughter and Use of a Firearm on self-defense grounds.

Facts: Defendant and the victim, who had been drinking, verbally argued in the defendant's home. During the argument, the defendant claimed that he saw the victim holding a gun. The defendant's wife and sister were both in the room as well. The defendant left the room, retrieved his own gun, and returned. The defendant claimed that the victim pointed the gun at him. The defendant shot and killed the victim.

At trial, the Commonwealth's evidence was that the victim did not have a gun, but the trial court found that the defendant's version of events was correct. Nevertheless, the trial court found that the defendant did not prove his claim of self-defense because when he went to another room to retrieve his own gun, he "removed himself from [the] danger" presented by the victim's gun. The trial court explained: "He cannot assert any privilege to return to the room with a weapon of his own and trigger a shoot-out." The Court of Appeals refused to hear the defendant's appeal.

Held: Reversed. The Court held that the victim was brandishing a weapon in the defendant's own home, and the defendant exercised his right to defend himself, his family, and his home with appropriate force.

The Court reviewed the "castle doctrine" as articulated by the 1922 *Fortune* case. The Court reaffirmed that, "when a party assaults a homeowner in his own home, as in this case, the homeowner has the right to use whatever force necessary to repel the aggressor." The *Fortune* case had set forth

the "castle doctrine", stating "a man is not obliged to retreat if assaulted in his own dwelling but may use such means as are absolutely necessary to repel the assailant even to the taking of life."

The Court rejected the trial court's analysis of the facts and explicitly found that the evidence demonstrated that the victim pointed a gun at the defendant. The Court reasoned that if the victim was pointing a gun at the defendant, that was an act sufficient to establish imminent danger to the defendant. The Court ruled that the defendant lawfully shot the victim out of fear for his own life.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151066.pdf

Virginia Court of Appeals –
Published

Bell v. Commonwealth: August 2, 2016

King George: Defendant appeals his convictions for Attempted Murder, Felony Assault and Use of a Firearm on Jury Instruction grounds.

Facts: Defendant repeatedly shot a man who was working as a police informant, maiming him. According to the victim and his girlfriend, the defendant saw the victim walking, approached him, cursed him, and shot him repeatedly, unprovoked. The victim denied being armed. At trial, the defendant and other witnesses testified that the victim had walked up to the defendant, cursed at the defendant, and was carrying a gun. Defense witnesses also testified that, after the defendant shot the victim, the victim discarded a gun. The defendant also alleged that the victim had threatened him in the recent past. A police detective testified on rebuttal that the defense witnesses had told different stories earlier.

The defense requested a jury instruction on self-defense without fault. The trial court rejected that instruction and instead gave the Commonwealth's requested instruction on self-defense with fault.

Held: Reversed. The Court held that the trial court should have granted both instructions. The Court pointed out that justifiable self-defense differs from excusable self-defense because it does not necessitate that a defendant retreat and make known his desire for peace, two requirements of excusable self-defense. The Court observed that significant portions of the evidence were in controversy, and if the jury accepted the testimony of the defense witnesses, it could have found the defendant not guilty if properly instructed on justifiable self-defense.

The Court also reviewed the language of both the "with fault" and "without fault" instructions proffered in the case and found that they were correct statements of the law.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1479152.pdf

Virginia Court of Appeals –
Unpublished

Watkins v. Commonwealth: September 27, 2016

Waynesboro: Defendant appeals his conviction for Involuntary Manslaughter on sufficiency of the evidence.

Facts: Defendant and the victim engaged in a verbal dispute and then a scuffle. After it ended, both men started to leave the area. However, an independent witness then watched the defendant approach the victim and punch him once in the jaw. The victim fell to the ground, striking the back of his head, and began to bleed profusely. He died soon thereafter.

In an interview with the police, the defendant admitted to striking the victim and stated that he hit him because the victim had used a racial epithet. At trial, the defendant claimed self-defense, and stated for the first time that the victim had prevented him from leaving and had shoved his bicycle at the defendant, running over the defendant's foot.

Held: Affirmed. The Court found that the evidence did not support the defendant's claim of self-defense, as the defendant did not sufficiently demonstrate that the victim threatened him in any manner. Based on the independent witness' observations and his own inconsistent statements, the Court ruled that the record demonstrated that the defendant instigated the violence and brutally attacked a defenseless victim.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1797153.pdf

Hope v. Commonwealth: January 24, 2017

Richmond: Defendant appeals her convictions for Murder, Aggravated Malicious Wounding, and Use of a Firearm on a self-defense instruction and refusal to admit the defendant's statement.

Facts: During a confrontation in a parking lot, the defendant shot two men, killing one and wounding the other. The wounded man had threatened the defendant's boyfriend earlier with a knife, and had been walking up to the defendant with his hand in his pocket. However, the man that the defendant killed had not done any overt acts or displayed any weapon. He was merely walking toward the defendant.

At trial, after the defendant testified, the Commonwealth cross-examined the defendant regarding statements she had made during a recorded jail phone call. The defendant sought to introduce the entire call on re-direct, but the trial court sustained the Commonwealth's objection. The Commonwealth called a detective in rebuttal, who testified to one of the defendant's statements in the call. The defendant again attempted to move in the entire statement, but the trial court again sustained the Commonwealth's objection.

During closing argument, both the Commonwealth and the defendant referred to self-defense with respect to the shooting generally. After closing arguments, the trial court clarified to the jury that it could consider self-defense for the man with the knife, but not the un-armed man who hadn't done anything.

Held: Affirmed. The Court first ruled that the defendant was entitled to a self-defense instruction regarding the man with the knife, but not regarding the man that she killed. The Court agreed that the evidence supporting the defendant's contention that she feared for her life and believed that she was being approached with a weapon, such as the armed man's words and actions, entitled her

to a self-defense instruction. However, regarding the man she killed, the Court ruled that walking toward someone, in and of itself, is not sufficient to justify a self-defense instruction.

The Court then ruled that because the closing arguments may have conflicted with the jury's actual instructions, the trial court did not err in ensuring that the jury correctly understood the context in which it could consider the affirmative defense of self-defense.

Finally, the Court agreed that the defendant could not admit her own statement. The Court agreed that a defendant may introduce his or her own prior consistent statements when the prosecution suggests that the defendant has a motive to falsify, alleges that the defendant's testimony is a recent fabrication, or attempts to impeach the defendant with a prior inconsistent statement. However, in this case, the Court noted that while the prosecution merely asked about specific parts of the telephone conversation on the defendant's cross-examination and ruled that these actions did not fall under an exception to the hearsay rule.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0176152.pdf

Washington v. Commonwealth: May 30, 2017

Richmond: Defendant appeals his conviction for Murder on refusal to admit evidence of the victim's prior bad acts.

Facts: While he was picking up his child from the mother of his child, the defendant shot and killed a man who was accompanying the mother during the exchange. The defendant became angry at the victim during the exchange and attacked him. During the fight, the defendant pulled a gun and shot the victim repeatedly, walked away, and then returned and shot him again several more times. The defendant claimed that the victim had pulled a gun on him and that he was defending himself.

Prior to trial, the defendant attempted to introduce evidence of the victim's prior gang affiliation and prior bad acts, but the Court denied his request. At trial, the defendant claimed that he had never had any problems with the victim before that day, but that when he argued with the victim, the victim pulled a gun on him.

Held: Affirmed. The Court began by agreeing that an exception to Rule 2:404's prohibition on the admission of character evidence is that a "criminal defendant may offer evidence regarding the victim's character for violence, turbulence, or aggression for two purposes: (1) to show 'who was the aggressor' or (2) to show 'the reasonable apprehensions of the defendant for his life and safety.'"

However, the Court explained that, in order for the victim's character for violence to have affected the defendant's apprehensions, the defendant must have known of this character for violence at the time he acted. In this case, the defendant gave no indication that he was aware of the victim's character for violence, and therefore "common sense tells us that these facts could not have legitimately affected" the defendant's apprehensions at the time he shot the victim.
The Court also agreed that the evidence demonstrated malice.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2023152.pdf

Sovereign Citizens

Virginia Court of Appeals –
Unpublished

Thomas v. Commonwealth: August 16, 2016

Chesterfield: Defendant appeals his convictions for Driving Suspended and False ID on refusal to permit him to argue a "Sovereign Citizen" defense.

Facts: Defendant, stopped for a traffic violation, admitted that he had no driver's license. He stated his name was "Barry Thomas-El" and provided a false social security number. The officer was not able to locate the defendant with that information. However, after arresting the defendant, the officer learned the defendant's real social security number and learned that his real name was "Barry Nelson Thomas, Jr."

Prior to trial, the defendant filed a notarized "Affidavit of Fact" stating he is "Barry Thomas-EL, a Moorish-American National" and that "[t]he Treaty of Peace and Friendship of 1787 signed by Sultan of Morocco and George Washington . . . establishes my nation and verifies my citizenship." The trial court granted the Commonwealth's motion *in limine* to prohibit the defendant from presenting the documents at trial or arguing at trial that he is a sovereign or Moorish-American citizen. The trial court overruled the defendant's request to argue to the jury that he was simply exercising his freedom of religion and that his faith as a Moorish-American was the religious reason for his refusal to provide his real name or social security number.

Held: Affirmed. The Court first found that, in large part, the defendant had waived his "free exercise" argument at the trial court level. The Court then found that the documents that the defendant proffered in his defense were political, rather than religious, because they spoke to the defendant's Moorish-American nationality and not his religious beliefs. The Court noted that the defendant was unable to offer a clear explanation of how, exactly, Moorish-American nationality and religious beliefs necessitated that he provide a false name and false social security number to the police. Thus, the Court found that his proffered defense was irrelevant and more prejudicial than probative.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0992152.pdf

Evidence

Best Evidence Rule

Virginia Court of Appeals –
Unpublished

Melice v. Commonwealth: August 30, 2016

Prince William: The defendant appeals his conviction for Possession with Intent to Distribute on Best Evidence grounds.

Facts: Police stopped and arrested the defendant for driving on a suspended license. In the car, police found two pill bottles of prescription oxycodone and methadone. The defendant had filled the prescriptions approximately one hour prior to the traffic stop. The prescription for oxycodone was for 138 pills, yet only five pills were in the bottle. The prescription for methadone was for 81 pills, yet only 46 pills were in that bottle. The defendant had $2,415 in cash and a cell phone in his pocket. The defendant claimed he left the pills at a friend's house, then changed the location to a different friend's house, but couldn't identify the house and refused to take police there. An expert testified that the missing pills were worth approximately $2,300.

At trial, the officer testified that the defendant's phone was constantly receiving text messages and phone calls and that he remembered that some of the text messages asked if the defendant was still in the Manassas area; one person asked if the defendant "could help him out with something." The officer could not remember the exact details and no one introduced the text messages themselves. The defendant objected that this evidence violated the "Best Evidence Rule" as codified in Rule 2:1002, and that none of the exceptions in Rule 2:1004 applied.

Held: Affirmed. The Court assumed, without deciding, that the trial court erroneously admitted the evidence, but ruled that the other evidence was overwhelming and therefore the error was harmless. The Court agreed that text messages are "writings" under *Dalton* for purposes of the Best Evidence Rule. However, the Court found that the fact that the defendant went through almost all of the pills in less than an hour, could not explain what happened to the pills, gave inconsistent statements about the location of the pills and refused to take law enforcement to them, and had an amount of money consistent with having sold the pills was sufficient to convict him of the offense.

The Court also noted that the trial court found the evidence of the "constant ringing" to be more significant than the vague description of the text messages.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0531154.pdf

Pugh v. Commonwealth: May 23, 2017
(See above for same case on different issue)

Suffolk: Defendant appeals his convictions for Fraud, Forgery, and related offenses on sufficiency of the evidence and admission of a copy of a check.

Facts: The defendant cashed a forged check at a Walmart store, drawn on a non-existent business. After police located him, the defendant claimed that the received the check as payment for the sale of a vehicle on Craigslist. He could not provide the name of the buyer, nor did he provide any contact information for the buyer. He stated that the buyer told him that the check was from his employer and that they entered the Walmart together to cash the check. The defendant had numerous prior felony convictions.

At trial, the defendant provided no corroboration for his story. The Commonwealth introduced a copy of the check at trial. The copy read: "This is an image of a check, substitute check or deposit ticket. Refer to your posted transactions to verify the status of the item. For more information about image delivery. . . " The defendant objected on Best Evidence grounds that the check did not contain the exact phrase in Rule 2:1003 "This is a legal copy of your check. You can use it the same way you would use the original check", but the trial court overruled his objection.

Held: Affirmed. Regarding sufficiency of the evidence, the Court first reaffirmed that possession of a forged check by an accused, which he claims as a payee, is prima facie evidence that he either forged the instrument or procured it to be forged. The Court then found that the jury was entitled to disbelieve the defendant, who had a dozen prior felony convictions, including for forgery, and to conclude that his hypothesis of innocence was not reasonable. The Court agreed that the defendant failed to rebut the presumption that he knew the check was forged when he cashed it.

Regarding admission of the copy of the check, the Court rejected the argument that the check admitted in this case should have been excluded because it did not contain the exact language set forth in quotation marks in Rule 2:1003(b). The Court did not agree that the copy was a "substitute check" under 2:1003, but also observed that even if the exhibit was a "substitute check," the omission of the exact language from Rule 2:1003(b) should not require its exclusion — it simply would not receive the presumption of admissibility as an original. Instead, the Court pointed out that proper circumstances existed here to treat a photocopy as a duplicate original, since the accuracy of the photocopy was not disputed

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1299161.pdf

Business Records

Virginia Court of Appeals -
Unpublished

Manning v. Commonwealth: January 31, 2017

Norfolk: Defendant appeals his conviction for Statutory Burglary and Larceny on admission of business records evidence.

Facts: The defendant kicked in the door of a residence and stole electronics and other items. The defendant then pawned the items at a nearby pawn shop. At trial, a pawn shop employee testified about the store's records. Although the witness was not working at the store when the defendant sold the stolen items were purchased, he was a long-time employee and he was familiar with the store records and the manner they were produced and maintained. He explained that the procedure for

recording purchases was the same at all their stores. Using the records, the witness located the date of the transaction and the employee identification number for the employee who conducted the defendant's transaction. The trial court overruled the defendant's objection to the records and admitted them.

Held: Affirmed. The Court ruled that the witness' testimony established that the records were sufficiently trustworthy and reliable to be admissible under the business records exception

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0091161.pdf

Certificates of Analysis

Virginia Court of Appeals –
Published

Coffman v. Commonwealth: January 10, 2017

Roanoke: Defendant appeals his conviction for DUI on admission of the certificate of analysis

Facts: Defendant drove drunk. An officer arrested him and brought him to a hospital, where a registered nurse drew a sample of the defendant's blood. At trial, the defendant argued that the nurse who took the blood sample was not designated by the Circuit Court's order designating certified phlebotomists and therefore the certificate was not admissible under 18.2-268.5.

Held: Affirmed. The Court construed 18.2-268.5, which provides, in relevant part: "For purposes of this article, only a physician, registered nurse, licensed practical nurse, phlebotomist, graduate laboratory technician or a technician or nurse designated by order of a circuit court acting upon the recommendation of a licensed physician . . . shall withdraw blood for the purposes of determining its alcohol . . . content." The Court rejected the argument that, by including the word "nurse" in the list of individuals required to be designated by court order, the General Assembly intended for all nurses withdrawing blood to be "designated by order of a circuit court acting upon the recommendation of a licensed physician."

Applying the rule of "the last antecedent", the Court ruled that the General Assembly intended to distinguish "registered nurse" and "licensed practical nurse" from other types of nurses who must be "designated by order of a circuit court acting upon the recommendation of a licensed physician." In doing so, the Court agreed with the unpublished November 2016 opinion in *Haley v. Commonwealth* that, by their licensure, licensed registered nurses may withdraw blood in DUI cases.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1640153.pdf

Wolfe v. Commonwealth: December 13, 2016

Loudoun: Defendant appeals his conviction for DUI on admission of the certificate of analysis for blood, under *Birchfield*.

Facts: Defendant drove while intoxicated. An officer stopped the defendant for speeding and observed him fail several field sobriety tests. The officer arrested the defendant and initially attempted to administer a breath test. However, the defendant repeatedly belched during the observation period, so the officer opted for the breath test. The defendant responded that he did not like needles and did not want a blood test. However, the officer brought the defendant to the hospital anyway. The defendant did not otherwise protest or resist having his blood drawn. The certificate revealed a BAC of .196.

At trial, the defendant objected to the blood-draw as an unconstitutional search under *Birchfield* and *McNeely*.

Held: Affirmed. The Court ruled that the blood draw was lawful under the implied consent exception to the search warrant requirement. The Court reiterated that, in blood cases, the constitutional validity of the implied consent statute is well-established, even in light of *Birchfield*. The Court also repeated that the implied consent statute is civil in nature and does not implicate the Fourth Amendment. Lastly, the Court noted that implied consent is neither implied nor conditional.

In a footnote, the Court also addressed the defendant's argument that he "refused" the blood test and therefore the officer should have obtained a warrant. The Court noted that, under *Rowley*, the act of driving constitutes an irrevocable, albeit implied, consent to the officer's demand for a breath sample. The defendant had argued that *Birchfield* overruled that doctrine in blood cases. However, the Court dodged that issue and concluded that the defendant's statements, taken in context, did not establish that he refused to consent to a blood test, especially given that he ultimately permitted the officer to collect a blood sample.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0058164.pdf

Virginia Court of Appeals -
Unpublished

Haley v. Commonwealth: November 8, 2016

Roanoke: Defendant appeals his conviction for DUI on admission of the certificate of analysis.

Facts: Defendant drove while intoxicated. After arresting him, the officer took the defendant to the hospital, where a registered nurse took his blood. The nurse was not on the trial court's list of persons designated to withdraw blood. DFS found that the BAC was .11. Prior to trial, the defendant moved to suppress the blood sample pursuant to §18.2-268.5 on the grounds that the nurse "was not designated by order of the trial court."

Held: Affirmed. The Court ruled that the nurse was authorized, by reason of her status as a registered nurse, to withdraw the defendant's blood for use in his DUI prosecution The Court construed the language of §18.2-268.5, which provides, *inter alia*, "For purposes of this article, only a physician, registered nurse, licensed practical nurse, phlebotomist, graduate laboratory technician or a technician or nurse designated by order of a circuit court acting upon the recommendation of a licensed

physician . . . shall withdraw blood for the purposes of determining its alcohol or drug . . . content." The Court then rejected the argument that because "designated by order of a circuit court" appears at the end of a list of individuals, every person who takes blood must appear on the court's order.

The Court stated that the grammatical impact of the comma is not necessarily determinative of the meaning of a statute, noting "punctuation is not resorted to in the interpretation of statutes, unless the intention of the legislature cannot be ascertained from the language of the statute read in the light of legislation existing upon the subject . . . and other statutes *in pari materia*." Instead, the Court relied on the "last antecedent doctrine", which provides that referential and qualifying words or phrases, where no contrary intention appears, refer solely to the last antecedent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1951153.pdf

DNA

Virginia Court of Appeals –
Published

Jennings v. Commonwealth: May 2, 2017

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

Facts: Responding to a robbery, police located clothing and discarded items nearby the crime scene. DNA analysis resulted in a "cold hit" on the defendant. At trial, the evidence tying the defendant to the crime was the presence of his DNA, along with the DNA of other unknown persons, on clothing and a weapon employed during the robbery. The defendant was a "major contributor", although not the sole contributor, regarding some of the clothing items. The defendant's DNA constituted about half the DNA identified on the robbery weapon, a knife.

At trial, the victim did not and could not identify the defendant as the robber, because his face had been obscured by clothing. Other than the DNA evidence, there was no evidence that the defendant was the person who used the items during the robbery.

Held: Reversed. The Court held that the DNA evidence was insufficient to prove that the defendant was the person who perpetrated the robbery, since the DNA came from multiple people and there was no evidence establishing when the defendant's DNA was deposited on the items. The Court reasoned it was reasonable to conclude that the defendant was a contributor because he either wore the clothing more often than any of the other DNA contributors, but not necessarily at the time of the robbery, or that another contributor wore the clothes less often but did so during the robbery. These Court found that the fact that the hooded sweatshirt had a DNA mixture of so many individuals that no conclusions as to the identity of the contributors could be reached bolstered these possibilities.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1088161.pdf

Samson v. Commonwealth: May 2, 2017

Alexandria: Defendant appeals his conviction for Possession with Intent to Distribute on refusal to admit a certificate of analysis under 19.2-187

Facts: Defendant possessed marijuana with intent to sell while riding as a passenger in a car. The officer who searched the defendant found plastic bags, in addition to the marijuana. The Department of Forensic Science analyzed those bags and found fingerprints belonging to the driver of the car, but not the defendant's fingerprints.

Immediately prior to trial, the Commonwealth moved *in limine* to prohibit the defendant from admitting the certificate of analysis. No one had filed the certificate with the Court and no one had subpoenaed the analyst from the laboratory. The defendant argued that he was not required to comply with the provisions of §19.2-187. The trial court disagreed and excluded the certificate.

Held: Affirmed. The Court first noted that the notice-and-demand procedure in §19.2-187.1, by its explicit terms, is only available to the Commonwealth. The Court then agreed that § 19.2-187 clearly states that for a certificate of analysis to be admissible in lieu of testimony, the moving party must file it with the clerk at least seven days prior to the proceeding. In this case, the defendant failed to file the certificate properly and the trial court properly excluded it.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0528164.pdf

Electronic Evidence

Virginia Court of Appeals –
Unpublished

Reed v. Commonwealth: August 30, 2016

Alexandria: Defendant appeals his conviction for Distribution of Drugs on issuance of a Subpoena Duces Tecum for phone records.

Facts: Defendant sold drugs to another drug dealer while an undercover police officer was present. The buyer identified the defendant as his distributor. Police obtained an *ex parte* order for the defendant's phone records under 19.2-70.3 and 18 U.S.C. §2703(d) and obtained the records pre-indictment, including historical GPS location-data for the phone.

The Commonwealth indicted and arrested the defendant for distribution. Prior to trial, the Commonwealth requested the same cell site data, text message data, and incoming and outgoing detail records that it already had, this time using a subpoena *duces tecum*. Verizon requested a subpoena for internal purposes, so that it would have authority to have a local records custodian pull the records and attend the trial to authenticate the records.

The defendant moved to quash the subpoena duces tecum. The trial court granted the motion, in part, limiting the scope to two days before and two days after the offense, but otherwise rejected the defendant's argument that the subpoena duces tecum violated his Constitutional rights and that the trial court did not have the authority to issue an order to Verizon, which is based in New Jersey.

Held: Affirmed. The Court first held that the defendant lacked the standing to object to the subpoena duces tecum or the effectiveness of the service of the Subpoena. The Court found that only Verizon could object to the service of the subpoena duces tecum and found that, by accepting service of the subpoena duces tecum, willingly producing the requested records, and sending a custodian of records to testify at the defendant's trial, Verizon waived any objection to the method of service of the subpoena duces tecum that it may have had. Verizon's voluntary acceptance of and compliance with the subpoena duces tecum negated the need for the Commonwealth to compel Verizon's compliance through §§ 19.2-272 through 19.2-282.

The Court then found that the Commonwealth sufficiently demonstrated a basis for the subpoena. The phone number was known to be the defendant's, someone used the phone number to contact the drug buyer within hours of the transaction, and a witness placed the defendant at the scene.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1305154.pdf

Garnett v. Commonwealth: December 20, 2016

Henrico: Defendant appeals his conviction for Possession with Intent to Distribute on admission of text messages and sufficiency of the evidence.

Facts: Police stopped the defendant and located a significant amount of marijuana in the car he was driving. The defendant claimed that he had borrowed the car from his sister. An officer also located a mobile phone in the car, but at trial, she could not recall whether she found it in the center console or on the defendant's person.

Police obtained a search warrant for the contents of the phone. The Commonwealth introduced text messages contained in the phone that discussed the sale and distribution of marijuana at trial. The defendant objected that the Commonwealth did not establish a sufficient foundation that the phone belonged to the defendant. The Commonwealth argued that the defendant was the only person in the car and therefore, the mobile phone had to belong to him. The trial court admitted the text messages.

Held: Reversed. The Court ruled that the trial court erred in admitting the text messages because the Commonwealth did not provide an adequate foundation for their admission. The Court agreed that the Commonwealth can authenticate text messages and prove the ownership of a mobile phone with either direct or circumstantial evidence, citing numerous cases where Virginia and other courts had found a sufficient foundation for digital evidence. The Court ruled that mere proximity to the phone was insufficient to prove that the defendant owned the phone and authored the text messages.

However, the Court found that the evidence at trial would have otherwise been sufficient to prove that the defendant possessed marijuana with the intent to distribute. The Court found that the text messages, coupled with the strong and obvious odor of marijuana in the vehicle, sufficiently demonstrated the defendant's guilt. Therefore, the Court remanded the case for re-trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1573152.pdf

Hearsay

Virginia Court of Appeals –
Published

Synan v. Commonwealth: January 24, 2017

Spotsylvania: Defendant appeals his convictions for Malicious Wounding, DUI and Assault on admission of hearsay testimony and sufficiency of the evidence.

Facts: Defendant, drunk, grabbed hold of the steering wheel of his wife's van while she was driving, resulting in their van crashing into an embankment after crossing through oncoming traffic. The van was moving very fast and did not slow down as it turned sharply in front of the school bus. As a result, the bus driver had to swerve over the yellow line into oncoming traffic to prevent the bus from colliding with the van. The swerve she took caused the children on the bus to fall out of their seats.

The crash injured the wife. Within two minutes of the crash, a witness brought the defendant's wife out of the van. At trial, he testified that she was crying and shaking and that he asked her what happened. The witness testified the wife told him that the defendant "jerked the steering wheel" and "tried to kill them both by hitting the van, that he was yelling at her, [and] that they were fighting." The defendant objected to the statements being offered as hearsay testimony.

At trial, the defendant's wife testified that the defendant did not grab the wheel, as she had originally stated, but admitted to telling the investigating officer that the defendant had caused the crash by grabbing the wheel.

Held: Affirmed. The Court first found that it was proper to admit the wife's statements. The Court noted that the wife made her statements within minutes of the startling event, with no indication that there was any meaningful delay between the time of the accident and the time that the witness heard her statements. The Court also noted the lack of evidence that the witness questioned the wife or directed her to make her statements.

The Court then affirmed the conviction for DUI. The Court repeated the holding in *Dugger*, that a passenger who forcibly seizes control of the steering wheel of a moving vehicle exercises sufficient control to fall within the scope of DUI. In this case, the Court agreed that the defendant had control of the vehicle, even if only momentarily, by fighting for the wheel.

The Court then found that the evidence was sufficient to prove malicious wounding. The Court found that the trial court could have reasonably inferred that the defendant committed a "purposeful and cruel act without great provocation" by directing the van into oncoming traffic, off the road, and into an embankment.

The Court also ruled that the evidence was sufficient to prove that the defendant assaulted the school bus driver and the chaperone who was looking out the window at the time. The Court ruled that the evidence was sufficient for the trial court to conclude that the defendant acted overtly with the intent to inflict bodily harm and place the occupants of the bus in fear of bodily harm.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0795152.pdf

Virginia Court of Appeals –
Unpublished

Grady v. Commonwealth: October 4, 2016

Loudoun: Defendant appeals her conviction for Petit Larceny, Third Offense, on admission of hearsay testimony.

Facts: The defendant stole shoes from a store. Loss Prevention captured him on video and summoned the police, who identified his vehicle using surveillance video. Officers called the company that owned the vehicle and asked that the driver call them. The defendant called the police back. The officer asked the person if there was anything he wanted to tell the officer; the defendant admitted that he stole shoes from the store. The defendant identified himself by name and provided his cellphone number. The officer then called the defendant back and told him that they had a warrant for his arrest, and soon thereafter the defendant turned himself in.

Prior to trial, the defendant moved to exclude the telephone call, arguing that there was an insufficient foundation under *Snead* for the trial court to admit the call as a statement of the defendant. The trial court denied the motion. A witness identified the defendant as the perpetrator.

Held: Affirmed. The Court held that the Commonwealth established by a preponderance of the evidence that the defendant was the person who spoke with the deputy and who admitted in one of the phone conversations that he stole the shoes and, consequently, the evidence was admissible as an admission by a party opponent.

The Court agreed that, under *Snead*, a statement during a phone call of the speaker's identity, standing alone, is not generally regarded as sufficient proof of such identity unless it is corroborated by other circumstances. However, the Court repeated that "completeness of the identification" goes to weight rather than admissibility, with the responsibility of determining the threshold question of admissibility resting with the trial court. In this case, the Court found that the timing of events, details provided by the individual on the phone, and the actions of the defendant support the conclusion that the individual on the phone was the defendant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0339154.pdf

Karika v. Commonwealth: November 1, 2016

Chesapeake: Defendant appeals his conviction for Assault and Battery on Subject Matter Jurisdiction and Admission of a 911 tape

Facts: Defendant spit in a man's face during a road-rage incident. The victim called 911. During the call, the victim handed the phone to the defendant. The defendant then spoke to the 911 operator as well. Prior to trial, the parties orally requested a bench trial, and the trial court entered an order that essentially stated "Upon motion of the Commonwealth's Attorney, defendant, attorney for the defendant, and the Court, this matter will be heard by the Court" and not a jury.

At trial, the defendant sought to introduce the 911 call, contending that it demonstrated that the victim's tone of voice was inconsistent with someone who had been assaulted. The trial court excluded the tape as hearsay evidence.

Held: Affirmed. The Court first rejected the defendant's argument that the trial court lacked subject matter jurisdiction because it failed to enter into the record that the defendant waived a jury trial with the consent of the Commonwealth and the trial court. The Court noted that the defendant never denied that he waived a right to trial by jury, nor did he contend that his waiver was not voluntary or not intelligently given. Instead, the Court found that the trial court's order demonstrated that the parties properly waived a jury trial as required by the Virginia Constitution, §19.2-258, and Rule 3A:13(b).

The Court then rejected the argument that the waiver must also appear in the conviction and sentencing orders. The Court also rejected the argument that the trial court's order must specifically include the word "waiver." Instead, the Court essentially inferred from the entry of the order setting the case for a bench trial that the trial court must have complied with the code and the rule.

The Court then found that the trial court improperly excluded the 911 tape. The Court noted, as in *Brown*, that this hearsay was not offered for the truth of the matter asserted, but instead for *how* the victim spoke. However, the Court found that the error was harmless, in light of the other evidence adduced at trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1512151.pdf

Turner v. Commonwealth: March 7, 2017

Newport News: Defendant appeals his convictions for Robbery, Carjacking and Use of a Firearm on Hearsay grounds.

Facts: The defendant and another man robbed the victim at gunpoint and fled in the victim's car. Officers located the car hours later. When they did, the defendant and other men fled from the vehicle. At trial, an officer testified that another officer stopped and detained the defendant approximately two blocks away from the vehicle. The officer testified that his fellow officer saw the defendant emerge from a backyard, out of breath and wearing dirty black clothes, and therefore the testifying officer arrested the defendant. The defendant objected to the hearsay description by the officer of what the other officer observed, but the trial court admitted it as an explanation for why the officer took the actions that he took. The officer then testified that he recovered two of the victim's stolen credit cards and a handgun on the defendant's person.

Held: Affirmed. The Court ruled that the out-of-court statements to which the officer testified were not offered or admitted for the truth of the matters asserted, and thus were not hearsay. The Court reiterated that, under *Upchurch* and *Fuller*, when such evidence is admitted not for showing the guilt or innocence of the defendant, but for showing the reason for the police officers' action in arresting him, it will not be excluded on hearsay grounds.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0034161.pdf

Bethel v. Commonwealth: May 2, 2017

Newport News: Defendant appeals his conviction for Burglary on refusal to admit a statement on Hearsay grounds.

Facts: The defendant forcibly entered a woman's home at night, without permission, after banging on the door and yelling for approximately one minute—all while the victim and her young daughter were alone in the house. At trial, defense counsel sought to elicit from the victim that the defendant told her "they're trying to kill me" while banging on the door. However, the trial court sustained the Commonwealth's objection that the statement was hearsay.

Held: Reversed. The Court ruled that the statement was not subject to exclusion as hearsay, and it was error for the trial court to exclude the evidence. The Court explained that in this case, the statement was not being offered to prove that someone was trying to kill the defendant, but only to show the reasoning behind the defendant's actions. Thus, in the Court's view, the statement "They're trying to kill me," was not offered for the truth that people were actually attempting to kill him, but instead that the statement was made and was relevant to the issue of what the defendant's subjective motive was at the time and whether it was the intent required in a Burglary case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1095161.pdf

Impeachment Evidence

Virginia Court of Appeals
Unpublished

Battaglia v. Commonwealth: March 7, 2017

Prince William: Defendant appeals his convictions for Assault on Law Enforcement and Resisting Arrest on Admission of a Witness' statement, Refusal to Grant a Mistrial, and Sufficiency of the Evidence.

Facts: Police responded after the staff at a bar ejected the defendant for threatening people. An officer located the defendant, drew his weapon and told the defendant that he was under arrest and to turn around and put his hands behind his back. However, the defendant began running away. After the defendant tripped, the officer captured him. The defendant kicked the officer, but ultimately police restrained him.

At trial, the defendant's attorney cross-examined a witness regarding a report he wrote about the incident. Specifically, the attorney asked him about details to which he testified that were not contained in his report. On re-direct, the trial court allowed the witness to read his entire written statement over the defendant's objection.

At trial, the defendant's ex-wife testified for the Commonwealth. On cross-examination, she testified that she had to meet the defendant "at a police station because he caused so much – ". As soon as she started to make that statement, however, the defendant's attorney stopped the witness, objected, and approached the bench. The defendant moved for a mistrial, arguing that the witness' statement implied to the jury that he committed a violent offense in the past. The trial court denied the motion.

Held: Affirmed. Regarding the admission of the witness' prior written statement, the Court concluded that the trial court had the discretion under Virginia Rule of Evidence 2:106(a) to allow the witness to read his statement to the jury because the defendant's counsel tried to impeach him with it

on cross-examination. The Court reasoned that the Commonwealth could present the statement to the jury so that the jury could determine what parts to believe rather than hearing select pieces of it from the defendant's counsel on cross-examination.

Regarding the motion for mistrial, since the defendant's ex-wife was responding to a question when she gave her answer, she stopped talking as soon as the defendant's counsel objected, and the trial court immediately gave the jury a curative instruction to disregard her statement about meeting the defendant at a police station, the Court ruled that the trial court did not err by denying the motion for a mistrial.

Regarding sufficiency, the Court rejected the argument that, under the facts, the evidence was not sufficient to establish that the officer had the immediate physical ability to place the defendant under arrest during the few seconds that the defendant ran away from the officer.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0719154.pdf

Medical Records

Virginia Court of Appeals
Unpublished

Parker v. Commonwealth: February 21, 2017

Pittsylvania: Defendant appeals his convictions for Armed Burglary and related charges on refusal to sever his charges and admission of medical records.

Facts: The defendant and his co-defendant burst into the victim's home with rifles and shot at the victim, but the victim returned fire and wounded both the defendant and the co-defendant. The defendants fled to a local hospital. When police investigated, the defendant claimed that he and his co-defendant were together at a party somewhere else, when they were both inadvertently caught in cross-fire between unknown individuals who began shooting. The defendants could not recall where the party was or who attended the party. However, the co-defendant's cell phone records, the projectiles recovered from his gunshot wounds, and the blood evidence in their car demonstrated that the defendants were at the crime scene and not at the "party."

The Commonwealth moved to try the defendants jointly and the trial court agreed, over the defendant's objection. Prior to trial, the Commonwealth subpoenaed the defendant's medical records. The trial court overruled the defendant's objection that the subpoena violated his medical privacy. At trial, the defendant objected to the Commonwealth's introduction of his medical records, arguing that the Commonwealth failed first to obtain the defendant's consent in accordance with § 32.1-127.1:03(A)(3).

Held: Affirmed. The Court first found that it was proper to join the two defendants. In this case, the Court noted that his alibi defense made his co-defendant's location at the time and date of the home invasion relevant and admissible, and would have been admitted even if the trials had been separate.

The Court then rejected the argument that § 32.1-127.1:03(A)(3) prohibited the Commonwealth from disclosing the defendant's records unless the purpose behind their original disclosure was to

submit them into evidence at trial. The Court ruled that the defendant's consent was only required if the Commonwealth sought to re-disclose the medical records beyond the original purpose for which they were obtained, which was to present evidence that would link the defendants to the home invasion.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0113163.pdf

Mugshots

Virginia Court of Appeals –
Unpublished

Turner v. Commonwealth: March 14, 2017

Norfolk: Defendant appeals his conviction for Murder, Robbery, and Use of a Firearm on admission of his mugshot during trial

Facts: The defendant, along with two other men, robbed and killed a man, shooting him nearly two dozen times. After the murder, the defendant and his co-defendants exchanged text messages. One of the murderers texted another of the murderers that "he's gone" and referred him to the TV news. The defendant's co-defendant then visited the TV news website with his phone, downloading the news story about the murder. The story included a mugshot of the defendant.

At trial, the Commonwealth introduced a download of the co-defendant's phone. The download included a mugshot of the defendant. The trial court gave the jury a cautionary instruction that the mugshot was not to be considered against the defendant, but only as evidence against the co-defendant.

Held: Affirmed. The trial court first repeated that, due to the potential prejudice inherent in mug shots, Virginia has adopted the test set forth by federal courts to determine their admissibility:

(1) The Government must have a demonstrable need to introduce the photographs;
(2) The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and
(3) The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.

In this case, the Court pointed out that the photo was not a typical "mug shot." There was nothing to indicate that the photograph was taken by a law enforcement agency or was created pursuant to police procedure. In addition, the Court pointed out that nothing in the record indicates that the jury did not follow the trial court's cautionary instruction.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1866151.pdf

Prior Bad Acts

Virginia Court of Appeals -
Unpublished

Massey v. Commonwealth: December 13, 2016

Fairfax: Defendant appeals his convictions for Rape and Abduction on admission of a victim's previous testimony and *Brady* grounds.

Facts: The defendant abducted and raped his former girlfriend. At the preliminary hearing, the victim testified that the defendant physically forced her to the bed, repeatedly raped her, and then refused to let her leave her apartment. Later, she explained that the defendant forced her to accompany him to his residence, binding her with packing tape and dropping her off near her parents' residence. On cross-examination, the defense attorney asked the victim many questions about the events surrounding the attack. The victim often stated she did not recall certain details or facts. She denied having called the defendant the night of the attack, however.

After the preliminary hearing, the Commonwealth disclosed that the victim had made inconsistent statements about whether she named on the defendant's lease. The defendant also learned that the victim, while she had denied on cross examination taking any naked pictures for the defendant, in fact had posed for such a picture for the defendant. The defendant also obtained phone records that demonstrated that she had, in fact, called him on the night of the rape. Finally, the defendant learned that the victim sent several texts in which she appeared to brag or gloat about refusing to answer the defense attorney's questions at preliminary hearing.

The victim died prior to trial. At trial, the Commonwealth presented the victim's testimony through the preliminary hearing transcript. The Commonwealth also presented a SANE nurse, who testified to significant injuries that she observed on the victim, as well as testimony from the defendant's friend, who testified that the defendant told her that he "kind of made [the victim] have sex."

The defendant attempted to admit one of the texts the victim sent after the preliminary hearing, where she stated "Is it sick that I'm making myself look really good right now just to piss him off?." However, the trial court refused to admit the text. Nevertheless, the trial court admitted the naked picture and the phone records that reflected the victim calling the defendant. The jury convicted the defendant at trial.

On appeal, the defendant made several arguments, including that:

1. His preliminary hearing was defective because the Commonwealth failed to timely disclose the victim's inconsistent statements about the lease pursuant to *Brady,* depriving him of the opportunity to fully cross-examine the victim.
2. The defendant discovered potential impeachment evidence after the preliminary hearing, and therefore the cross-examination at the preliminary hearing was defective and the transcript should have been inadmissible.
3. The victim's repeated failure to remember things during the cross-examination at the preliminary hearing rendered her "unavailable" for cross-examination and therefore the transcript should have been inadmissible,
4. The charges changed after the preliminary hearing and therefore the transcript should have been inadmissible.
5. The trial court erred by not admitting the victim's text regarding her preliminary hearing testimony.

Held: Affirmed.

First, regarding the victim's inconsistent statements about being on the defendant's lease, the Court examined the *Brady* issue. The Court refused to find that the inconsistent statements were "impeachment" material. The Court pointed out that, although there was evidence that the victim made statements that were inconsistent with each other, none of the pertinent statements were inconsistent with her preliminary hearing testimony. The Court reiterated that the mere fact that prior to testifying, a witness has made multiple statements that are inconsistent with each other, does not render such inconsistencies admissible.

The Court declined to rule on whether the Commonwealth should have produced the statements prior to the preliminary hearing, rather than prior to trial. Instead, the Court examined whether the defendant had shown any prejudice under *Brady*. The Court found that the statements did not directly touch on the defendant's guilt or innocence, but dealt with purely collateral matters that would not have been properly admitted and were unlikely to have had any effect on the jury's verdict if they had been admitted.

Second, the Court addressed the defendant's argument that, because he found impeachment evidence after the preliminary hearing, the trial court should not have admitted the preliminary hearing transcript. The Court refused to find that the defendant "had a right for the factfinder to see [the victim] squirm when confronted with the potential inconsistencies" in her testimony. Instead, the Court noted that the defendant had the opportunity to cross-examine the victim at the preliminary hearing and introduced the subsequently discovered impeachment materials. The Court therefore held that the defendant's right of confrontation was satisfied.

Third, the Court refused to hold that the Sixth Amendment is violated every time a witness for the Commonwealth testifies on cross-examination that he or she does not remember something. In a footnote, the Court reviewed at length how victims of crime often have difficulty remembering details, directly quoting the SANE nurse's testimony comparing memories of sexual assault to a deck of cards. The witness stated that "it takes [victims] a while to retrieve all the cards. Sometimes they never retrieve them in their lifetime; sometimes they may retrieve a card years or months later. So they have a hard time . . . to tell a story in a complete start to finish."

Fourth, the Court reaffirmed that, under *Fisher*, although the Commonwealth added an additional charge after the preliminary hearing, the preliminary hearing transcript was still admissible. The Court pointed out that the factual basis of the new charge was fully developed at the preliminary hearing and the defendant could and did conduct a thorough cross-examination related to those facts.

Lastly, the Court found that the victim's text message on the morning of the preliminary hearing was, at best, tangential to whether or not the defendant raped and abducted her.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1421154.pdf

Prior Convictions

Virginia Court of Appeals
Unpublished

Rogers v. Commonwealth: October 18, 2016

Chesapeake: Defendant appeals his conviction for Possession of Firearm by Felon on admission of prior convictions.

Facts: The defendant, a felon, possessed a firearm. At trial, the Commonwealth introduced several prior felony convictions. The defendant objected and requested that the trial court redact the sentences from the conviction orders. The trial court overruled that objection.

Held: Affirmed. The Court first agreed that it was error, under *Burke*, for the trial court to admit the prior conviction orders without redacting the defendant's sentences. However, the Court found that the error was harmless. The trial court had instructed the jury to disregard the sentences and the evidence in the case was overwhelming.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1056151.pdf

Pitts v. Commonwealth: November 8, 2016

Chesterfield: Defendant appeals her conviction for Petit Larceny 3rd offense on sufficiency of prior convictions and vagueness grounds.

Facts: Defendant obtained money using a "false return" scheme at a retail store. The defendant had one prior conviction for Larceny at the time of the offense, but earned another conviction for Larceny a few days prior to indictment. The trial court convicted the defendant of Petit Larceny, 3rd or subsequent offense.

Held: Affirmed. The Court rejected the argument that the larceny convictions must take place before the offense. The Court contrasted §18.2-104, which refers to "convictions", with the Habitual Offender statute, §46.2-357, which uses the word "offense" instead of "conviction." The Court found that the choice of the word "conviction" rather than "offense" demonstrates the intent to authorize punishment enhancement where the defendant has been convicted of the prior charge.

The Court also rejected the argument that the statute is unconstitutionally vague.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1728152.pdf

Virginia Court of Appeals - Unpublished

Covil v. Commonwealth: May 17, 2016

Chesapeake: Defendant appeals his convictions for Distribution, 3rd offense, on admission of prior convictions.

Facts: Defendant sold cocaine and heroin after having 2 previous convictions for similar offenses. At trial, the Commonwealth submitted a conviction for PWID-Accommodation under §18.2-248(D) as

proof of a prior conviction. The defendant argued that such a prior did not qualify as a prior conviction under the Code.

The Commonwealth also introduced a second prior conviction for "PWID Cocaine" that cited the VCC code for Possession with Intent to Distribute but cited the code section for Possession, §18.2-250. Along with that prior, the Commonwealth introduced the indictment, which described the offense as Possession with Intent to Distribute. The defendant argued that this prior was for possession only, but the trial court found that the reference to §18.2-250 was a scrivener's error.

Held: Affirmed. The Court first noted that the defendant only appealed the admissibility, rather than the sufficiency, of the prior convictions. The Court observed that the prior convictions were properly certified and had a "tendency" to prove that the defendant had the requisite prior convictions. The Court refused to find that, to be admissible, the orders must unequivocally establish the fact in question. Instead, the Court repeated that the Commonwealth may prove a fact through circumstantial evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2268141.pdf

Clinton v. Commonwealth: April 18, 2017

Norfolk: The defendant appeals his conviction for Possession of a Firearm by Felon on Admission of a Prior Conviction.

Facts: The defendant possessed a firearm after having been convicted of Robbery. When the Commonwealth offered the conviction order indicating that the defendant had been convicted of robbery, the defendant objected and indicated he would stipulate to that element of the offense. The Commonwealth refused the stipulation and the trial court permitted the Commonwealth to enter the conviction order. The trial court offered to instruct the jury that the jury may consider the prior conviction only for the purpose of establishing that the defendant was a convicted felon and not to consider it as character evidence or that the defendant committed the charged offense, but the defendant did not request that instruction.

Held: Affirmed. The defendant had argued that, because the Virginia Rule of Evidence 2:403 was adopted from the Federal Rule of Evidence 403, Virginia is bound by the United States Supreme Court's interpretation of the rule. Virginia Rule of Evidence 2:403 states in part: "Relevant evidence may be excluded if: (a) the probative value of the evidence is substantially outweighed by (i) the danger of unfair prejudice, or (ii) its likelihood of confusing or misleading the trier of fact . . . ."

The Court dodged the defendant's argument that the U.S. Supreme Court's ruling in *Old Chief* applies in Virginia. Instead, the Court focused on the fact that the defendant never requested a curative instruction, nor did he move for a mistrial. The Court found that his failure to do so deprived him of the right to claim prejudice, having rejected the opportunity to resolve any possible prejudice.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0184161.pdf

Rape Shield

Virginia Court of Appeals –
Unpublished

Hankins v. Commonwealth: September 27, 2016

Alexandria: Defendant appeals his convictions for Indecent Liberties on the admission of hearsay and recent complaint evidence.

Facts: Defendant, a mental health therapist, engaged in sexual relationship with a child whom he was counseling over the course of several months. During that time, the defendant sent the boy numerous text messages. When the child's mother discovered the crimes, she brought the boy to the police. A police officer took a brief initial report, but as soon as he found out the child was the victim of a sexual assault, he referred the case to a detective, who then took a more detailed report.

At trial, the defendant objected to admission of the text messages on hearsay grounds, but the trial court admitted them, finding that they were not offered for the truth of the matters asserted in the messages. The trial court instructed the jury that the text messages were not admitted for their truth, but simply to establish a relationship between the defendant and the victim.

At trial, the initial intake officer and the detective both testified as to the victim's "recent complaint" to the police. The defendant objected to "recent complaint" evidence by the detective. The trial court overruled the objection and instructed the jury that the testimony was not substantive evidence of the defendant's acts, but instead was offered for the sole purpose of corroborating the victim's earlier testimony.

Held: Affirmed. The Court first refused to rule on whether the trial court improperly admitted the detective's "recent complaint" testimony. Instead, the Court held that, even if the trial court erred, the error was harmless. The Court pointed out that the detective's brief testimony was nearly identical to the testimony from the first police officer and from the victim.

The Court then addressed the text messages. The Court ruled that the trial court properly admitted the messages to demonstrate the relationship between the victim and the defendant. The Court wrote: "For instance, two messages from J.P. to appellant concern whether appellant was "hotter" than one of J.P.'s friends. Certainly, the Commonwealth did not need to establish appellant's relative attractiveness in order to prove the charges against appellant. Instead, the informal, often flirtatious character of the messages does much to illustrate the nature of the relationship between appellant and J.P.."

The Court also rejected the argument that the text messages were more prejudicial than probative. The Court pointed out that the mere fact that relevant evidence is prejudicial to a defendant is insufficient to exclude it under Virginia Rule of Evidence 2:403; "indeed, the Commonwealth's evidence usually is prejudicial to a defendant." The Court ruled that the coarse language and sexual content contained within the text messages were not so excessively prejudicial as to outweigh the messages' substantial probative value to show the existence and nature of the relationship between the victim and defendant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1250154.pdf

Moulds v. Commonwealth: October 25, 2016

Fairfax: Defendant appeals his convictions for Sexual Assault on refusal to permit cross examination of the victim.

Facts: Defendant strangled and raped his former girlfriend. The defendant claimed that the victim consented to "rape play" and "choke play" during the assault. In support of that claim, the defendant proffered evidence that the victim had previously discussed consenting to "rape play" and "choke play," several weeks earlier. The evidence included the victim's alleged statements to a witness, prior to the assault, that she had had rough sex with the defendant in the past and liked it and that the rough sex had included choking, as well as a statement several weeks before the assault that she wanted to get the defendant drunk so he would engage in "rough sex" later that night. The trial court excluded the testimony under the "rape shield" statute.

At trial, the victim denied having previously engaged in "rough sex" and denied having asked or permitting the defendant to choke her in the past. She also denied making any previous statements to the contrary. The defendant again asked to cross-examine the victim regarding the prior inconsistent statements, but the trial court again denied the motion.

Held: Reversed. The Court held that the trial court improperly prevented the defendant from using the evidence for impeachment purposes.

The Court first ruled that the trial court properly excluded the victim's statements as substantive evidence. The Court refused to find that the victim's statements were admissible as "state of mind" evidence under Virginia Rule of Evidence 2:803(3). The Court pointed out that the victim's previous statements were irrelevant to her state of mind during the assault. The Court also pointed out that the victim's statements do not fall under "prior sexual conduct . . . between the complaining witness and the accused", permitted by § 18.2-67.7(A)(2). Thus, her statements of intended future conduct, prior to the assault, were not admissible as substantive evidence.

However, the Court then ruled that the victim's statements were admissible for impeachment purposes. The Court found that whether the victim had previously told a third party that she enjoyed engaging in "rough sex" and "choke play" with the defendant was not collateral, in light of the defendant's claim of consent at trial, and therefore it was a proper topic of cross-examination. The Court held that, once the victim denied making the statements, the defendant was entitled to present the victim's prior inconsistent statements as impeachment evidence. The Court again stated that the victim's prior statements are not covered by the rape shield statute, because they are mere statements, not conduct.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1396154.pdf

Poff v. Commonwealth: January 24, 2017

Norfolk: Defendant appeals his convictions for Forcible Sodomy and Indecent Liberties on refusal to permit cross-examination of the victim regarding allegedly false previous allegations.

Facts: The defendant, 41 years old, sexually assaulted the 15-year old child of his live-in girlfriend. The defendant forced the victim to touch his penis and then raped her. A forensic analysis found the victim's DNA on the defendant's genitals and on the inner fly of his underpants.

At trial, the defendant cross-examined the victim about a prior allegation that she had allegedly made that three men had raped her. The victim denied making the allegation. The defendant then attempted to introduce testimony from the victim's former best friend that the victim had made the allegation and that it was false. However, the trial court granted the Commonwealth's objection to that testimony.

Held: Affirmed in part, reversed in part. The Court held that the trial court erred in refusing to allow the jury to hear impeachment evidence concerning the witness' testimony that contradicted some of the victim's testimony. Thus, the Court reversed the conviction for forcible sodomy.

The Court began by noting that under 2:608(e) and *Clinebell*, as an exception to the general rule, in a sex crime case, the defendant may cross-examine the victim about prior false accusations, and if the victim denies making the statements, the defendant may submit proof of such false charges.

The Court agreed that, under *Roadcap,* unless the prior claims of sexual abuse are "patently untrue" on their face, the defendant must proffer evidence sufficient to persuade a trial court of a "reasonable probability that the victim's allegations were false." In this case, the Court noted that the victim had acknowledged that the witness had been her best friend and that she had, on another occasion, made a false rape allegation against another person.

The Court also rejected the argument that the "Rape Shield" statute bars such testimony. The Court found that the testimony concerned statements, rather than conduct. In a footnote, however, the Court noted that the witness' testimony regarding the victim's previous sexual relationships are barred by the rape shield statute.

However, the Court found that the remaining evidence was overwhelming regarding the indecent liberties offense and affirmed that conviction. The Court found that, setting aside the victim's testimony, the forensic evidence, the age difference, and the defendant's supervisory relationship, standing alone, were sufficient to convict the defendant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0911151.pdf

Miscellaneous

Habeas

Virginia Supreme Court

In Re: Vauter: December 15, 2016

Dinwiddie: The Commonwealth seeks a writ of prohibition to prevent a circuit court from hearing a *habeas corpus* petition challenging a pre-trial detention order entered by a different circuit court.

Facts: In 2000, Gregory Murphy (the defendant) murdered a young child in Alexandria. The Commonwealth indicted the defendant for capital murder, but the Alexandria circuit court found the defendant incompetent to stand trial. Since 2000, the defendant has been held at Central State Hospital in Dinwiddie. He has never become competent to stand trial.

In 2015, the defendant filed a petition for a writ of *habeas corpus* in the Circuit Court of Dinwiddie County, arguing that the Alexandria Circuit Court wrongfully found that his continued treatment was medically appropriate under Code § 19.2-169.3(F). The defendant argued that his continued detention violated both the Due Process and Equal Protection Clauses of the Constitution of the United States. He asked the Dinwiddie Court to order the Alexandria Court to dismiss the capital murder indictment and begin civil commitment proceedings.

Central State Hospital moved to dismiss the petition, arguing that the Dinwiddie Court lacked jurisdiction under Code § 8.01-654(B)(1), and filed a writ of prohibition. The Dinwiddie Court denied motion.

Held: Writ denied. The Court explained that a writ of prohibition is an extraordinary remedy issued by a superior court to prevent an inferior court from exercising jurisdiction over matters not within its cognizance where damage or injustice is likely to follow from such action. It is a remedy provided by the common law to redress the grievance growing out of an encroachment of jurisdiction, and issues properly out of a superior court to an inferior court, commanding them to cease from the prosecution of a suit, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.

In this case, the Court first pointed out that any circuit court has subject matter jurisdiction to hear a petition for a writ of *habeas corpus.* While the Virginia Code restricts the jurisdiction of a court to hear certain petitions, the Court observed that the defendant's *habeas* petition complains of detention under the Alexandria Court's finding as to § 19.2-169.3(F), not a detention pursuant to a conviction order entered by it, therefore § 8.01-654(B)(1) does not apply to create sole jurisdiction in the Alexandria Court. Therefore, the Court ruled that the statutory scheme governing *habeas* jurisdiction does not prohibit the Dinwiddie Court from hearing the defendant's petition.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151723.pdf

Recusal

U.S. Supreme Court

Williams v. Pennsylvania: June 9, 2016

Certiorari to the Supreme Court of Pennsylvania: Defendant appeals his conviction for First Degree Murder on Due Process grounds.

Facts: Defendant murdered a man in 1984 and was convicted at trial and sentenced to death. During a *Habeas* proceeding, 26 years later, a subsequent court granted a *Habeas* petition, based on failure to disclose exculpatory evidence. The Commonwealth appealed and the Pennsylvania Supreme Court reversed the granting of the petition. However, one of the justices on the Pennsylvania Supreme Court had been the district attorney who gave his official approval to seek the death penalty in the defendant's case. That justice refused the defendant's request to recuse himself from the decision and participated in the decision to deny relief.

Held: Reversed. The Court held that, under the Due Process Clause, there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case. The Court explained that, in considering recusal, there is an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable."

In this case, the Court found an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a particular case. The Court expressed concern that the prosecutor could not set aside his previous position, personal knowledge, or personal knowledge or impressions of the case. The Court noted that, while there may not be bias in a situation where a prosecutor merely worked on a minute aspect of a case or had only tangential contact with the case, in this case, the prosecutor made a crucial decision regarding a significant issue.

The Court also refused to apply "harmless-error" analysis to the error in this case. Instead, the Court referred the case back to the Pennsylvania Supreme Court for reconsideration, albeit without the judge who had been the former prosecutor hearing the case.

Full Case At:
http://www.supremecourt.gov/opinions/15pdf/15-5040_6537.pdf

Rippo v. Baker: March 6, 2017

Certiorari to the Supreme Court of Nevada: Defendant appeals his conviction for Capital Murder on Due Process grounds.

Facts: Defendant, on parole for rape, murdered two women and stuffed their bodies into a closet. During his trial, the defendant learned that the judge was the target of a federal bribery probe and that the prosecutor's office was participating in that investigation. The defendant asked the trial judge to recuse himself, but the trial judge refused. The Nevada courts denied the defendant's post-trial appeals, finding that the defendant was not entitled to discovery or an evidentiary hearing because his allegations did not support the assertion that the trial judge was actually biased in this case.

Held: Reversed. In a *per curiam* opinion, the Court unanimously found that the Nevada courts had applied the wrong standard. The Court repeated that the Due Process Clause may sometimes demand recusal even when a judge has no actual bias. Instead, the appropriate inquiry is whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias. In other words, whether "the risk of bias was too high to be constitutionally tolerable."

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/16-6316_32h6.pdf

Virginia Court of Appeals –
Unpublished

Grandy v. Commonwealth: October 25, 2016

Chesapeake: Defendant appeals his convictions for Robbery, Malicious Wounding, and related offenses on the judge's refusal to recuse herself and refusal to declare a mistrial.

Facts: The defendant, who was 14 years old, robbed and shot a man. Two years later, after two trials, the defendant presented evidence at sentencing that he had significantly matured. However, during the defendant's attorney's argument, the trial court stated "I don't know anybody who stares directly in my eyes as much as your client." The trial court speculated that the defendant had been attempting to stare her down and observed: "That is the first time he looked away, and he is intent on: I will not blink. That is the impression I got and not just today but every time he has been in court. He is going to put his eyes to mine and they are going to stay there, and I do. I look away."

After the trial court continued the hearing to permit the defendant to apply for a program, the defendant moved for the trial judge to recuse herself and moved for a mistrial.

Held: Affirmed. The Court found that the trial judge's statements did not establish or imply that she was impermissibly biased against the defendant. Instead, the Court ruled that the trial judge's comments about the defendant's demeanor were appropriate given the context of the case, and were proper in light of the stage of the proceedings and directly responsive to the defendant's argument that he respected authority in light of his increased maturity.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0971151.pdf

Use of Force

United States Supreme Court

White v. Pauly: January 9, 2017

Writ of Certiorari to the U.S. Court of Appeals for the 10th Circuit: Police Officer appeals the denial of his claim of qualified immunity in a civil lawsuit for shooting an individual.

Facts: Officers responded to a residence after a call regarding a recent road rage incident. The officers approached the house surreptitiously, knocked on the door and demanded that the occupants come outside. Witnesses testified that the officers did not identify themselves as police. The occupants announced that they had guns. As they did, a third officer arrived and heard that statement. He took cover as the occupants yelled at the officers and fired two shotgun blasts out of the residence. The third officer returned fire and killed one of the occupants.

The District Court and 10th Circuit Court of Appeals held that an officer who arrives late at an ongoing police action after witnessing shots being fired by one of several individuals in a house surrounded by other officers cannot claim qualified immunity when that officer shoots and kills an armed occupant of the house without first giving a warning. The 10th Circuit found that, since the officer had a position behind a stone wall and had to move before he fired, he was required to first give verbal warnings to the occupants before firing at them.

Held: Reversed. The Court ruled that the officer did not violate clearly established law, and therefore was entitled to qualified immunity. The Court repeated that, under *Mullenix* and previous cases, qualified immunity attaches when an official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

The Court found that, under the Fourth Amendment, clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action, in circumstances like this one, from assuming that his fellow officer have followed proper procedures, such as officer identification. The Court then wrote that nothing requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one the officer confronted here.

The Court noted, however, that it was not addressing whether the first two officers were entitled to qualified immunity or whether their actions were proper under the Fourth Amendment.

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/16-67_2c8f.pdf

Los Angeles v. Mendez: May 30, 2017

Certiorari to the Ninth Circuit Court of Appeals: Officers appeal finding of liability in a Use of Force case on Fourth Amendment grounds.

Facts: Officers searched a residence for an armed and dangerous fugitive who had evaded capture before. The officers did not have a warrant, other than the arrest warrant, although it did not list the property address. While a group of officers dealt with the residence, a few other officers examined the rear of the property, which included three metal storage sheds and a one-room shack made of wood and plywood. The shack had a single doorway covered by a blue blanket, and had a power cord running to it, which powered an air conditioner that was attached to the side.

Two officers opened the door and moved the blanket, without knocking or announcing their presence. Inside, they discovered two men who had been living in the shack. The two men were unrelated to the fugitive. When the officers entered, the man grabbed a BB-rifle that resembled a real gun and pointed it towards the officers, who opened fire and injured both men.

At trial, the District Court found that the officers were liable for the act of entering without a warrant. The District Court then agreed that the officers' use of force was reasonable under the Fourth Amendment, but applied a special rule in the Ninth Circuit to find them liable for their use of force. That

rule states that, if law enforcement officers make a seizure of a person using force that is judged to be reasonable based on a consideration of the circumstances relevant to that determination, the officers nevertheless may be held liable for injuries caused by the seizure on the ground that they committed a separate Fourth Amendment violation that contributed to their need to use force. The Ninth Circuit affirmed, although it reversed the District Court's separate ruling that the officers should have knocked and announced their presence.

Held: Reversed. The Court ruled that the Ninth Circuit's special rule has no basis in the Fourth Amendment, explaining that a different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure. The Court repeated that, when an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim. However, the Court criticized the Ninth Circuit rule because it looks back in time to see if there was a different Fourth Amendment violation that is somehow tied to the eventual use of force.

Instead, the Court explained that the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional. The Court remanded the case, ordering the lower court to revisit the question whether proximate cause permits the plaintiffs to recover damages for their shooting injuries based on the officers' failure to secure a warrant at the outset.

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/16-369_09m1.pdf